

Labor Regulation as Family Regulation: Decent Work and Decent Families

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“The normal behavior of husband and wife . . . toward each other is beyond the law—as long as the family is ‘healthy.’ The law comes in when things go wrong.”

- Kahn-Freund¹

It is due time that we understood that regulating the family has been a longstanding goal of labor regulation. This article presents the trajectory of labor regulation as family regulation. It provides a history of the “decent standards” discourse pertaining to wage and hour regulation, and reveals its double meanings: to provide “decent work” and to promote “decent families.” It terms the goal of providing decent standards of work and wages as “productive decency” and the goals pertaining to family decency, proper gender norms, and sexual purity as “repressive decency.” It shows how labor regulation surprisingly began in the Progressive Era as a means to lower divorce rates by fighting prostitution and address concerns over maternal functions and domestic roles in the family at the beginning of the 20th century, and how it culminated in the New Deal as reproducing the husband-as-breadwinner family model in the Fair Labor Standards Act of 1938. Despite the notion that federal law does not interfere in the personal relationship between husband and wife in such mundane and private issues as “who does the dishes,” regulating the family has, in fact, been a longstanding goal of labor regulation. Understanding labor regulation as regulating the family

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1. Otto Kahn-Freund, *Editorial Forward* to J. EEKELAAR, FAMILY SECURITY AND FAMILY BREAKDOWN, at 7 (1971) quoted in Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 MICH. J. L. & REF. 835 (1985).

allows scholars and lawmakers to revisit the family model as established through existing labor law and to redesign the law for the twenty-first century. The article concludes by suggesting that the 2010 amendments to the Fair Labor Standards Act should be understood as a new “entering wedge” toward a re-working of the relationship between the labor market, husbands, wives, and families, and that additional reform is highly merited in light of both the historically-conscious trajectory put forth, and contemporary ideologies about gender and the family.

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INTRODUCTION

Ensuring “decent” working conditions has been central to the enactment of labor regulation in the United States² and is a cornerstone term in labor law discourse.³ However, legal scholars rarely explore the meaning

2. Arianne Renan Barzilay, *Women at Work: Towards an Inclusive Narrative of the Rise of the Regulatory State*, 31 HARV. J. L. & GENDER 169 (2008) (claiming “decent standards” was central to New Deal labor regulation, particularly FLSA); Cynthia Estlund, *Who Mops the Floors at the Fortune 500? Corporate Self-Regulation and the Low Wage Workplace*, 12 LEWIS & CLARK L. REV. 671, 676-78 (2008) (claiming that FLSA’s commitment to “decent wages and working conditions set the template for modern labor and employment law.”); *but see* Amy Wax, *Waiver of Rights Under the Age Discrimination in Employment Act of 1967*, 86 COLUM. L. REV. 1067, 1077-78 (1986) (arguing that FLSA’s decent standard paradigm should not guide the interpretation of the Age Discrimination in Employment Act of 1967).

3. The International Labor Organization set a goal of securing “decent work” to improve workers’ “economic and social well-being.” *See, e.g.* John Howe, *The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation, and Decent Work*, in THE IDEA OF LABOUR LAW 295, 298-299 (Guy Davidov & Brian Langille eds., 2011); Gary S. Fields, *Decent Work and Development Policies*, 142 INT’L LAB. REV. 239, 240 (2003). For other examples of the discussion of “decent work” in labor regulation, see e.g., Susan Bisom-Rapp, Andrew Frazer & Malcom Sargeant, *Decent Work, Older Workers and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom and the United States*, 15 EMP. RTS & EMP. POL’Y 43 (2011) (evaluating how the three countries performed during the economic recession with regard to decent work); J. Marshal Wolman, *Equity Between the Public and Private Sectors: The Need for Compensatory Time Legislation for the*

of decency in this discourse.⁴ Taking into consideration gender and class, this article unpacks the cornerstone term “decency” in wage and hour regulation history from the Progressive Era to the New Deal. This article argues that, although “decency” provides decent standards of work and wages, “decency” also has repressive meanings pertaining to family decency, proper gender roles, and sexual purity. The article terms the former “productive decency” and the latter “repressive decency.”

It is due time to revisit the history of the Fair Labor Standards Act of 1938 (FLSA or “the Act”)⁵ and understand the origins and goals of federal labor regulation as family regulation. The legal eye has largely neglected to see how labor legislation has actively formed the relationship between husband and wife. This could be a result of the dominance of the family-autonomy doctrine, or the prevalence of federal non-intervention in the family jurisprudence. This article shows how federal labor law has structured a family model in indirect but conscious ways, de-facto constituting the power relations and dynamics of family relations, and demonstrates that family regulation has been a goal of labor regulation. Labor regulation’s entangled history reveals that constructing gender roles in the family have been longstanding goals of labor regulation, and federal labor regulation at that.

The enactment of federal labor legislation was the product of decades of advocacy by Progressives and women reformers.⁶ This article shows how labor regulation’s long history is embedded with anxiety over changing sexual and gender norms, the stability of the white, middle-class family, the future of motherhood, and gender roles in the family. Labor regulation’s early origins in the late nineteenth century surprisingly point to the regulation of prostitution and protection of families from venereal diseases—both believed to bring about family degeneration by raising divorce rates and lowering birth rates. Later in the early decades of the twentieth century, labor regulation was enacted primarily in relation to women’s potential motherhood, and protection of maternal functions. And, finally, the enactment of the FLSA during the Great Depression as a centerpiece of President Roosevelt’s New Deal legislation was a means of

Private Sector, 12 GEO. J. ON POVERTY L. & POL’Y 243, 245 (2005); Andrew C. Brunsten, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 272 (2008); Kerry A. Burchill, *Madison’s Minimum-Wage Ordinance, Section 104.001, and the Future of Home Rule in Wisconsin*, 2007 WIS. L. REV. 151, 180-181 (2007).

4. Recently writing about the International Labor Organization’s program for “decent work,” one scholar noted that “there may be a lack of understanding as to what exactly is meant by ‘Decent Work,’” as the term “for nearly all Americans is an unfamiliar term.” Janice R. Bellace, *Achieving Social Justice: The Nexus Between ILO’s Fundamental Rights and Decent Work*, 15 EMP. RTS. & EMP. POL’Y 5, 7-8 & n.9 (2011).

5. 29 U.S.C. §§ 201-219 (2006).

6. See generally Renan Barzilay, *supra* note 2 (arguing that women reformers were instrumental in the enactment of labor regulation in the Progressive and New Deal Eras).

protecting a specific family model of male-breadwinning, and a decent, “traditional” family life. Its goals were not just the spreading of work and saving the economy, it was aimed to promote “decent standards,” and as this article shows, to reinstate the “decent” family, with its husband-as-breadwinner and the wife-as-dependent model. The discourse from the FLSA’s legislative history clearly reflects the “decent” family notion that cast husbands as breadwinners and as the main beneficiaries of the Act.

Since it is clear that labor law has taken part in the construction of the “decent”, male-breadwinner family model, and that today this is a widely contested family model, it is time to redesign labor law to better correspond with present-day ideas about the family and gender roles within it. In 2010, President Obama’s health care reform bill added a new provision to the FLSA, which provides “reasonable break time” for working mothers to extract breast-milk for feeding their newborn children.⁷ The article suggests that Obama’s amendment to the FLSA has been a step in this direction, and that additional reform is merited in light of the trajectory of labor regulation as family regulation and current ideologies about gender and the family.

I.

THE GOALS OF LABOR LAW AND THE MYTHS OF NON-INTERVENTION IN THE FAMILY

FLSA was a center-piece of New Deal Labor Legislation advanced by President Roosevelt during the Great Depression. Its major provisions established a minimum-wage floor, and maximum-hours with an overtime provision, for employees engaged in interstate commerce.⁸ The FLSA was concerned with labor conditions detrimental to the maintenance of minimum standards of living for workers and their purchasing power, and addressed the unequal bargaining power of workers vis-à-vis management.⁹ Its primary purpose was to alleviate unemployment by spreading available work among many workers.¹⁰ But the FLSA was not just the product of

7. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 4207, 124 Stat. 119, 577-78 (2010).

8. See AM. BAR ASS’N, SECTION OF LABOR AND EMP’T LAW, THE FAIR LABOR STANDARDS LEGISLATION COMMITTEE 11-16 (Ellen C. Kearns et al. eds., 1999) [hereinafter A.B.A.]; Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938: The Act as Finally Passed*, 54 POL. SCI. Q. 1, 492 (1939) [hereinafter Douglas & Hackman, *Act as Finally Passed*].

9. E.g., Laura C. Edmonds, *The Fair Labor Standards Act – Anti-Poverty Legislation in the Modern Era: Advocating Judicial Scrutiny Under a Feminist Policy-Centered Analysis*, 19 W. NEW ENG. L. REV. 229, 232-33 (1997); Robert N. Willis, *Evolution of the Fair Labor Standards Act*, 26 U. MIAMI L. REV. 607 (1972) (claiming the Act was passed to stimulate the economy).

10. Deborah Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2234-36, 2285 (1998).

Depression Era politics; it was the result of efforts dating back to the late nineteenth century to promulgate labor standards.¹¹

The goals of labor regulation, in general, tend to include the facilitation of labor organization and collective bargaining, worker participation, and even the promotion of efficiency and redistribution.¹² While the “basic idea” of labor regulation still seems to be the protection of workers, guaranteeing “decent work,” and correcting the bargaining power imbalance between employer and employee, other rationales and purposes, such as distributing labor market opportunities among workers, have been put forth.¹³ Still, it is commonly agreed that a major tenant of labor regulation is to provide “decent work” for all, usually meaning decent conditions of work, pay, job security, and collective bargaining; however, the idea of “decency” has not fully been explored. I argue that a major meaning of decency has been neglected: a component, which I term “repressive decency”, pertaining to the idea of a “decent family” as reflected in the history of the FLSA. This neglect, in turn, has obscured an important goal of labor regulation: regulating the family.

The legal eye has largely overlooked how labor legislation has actively formed the relationship between husband and wife. This overlook may have resulted from the dominance of the family-autonomy doctrine and the prevalence of federal “non-intervention in the family” jurisprudence. These double myths of non-intervention in the family have compiled to obscure how federal labor regulation regulates the family. The family-autonomy doctrine—the belief that the government should not intervene in private family relations—is a pillar in family law.¹⁴ The Supreme Court has long recognized the marital relationship as an area of privacy meriting staunch protection.¹⁵ The very idea that the state, through its laws, might intervene in private, mundane family issues and tell us how “to do [our] dishes” is,

11. While the history of the FLSA has been described in detail elsewhere, I focus on the close connections between the labor legislation and the regulation of family.

12. MICHAEL C. HARPER & SAMUEL ESTREICHER, *LABOR LAW: CASES, MATERIALS AND PROBLEMS* 1-4 (6th ed. 2007).

13. Guy Mundlak, *The Third Function of Labour Law: Distributing Labor Market Opportunities Among Workers* in *THE IDEA OF LABOUR LAW* (Guy Davidov & Brain Langille eds., 2011) 315, 316-317. See generally, *THE IDEA OF LABOUR LAW* (Guy Davidov & Brain Langille eds., 2011).

14. LYNN D. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 40 (2002). This doctrine is also referred to as family-privacy doctrine. *Id.* For the theoretical incoherence of the non-intervention doctrine, see Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J. L. REFORM 835 (1985).

15. Martha Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. AM. HIST. 959 (1987). See *Griswald v. Connecticut*, 381 U.S. 479 (1965) (Douglas J. stating “We deal with a right of privacy...marriage is a coming together for better or worse...and intimate to the degree of being sacred.” *Id.* at 486. Goldberg J. referring to “the private realm of family life which the state cannot enter.” *Id.* at 495). However, more problematic decisions in my view are *United States v. Lopez*, 514 U.S. 549, 564 (1995) (giving family law (marriage, divorce, child custody) as example of realm in which Congress cannot regulate), and *United States v. Morrison*, 529 U.S. 598, 613 (2000).

for example, considered an infringement of fundamental rights.¹⁶ According to the family-autonomy doctrine, insofar as the law constitutes family relationships (for example, by determining who can marry, or how to divorce), the law should not interfere in the ongoing everyday private relationship, save in extreme circumstances, such as violence and abusive behavior.¹⁷ Furthermore, despite mounting evidence to the contrary,¹⁸ family law continues to be regarded as a matter of state, not federal responsibility.¹⁹ The following narrative challenges these two mythical pillars of family law.

II.

A TRAJECTORY OF LABOR LEGISLATION AS FAMILY REGULATION

A. *Historical Background*

During the late nineteenth century, immigration, industrialization, and urbanization changed American society from essentially agrarian to an industrial one.²⁰ Following the Industrial Revolution, factories mushroomed in American cities, changing the nature of labor.²¹ Young and single recent émigrées were hired in garment and food production industries where they worked long hours earning meager pay.²² During this time, family life changed rapidly: working-class women were joining the industrial labor force in huge numbers and middle-class women were creating a national network of organizations for social reform.²³ The dislocating forces of urbanization, massive immigration, and industrialization, triggered social

16. MARTHA CRAVEN NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 280 (2000).

17. For laws giving exceptions for domestic violence and abusive behavior, see generally Jeannie Suk, *Criminal Law Comes Home*, 116 *YALE L.J.* 2, 6 (2006). Additionally, insofar as the law constitutes family relationships (by deciding the major questions of who can marry, how to divorce), it does so in the local realm by means of the State. See Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 *UCLA L. REV.* 1297 (1998).

18. Sylvia Law, *Families and Federalism*, 4 *WASH. U. J. L. & POL'Y* 175, 184 (2000). The mounting evidence includes, *inter alia*: federal child support guidelines, *id.* at 186-89; Congress making it a federal crime to willfully fail to pay child support, *id.* at 191; and federal treatment of pension distribution upon divorce, *id.* at 202). See also Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 *UCLA L. REV.* 1297 (1998).

19. Law, *supra* note 18, at 178, 182-3; Ann Laquer Estin, *Sharing Governance, Family Law in Congress and the States*, 18 *CORNELL J. L. & PUB. POL'Y* 267, 269, 299 (2009).

20. Renan Barzilay, *supra* note 2, at 175. See generally REBECCA EDWARDS, *NEW SPIRITS: AMERICANS IN THE GILDED AGE, 1865-1905* (2006); MICHAEL MCGERR, *A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920* (2003).

21. LYNN Y. WEINER, *FROM WORKING GIRL TO WORKING MOTHER: THE FEMALE LABOR FORCE IN THE UNITED STATES 1820-1980*, at 13-30 (1985).

22. See NANCY WOLOCH, *MULLER V. OREGON: A BRIEF HISTORY WITH DOCUMENTS* 5 (1996).

23. RUTH ROSEN, *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918*, at xi (1982).

unrest as wealth inequality in American society widened.²⁴ Middle-class reformers, known as “Progressives,” argued that families crippled with excessive poverty, unemployment, and dreadful work conditions “could not expect to produce contributing members of society.”²⁵

Women Progressives were central to the activism that brought about legal measures needed to address these concerns.²⁶ Some women Progressives formed settlement houses in poor neighborhoods to provide educational and cultural activities for the working-class. One of the most famous of such settlements was Hull House, founded by Jane Addams and like-minded women reformers in Chicago. In the mostly female garment industry, workers often labored ten to fourteen hour days, earning meager pay²⁷ and Hull House reformers were moved by the working conditions of women and children in factories and sweatshops.²⁸ Addams claimed that “the very existence of the State depends upon the character of its citizens, therefore if certain industrial conditions are forcing the workers below the standard of decency, it becomes possible to deduce the right of State regulation.”²⁹ Women reformers advocated for the government to take responsibility for working conditions and believed that the government should enact laws to provide minimum wages and improved working conditions.

This ideology, which I termed elsewhere “Standards of Decency,”³⁰ advocates for better wages and working conditions, and permeated New Deal labor regulation discourse.³¹ Reformers justified regulation to promote Standards of Decency aiming to provide citizens with a decent living—a life enriched by better wages, hours, working conditions, and even culture, clean air and water.³² This, the article terms “productive decency.” Reformers’ efforts started with regulating women’s working conditions as

24. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 4-5 (1992).

25. ALICE KESSLER-HARRIS, *OUT TO WORK, A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 115 (2003).

26. See Kathryn Kish Sklar, *The Historical Foundations of Women’s Power in the Creation of the American Welfare State, 1830-1930*, in *MOTHERS OF A NEW WORLD, MATERNALIST POLITICS AND THE ORIGINS OF WELFARE STATES* 43-93 (Seth Koven & Sonya Michel eds., 1993) (describing the role of middle-class women in Progressive Era legislative reform).

27. See Kathryn Kish Sklar, *Hull House in the 1890s: A Community of Women Reformers*, 10 *SIGNS* 658, 675 (1985) (discussing average wages and hours of garment workers at the end of the nineteenth century); see also WOLOCH, *supra* note 22, at 5.

28. KATHRYN KISH SKLAR, *FLORENCE KELLEY AND THE NATION’S WORK: THE RISE OF WOMEN’S POLITICAL CULTURE 1830-1900*, at 206-07 (1995) [hereinafter SKLAR, *NATION’S WORK*].

29. JANE ADDAMS, *TWENTY YEARS AT HULL-HOUSE* 152 (1st Signet Classic Printing ed., 1961) [hereinafter ADDAMS, *HULL-HOUSE*].

30. Renan Barzilay, *supra* note 2, at 171.

31. *Id.*

32. *Id.*, at 208; ANNELEISE ORLECK, *COMMON SENSE AND A LITTLE FIRE, WOMEN AND WORKING-CLASS POLITICS IN THE UNITED STATES, 1900-1965*, at 16 (1995).

“entering wedges” that could bring about change in the labor market as a whole.³³ But throughout the Progressive Era and New Deal, the quest for “Standards of Decency” gained additional meanings pertaining to family and gender “decency.” Standards of Decency created not only productive decency—“decent standards”—like those of promoting better labor standards through minimum wages and reasonable hours but these Standards of Decency also carried a “repressive” meaning of “decency.” “Repressive decency” pertains to women’s chastity, family decency, and gendered domestic roles. A “decent” family usually meant a family exhibiting white middle-class values, such as female domesticity and sexual purity, in which gender roles were fixed: in decent families, the husband was provider-breadwinner while his wife was dependent-homemaker.

B. *Sexual Morality and Saving the Family from Degeneration*

Labor regulation during the Progressive Era was embedded with family regulation. Progressive Era reformers tied together the discourse over labor conditions and the increasing practice in which young working-class women were providing sexual favors in exchange for pay, which was undermining the decent family notion of the respectable middle-class. Starting as early as the Progressive Era, labor regulation was closely entangled with regulating the family.

Men and women were engaged in separate spheres of activity in the nineteenth century: men in the market, business, and the professions, and women in the home. However, towards the turn of the twentieth century, due to increased urbanization and industrialization, more women began to move beyond the traditional domestic sphere and into the paid labor force.³⁴ Other scholars have noted that “[f]rom 1880 to 1930 the female market labor force increased from 2.6 million to 10.8 million and the number of women gainfully employed grew almost twice as fast as the adult female population.”³⁵ Still, while about a quarter of women over the age of fourteen were working in the marketplace by the 1920s, they were mostly confined to the low paid and repetitive work found in domestic service, the garment and food production industries, and some in pink-collar clerical and sales

33. Renan Barzilay, *supra* note 2, at 181.

34. JOANNE J. MEYEROWITZ, *WOMEN ADRIFT: INDEPENDENT WAGE EARNERS IN CHICAGO, 1880-1930*, at xvii (1988). While poor, black and immigrant women had long labored in the marketplace, “they had excited little public controversy because they had not been considered subject to middle class expectations of domesticity.” WEINER, *supra* note 21, at 4.

35. MEYEROWITZ, *supra* note 34, at xvii.

fields.³⁶ Nonetheless, their massive marketplace participation fueled widespread anxiety about the changes in traditional family life.

The idea of the traditional family rested on “a deeply held and centuries-old faith that marriage was a permanent hierarchical relationship that made men into husbands and women into wives.”³⁷ In the nineteenth century, this hierarchical relationship between husband and wife also meant that divisions of labor between home and market were prevalent, and that the authority over resources and allocation of duties rested with husbands. The turn of the century, however, witnessed angst over the future of this “traditional” family.³⁸

Beginning in the 1840s, women increasingly protested and critiqued traditional marriage arrangements.³⁹ Women litigated marriage—some sued for husbands’ support, for custody over children, for confirmation of separate property, for separation, and for divorce.⁴⁰ Rather than the arranged marriages of previous eras, “romantic love” became the most prevailing basis for marriage from the 1890s to the 1920s.⁴¹ For the upper levels of American society, divorce had become somewhat “fashionable” and twenty percent of those born between the end of the civil war and the turn of the century were divorced.⁴² A rising divorce rate threatened the idea of a lasting and stable traditional family life.⁴³ Studies conducted at the time further showed that women were usually the initiators of divorce.⁴⁴

As for the men and women of the middle-class, many postponed marriage, and once married, postponed having their first child.⁴⁵ Some women reformers, including Hull House reformer Florence Kelley, believed that the status of marriage was so undermined that the family would dissolve all together.⁴⁶ Marriage rates decreased as the first generation of college-educated women (the “Jane Addams[] generation”) was coming of

36. NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 166-67* (2000); LOIS SCHARF, *TO WORK AND TO WED: FEMALE EMPLOYMENT, FEMINISM, AND THE GREAT DEPRESSION 10* (1980).

37. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY 2* (2000).

38. WEINER, *supra* note 21, at 31-33.

39. See Reva B. Seigel, *She The People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (arguing that suffrage was embedded with a quest for equality in the family); see generally MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* (1985) (explaining the creation of American domestic-relations law).

40. HARTOG, *supra* note 37, at 2.

41. COTT, *supra* note 36, at 150.

42. MCGERR, *supra* note 20, at 11.

43. MEYEROWITZ, *supra* note 34, at 52.

44. ROSEN, *supra* note 23, at 44.

45. MCGERR, *supra* note 20, at 45.

46. See SKLAR, *NATION'S WORK*, *supra* note 28, at 182 (discussing Florence Kelley's letters to other women reformers about the changes to marriage and family).

age.⁴⁷ Perhaps this occurred because “going to Bryn Mawr College, which was regarded as extremely highbrow, was to damn oneself in the eyes of all right-thinking young males,”⁴⁸ or perhaps because, not keen on the prospect of intimacy with Victorian men, middle-class women of the Progressive Era were finding marriage less attractive. Women’s college graduates were seeking to put their education to use in the marketplace,⁴⁹ thus transgressing the gendered public-private divide. But not only were female college alumnae entering the “public” sphere, they were destabilizing the “private” one as well: their generation became the least likely to marry in American history.⁵⁰ Those women who did get married came to expect more from their spouses, and increasingly “middle-class husbands and wives judged their spouses by the pleasures they provided—the quality of the home and its objects, the happiness of the marriage.”⁵¹ By the turn of the century some women began advocating that women should not only be provided the opportunity to work when necessity insisted, but that women—even wives—might choose to do so.⁵² And yet, for the most part, still “[m]arriage and motherhood were assumed to be every woman’s hope, and . . . were viewed as inconsistent with full-time employment for all but the economically pressed.”⁵³

At the same time, the commercialization and technological changes brought about by the Industrial Revolution encroached on women’s traditional roles in the private sphere. Traditionally female roles in the home could now be performed cheaply outside: in bakeries, laundromats, and garment sweatshops.⁵⁴ Declining birth rates during this period show that women were having half as many children at the end of the nineteenth century as at its start.⁵⁵ Additionally, venereal diseases, thought of as epidemics, were causing sterilization and birth defects.⁵⁶

The young woman worker surged into the workforce and came to symbolize a threat to middle-class ideals of traditional family life. Some believed that factory life deprived women of domestic attributes necessary for their traditional female role in the family, and damaged their potential to

47. MCGERR, *supra* note 20, at 45-47.

48. *Id.* at 47.

49. ROBYN MUNCY, *CREATING A FEMALE DOMINION IN AMERICAN REFORM 1890-1935*, at 3-6 (Oxford Univ. ed., 1991).

50. MCGERR, *supra* note 20, at 45.

51. *Id.* at 61.

52. KESSLER-HARRIS, *OUT TO WORK*, *supra* note 25, at 109-17.

53. COTT, *supra* note 36, at 167.

54. KESSLER-HARRIS, *OUT TO WORK*, *supra* note 25, at 110; *see also* MCGERR, *supra* note 20, at 46.

55. ROSEN, *supra* note 23, at 45; MEYEROWITZ, *supra* note 34, at 52; WINIFRED D. WANDERSEE, *WOMEN’S WORK AND FAMILY VALUES, 1920-1940*, at 56 (1981).

56. ROSEN, *supra* note 23, at 39, 52-53.

become mothers. Accounts of the “miserable state of living”⁵⁷ of the young woman worker, and concerns about debilitation resulting from overwork that might be transmitted through heredity to children and could permanently damage their futures were common. A lively debate about the impact of industrialism on the single woman worker’s moral and physical potential for future motherhood began as the public discovery of the young working woman mirrored collective anxieties about changing gender roles, the family, and the fate of future generations.⁵⁸

Many wage-earning women not only entered the marketplace labor force, but also lived apart from family or kin. They were popularly known as “women adrift”: self-seeking women who shunned the constraints of family.⁵⁹ They lived in urban working class neighborhoods, which came to be associated with the public display of sexuality.⁶⁰ At the time, men and women made physical contact in the blossoming public dance halls and saloons often located in these neighborhoods. Further, with a surge of brothels and red-light districts in working class neighborhoods,⁶¹ prostitution had become more large scale, commercialized, and visible than before.⁶²

Similarly, as more women entered the low-paying workforce, some women also entered into “urban subcultures in which they gave men sexual ‘favors’ in return for limited economic support.”⁶³ Often, these were factory girls who scraped by to make ends meet.⁶⁴ They were “occasional” prostitutes—many did not actually belong to a brothel or have a pimp.⁶⁵ They were often employed in the seasonal garment industry and would occasionally accept money for sex.⁶⁶ Often, the boss or foreman would be their client.⁶⁷ Sometimes, unmarried women who did not face dire economic difficulties risked “accusation of immorality” as women’s employment became associated with prostitution.⁶⁸ Employers and social reformers often

57. Arianne Renan Barzilay, *Women at Work: The Rise of the Regulatory State Revisited* 47 (Feb. 2008) (unpublished J.S.D. dissertation, New York University School of Law) (on file with author) [hereinafter Renan Barzilay, J.S.D. dissertation].

58. WEINER, *supra* note 21, at 31-40.

59. MEYEROWITZ, *supra* note 34, at 3.

60. See THOMAS C. MACKEY, *PURSuing JOHNS: CRIMINAL LAW REFORM, DEFENDING CHARACTER, AND THE NEW YORK COMMITTEE OF FOURTEEN, 1920-1930* (2005) (discussing attempts in New York to eliminate sex trade by police and anti-vice crusades).

61. MCGERR, *supra* note 20, at 20-21.

62. ROSEN, *supra* note 23, at xii.

63. MEYEROWITZ, *supra* note 34, at xix.

64. MCGERR, *supra* note 20, at 21.

65. See KESSLER-HARRIS, *supra* note 25, at 102-03; MEYEROWITZ, *supra* note 34, at 101, 104-05.

66. See also AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* 226 (1998).

67. See KESSLER-HARRIS, *supra* note 25, at 103; MEYEROWITZ, *supra* note 34, at 93.

68. MEYEROWITZ, *supra* note 34, at 41.

referred to female employees who accepted gifts as prostitutes.⁶⁹ At times employers resorted to sexual innuendoes to discredit women workers, and in cases of worker upheaval, employers would have prostitutes join striking women workers, so as to allude that the women were all prostitutes.⁷⁰ This linking of women's employment in factories so closely with prostitution reflects the notion that women's work *per se* was often considered immoral and inappropriate.

The prevalence of prostitution was especially concerning to Progressives because it was perceived as deeply connected to the degeneration of marriage and the family, the cornerstone of society. For one, it decreased the number of people "able and willing" to enter marriage: by entering prostitution, young girls were questioning their future roles as wives, and therefore destabilizing the idea of marriage as every woman's hope, and as inevitable. Men who made contact with prostitutes and contracted venereal diseases were encouraged to postpone marriage, and in some cases were prohibited from marrying at all.⁷¹ In addition, for those who did get married, the widespread availability of prostitution was believed to induce divorce; many believed that middle-class husbands' contact with prostitutes and their contraction of venereal disease explained the growing number of wives seeking divorces.⁷² Finally, prostitution had caused birth rates to plummet.⁷³ Falling birth rates among middle-class families were blamed on the sterility caused by venereal infection of wives and mothers by their husbands—"johns" who frequented prostitutes and later inflicted their wives with venereal diseases.⁷⁴ Prostitution thus encapsulated discontent over the changes related to the family, and anxiety over women's traditional roles.⁷⁵

Although Progressives proclaimed prostitution a "social evil" that must be addressed,⁷⁶ at the same time, however, these Progressives understood that poverty and economic constraint led to vice. By the early twentieth century, most reformers no longer thought that women turned to prostitution because they were innately immoral.⁷⁷ Women reformers believed that in order to lessen "the social evil" every girl should be made

69. See *id.* at 104-05; ROSEN, *supra* note 23, at 60; Renan Barzilay, J.S.D. Dissertation, *supra* note 57, at 52-53.

70. ORLECK, *supra* note 32, at 62.

71. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 40-41 (2011).

72. ROSEN, *supra* note 23, at 44-45.

73. *Id.*

74. *Id.* at 41-45; see also BARBARA HOBSON, *UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION* (1987).

75. ROSEN, *supra* note 23, at 40-41.

76. See *id.* at 14-15, 60; MCGERR, *supra* note 20, at 89.

77. Renan Barzilay, J.S.D. Dissertation, *supra* note 57, at 53; ROSEN, *supra* note 23, at 47.

to be self-supporting with a living wage.⁷⁸ Women reformers concerned with the family observed that working conditions were creating “the social evil”⁷⁹—gross temptations lay for working women in the form of prostitution, according to reformers.⁸⁰

Many Progressive Era reformers believed that the newly industrialized working conditions resulted in “[d]ishonesty and immorality, not from choice but from necessity . . . in order to live.”⁸¹ Instead of working for hours on end in miserable conditions and for meager pay in the factory, prostitution offered a quicker reward for some wage-earning women. Toward the end of his life, abolitionist William Lloyd Garrison already remarked: “Between the wages of sin and the wages of the sweatshops, the simple wonder is that so many women in need can hold to lives of chastity.”⁸² Jane Addams recalled that girls would end their long day in the factory and would stop at the local saloon before a long walk home. There, the factory girl would be drinking alcoholic beverages containing “knockout drops” and subsequently waking up in a disreputable room.⁸³ Reformers concluded that this gross temptation needed to be prevented.⁸⁴

Progressive reformers set to preclude this state of affairs. The visibility and prevalence of prostitution brought about anti-vice crusades. While early campaigns against prostitution consisted of enacting criminal statutes aimed at the pimps and brother keepers who employed prostitutes,⁸⁵ government labor bureaus began linking the prevalence of prostitution in the cities to the low wages of women workers in the 1880s and 1890s.⁸⁶ By the 1910s, city and state vice commissions, labor bureaus, trade unions, and purity reformers advocated for increasing women’s wages to prevent prostitution.⁸⁷ Investigative commissions reported that “[t]he organized vice trade . . . is a challenge to the decent home.”⁸⁸ Low wages were presumed to

78. See MCGERR, *supra* note 20, at 21; ROSEN, *supra* note 23, at 16, 27.

79. See ROSEN, *supra* note 23, at 15, 60.

80. Jane Addams warned: “Let us know the modern city in its weakness and wickedness, and then seek to rectify and purify it until it shall be free at least from the grosser temptations which now beset the young people who are living in its tenement houses and working in its factories.” JANE ADDAMS, *THE SPIRIT OF YOUTH AND CITY STREETS* 14 (1930); see also MEYEROWITZ, *supra* note 34, at 119.

81. VICE COMM’N OF CHICAGO, *THE SOCIAL EVIL IN CHICAGO: A STUDY OF EXISTING CONDITIONS, WITH RECOMMENDATIONS* (Gunthrop Warren ed., 1911), *reprinted in* ROSEN, *supra* note 23, at 47.

82. *Id.*

83. ADDAMS, *TWENTY YEARS AT HULL HOUSE*, *supra* note 29, at 152.

84. Jane Addams stated, “the conviction was forced upon us that long and exhausting hours of work are almost sure to be followed by lurid and exciting pleasures; the power to overcome temptations reaches its limits almost automatically with that of physical resistance.” ADDAMS, *HULL-HOUSE* *supra* note 29, at 136.

85. MCGERR, *supra* note 20, at 90.

86. WEINER, *supra* note 21, at 74.

87. *Id.*

88. THOMAS H. RUSSELL, *THE GIRL’S FIGHT FOR A LIVING* 35-36 (1913).

be presenting the gravest problem to the “chastity of our women and sanctity of our homes.”⁸⁹ Labor laws throughout the early decades of the twentieth century were thus enacted with the hope that they would secure “American womanhood.”⁹⁰ According to some proponents, by aiming to abolish prostitution, a minimum wage would “promote domestic happiness . . . and result in more marriages than this republic has ever seen.”⁹¹

Florence Kelley, a Hull House labor reformer, who argued for minimum wage statutes, explained the connection between the prevalence of prostitution and the conditions under which working women labor:

Vice flourishes wherever self-support for honest working women is unusually difficult, and the sweating-system is breaking down to an alarming degree To establish effective restrictions upon the hours of labor in the needle-trades would equalize the burden borne by these workers, spreading work over more days and weeks, granting more daily leisure, and thus making righteous living easier for tens of thousands of young working people . . . who are now subjected to a pressure to which all too many victims succumb.⁹²

Florence Kelley observed that labor conditions induced women into vice. Kelley, interested in the long hours and meager pay in the garment industry,⁹³ claimed that a society could not go on “with increasing masses of people unable by honest work to live in health and frugal decency.”⁹⁴ Rose Schneiderman, an immigrant cap-maker, working-class union organizer, and reformer, having experienced first-hand labor conditions and factory life, more straight-forwardly remarked on the connection between unregulated wages and prostitution.⁹⁵ Schneiderman contended that low wages and terrible working conditions often encouraged women to turn to prostitution, explaining that: “[t]he same men who tell us we are angels, send vice commissioners to investigate why girls go wrong. I should think a glance at the pay-roll would give them an answer.”⁹⁶ Laws regulating women’s wages were believed to be essential for prevention of “degeneracy and prostitution”⁹⁷ and thus for the protection of the decent family.

89. *Id.* at 31.

90. *Id.* at 29, 197-99; MEYEROWITZ, *supra* note 34, at 64-65.

91. RUSSELL, *supra* note 88, at 41; MEYEROWITZ, *supra* note 34, at 64-65.

92. FLORENCE KELLEY, *SOME ETHICAL GAINS THROUGH LEGISLATION* 111 (Macmillan Co. ed., 1905).

93. SKLAR, *NATION’S WORK*, *supra* note 28, at 206-07.

94. JOSEPHINE GOLDMARK, *IMPATIENT CRUSADER* 169 (1953).

95. Rose Schneiderman was a cap-worker turned Women’s Trade Union League organizer and federal administrator, a long-time working-class activist. *See generally* ORLECK, *supra* note 32.

96. Rose Schneiderman, *The Industrial Women’s Need of the Vote*, reprinted in ROSEN, *supra* note 23, at 137.

97. WEINER, *supra* note 21, at 75.

Lobbying efforts for minimum wage legislation for women, however, were curtailed by 1923.⁹⁸

C. *Promoting Labor Legislation and Maternal Functions*

Laws regulating women's wages are only half of the story. Most reformers and many jurists saw legislation regulating women's working hours (also known as "protective legislation") primarily as a safeguard to future motherhood, by protecting the physical and moral health of women workers.⁹⁹

The reasons given by three important groups—the American Federation of Labor (AFL), working-class women, and middle-class women—to promote labor legislation for women are representative of Progressive Era arguments about women's working hour regulation. Around the turn of the century, family respectability was often measured by the husband's ability to provide for the family, as manifested by the presence of a non-wage-earning wife.¹⁰⁰ Working-class men aspired to better their working conditions by voluntarily and freely unionizing, rather than advocating for legislation, as the latter was deemed, "insulting to their manhood."¹⁰¹ The AFL, the largest labor organization at the turn of the century consisting almost exclusively of craft unions of male, skilled and usually Anglo workers,¹⁰² felt strongly that women need not be in the marketplace workforce, and the organization preached that women, especially wives, belong at home.¹⁰³ AFL journals insisted that women worked for unnecessary "pin money" (or luxuries) and that every woman employed displaced a man in need of a job.¹⁰⁴ The AFL further claimed that women's participation in the marketplace labor force brings down wages to the lowest limits.¹⁰⁵ With the highest paying factory jobs reserved for men, unions, including the AFL, assisted this commonplace but unofficial gender hierarchy in the workplace.¹⁰⁶ The AFL was explicit about its ideology and the connection between legislative labor measures and the construction of a

98. See *infra* Part II.C (discussing *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923)).

99. WEINER, *supra* note 21, at 69-70.

100. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH CENTURY AMERICA 9 (2001).

101. See *id.* at 23-24, 29; MCGERR, *supra* note 20, at 19; MARY ANDERSON, WOMAN AT WORK: THE AUTOBIOGRAPHY OF MARY ANDERSON AS TOLD TO MARY WINSLOW 77 (Univ. of Minn. Press ed., 1951).

102. MCGERR, *supra* note 20, at 32.

103. *Id.* at 131-32, 136.

104. *Id.* at 131; KESSLER-HARRIS, OUT TO WORK, *supra* note 25, at 153-54.

105. See KESSLER-HARRIS, OUT TO WORK, *supra* note 25, at 153-59; MCGERR, *supra* note 20, at 132.

106. See KESSLER-HARRIS, OUT TO WORK, *supra* note 25, at 157-58, 171.

family model of male-breadwinning and female-homemaking. It proclaimed:

We stand for the principle that it is wrong to permit any of the female sex of our country to be forced to work, as we believe that the man should be provided with a fair wage in order to keep his female relatives from going to work The man is the provider and should receive enough for his labor to give his family a respectable living.¹⁰⁷

The AFL advocated for special protective legislation for women-only, encouraging women to be removed from “everyday walks of life and relegate them to the home.”¹⁰⁸ For example, the AFL supported a ban on operating foot-power machinery and asked Congress to remove all women from government employment in 1898. The AFL’s relative support of labor regulation for women, such as restriction on work hours, assisted in reinforcing workplace gender hierarchy.

Working-class women also saw labor regulation as essential, believing that labor regulation would advance their working conditions, opportunities, and wages, and would put them on more even grounds with male workers in the more powerful unions.¹⁰⁹ Working-class women at the time were banned from joining the powerful unions because of their sex,¹¹⁰ and instead tried to organize in trade unions specifically established for women in order to gain the benefits of minimum wages and reasonable hours.¹¹¹ However, women’s trade unions lacked the power of their male counterparts. Women workers were hard to organize as many were relegated to the lowest paying and most seasonal industries.¹¹² For women like working-class reformer Mary Anderson, labor regulation provided a more even footing with male wage earners, and thus was a means of improving women’s financial independence and living standards.¹¹³ Creating decent standards of living was her primary reason for regulation. Anderson did not see labor

107. MCGERR, *supra* note 20, at 131-32.

108. Gladys Boone, *The Women’s Trade Union Leagues in Great Britain and the United States of America*, 489 *STUD. HIST., ECO. & PUB. LAW* 54 (1942).

109. *See id.* at 77; Mary Anderson, *Should There Be Labor Laws for Women? Yes* [hereinafter Anderson, *Should There Be Labor Laws for Women?*], *GOOD HOUSEKEEPING*, Sept. 1925, at 6, 8-10, *microformed on* General Correspondence and Papers (1918-1960), *in* Papers of the Woman’s Trade Union League and its Principle Leaders (Primary Source Microfilm) [hereinafter Anderson Papers], at reel 4 frame 730.

110. *See* MCGERR, *supra* note 20, at 33, 131.

111. *See* Renan Barzilay, J.S.D. Dissertation, *supra* note 57, at 85; ANDERSON, *WOMAN AT WORK*, *supra* note 101, at 33-34; *see* Anderson, *Should There Be Labor Laws for Women?*, *supra* note 109, at 8-10.

112. Anderson, *Should There Be Labor Laws for Women?*, *supra* note 109, at 11-12; ANDERSON, *WOMAN AT WORK*, *supra* note 101, at 68.

113. Anderson, *Should There Be Labor Laws for Women?*, *supra* note 109, at 6, 8-10; *see* Renan Barzilay, J.S.D. Dissertation, *supra* note 57, at 162-164, 177.

regulation as necessary only for women, but believed it could be more easily obtainable for women because of their maternal functions.¹¹⁴

Middle-class women reformers, settlement workers, and consumer clubs also advocated for improved working conditions for women, but they, however, emphasized the necessity of labor regulation for its protection of women's future child-bearing and child-rearing maternal functions. Middle-class reformers held a rather traditional understanding of the relationship between labor and the family, holding, primarily, that women should work only when they had to, and that their primary roles were as mothers.¹¹⁵ Jane Addams sometimes suggested that restrictions on night work for women were important because of women's household responsibilities,¹¹⁶ not imagining a different reworking of those responsibilities. Florence Kelley opposed health insurance proposals that would provide wage earning women with medical benefits for childbirth or maternity leave from work because she feared it would tempt husbands to keep their wives in the marketplace labor force. Married women who engaged in wage labor were often denied child care services in settlement house communities.¹¹⁷ Well aware of the toll of long hours and meager pay of toiling women, however, Kelley believed that industrial conditions made it virtually impossible for workers to maintain a life of decency and good health.¹¹⁸ This belief was supported by data showing that long hours had detrimental effects on birthrates and infant mortality.¹¹⁹ Kelley, along with other progressive reformers, and the National Consumers' League (NCL) lobbied state legislatures to pass bills to regulate the hours of labor.¹²⁰ State legislatures around the country, pressured by reformers, passed protective labor laws in the years that followed the turn of the century.

114. See Anderson, *Should There Be Labor Laws for Women?*, *supra* note 109, at 3, 8; see also Letter from M. Carey Thomas, Dean, Bryn Mawr Coll., to Mary Anderson, Dir., Women's Bureau, U.S. Dep't. of Labor (Feb. 6, 1925), *microformed on* Anderson Papers, *supra* note 109, at reel 1, frame 202 (arguing that protective labor legislation should not be abolished for women until it can "be replaced by protective legislation for both men and women"); Letter from Mary Anderson, Dir., Women's Bureau, U.S. Dep't. of Labor, to M. Carey Thomas, Dean, Bryn Mawr Coll. (Feb. 7, 1925), *microformed on* Anderson Papers, *supra* note 109, at reel 1, frame 204 (claiming that it is necessary to maintain safeguards for women until legislation for men and women is secured).

115. See generally MUNCY, *supra* note 49, at 162-63.

116. See, e.g., ADDAMS, HULL-HOUSE, *supra* note 29, at 116. ("The long hours of factory labor necessary for earning the support of a child leave no time for the tender care and caressing which may enrich the life of the most piteous baby. [] With all of the efforts made by modern society to nurture and educate the young, how stupid it is to permit mothers of young children to spend themselves in the coarser work of the world.")

117. KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 100, at 33.

118. GOLDMARK, *supra* note 94, at 169.

119. WEINER, *supra* note 21, at 70.

120. SKLAR, NATION'S WORK, *supra* note 28, at 234-35, 309-11.

Despite compelling rationales for regulating labor, employers resisted these labor regulations and challenged their validity in court.¹²¹ The well-known hour-law case, *Muller v. Oregon*, demonstrates how labor regulation was supported and upheld by arguments about protecting maternal functions.¹²² In 1903, Oregon legislators prohibited employers from allowing women to work more than ten-hour days in places that operated mechanical equipment.¹²³ Laundry owner Curt Muller violated the law by requiring Emma Gotcher, his employee, to work overtime. As a result of the violation, Oregon pressed criminal charges against Muller. But between the time when Oregon passed its ten-hour workday cap for women and when Muller violated it, the Supreme Court issued its famous ruling in *Lochner v. New York*.¹²⁴ In *Lochner*, the Court invalidated a New York hour law for bakers on the ground that labor legislation interfered with a right of contract between employer and employee protected by the Due Process Clause of the Fourteenth Amendment.¹²⁵ Muller argued, based on *Lochner*, that the Oregon law violated his right to contract and was an unconstitutional use of the state's police power.¹²⁶ When the law was upheld in the Oregon courts, and Muller sought review by the Supreme Court,¹²⁷ Progressive labor reformers feared that "[t]he Supreme Court might follow the *Lochner* precedent . . . and cripple the movement for worker protection."¹²⁸ These reformers hoped that the women's ten-hour law in *Muller* could be distinguished from the general hour law that was held unconstitutional in *Lochner*. The State of Oregon enlisted Florence Kelley and the NCL to help defend the Oregon law.¹²⁹ NCL, in turn, asked the help of a young lawyer named Louis Brandeis, a relative of an NCL staff member, to argue Oregon's case before the Supreme Court.¹³⁰ Instead of challenging *Lochner* directly, Oregon sought "to win back one-half the loaf," by showing that

121. WOLOCH, *supra* note 22, at 11.

122. 208 U.S. 412, 420-21 (1908), Justice Brewer held that:

woman's physical structure, and functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil. . . . as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

123. WOLOCH, *supra* note 22, at 20.

124. *Lochner v. New York*, 198 U.S. 45 (1905).

125. *See id.*; *but see id.* at 75 (Holmes, J., dissenting) ("a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.").

126. WOLOCH, *supra* note 22, at 21.

127. *Muller v. Oregon*, 208 U.S. 412 (1908).

128. WOLOCH, *supra* note 22, at 22.

129. KESSLER-HARRIS, IN PURSUIT OF EQUITY, *supra* note 100, at 30.

130. *See* WOLOCH, *supra* note 22, at 24-25.

women were a special class that needed the protection by the state.¹³¹ They agreed they would need data to support Oregon's case, including statistical evidence.¹³² Oregon's brief in *Muller*, commonly known as the "Brandeis Brief", cast working-women as mothers or future mothers, in need of protective labor regulation for the health of their maternal functions and that of future generations.¹³³ The Supreme Court followed Oregon's reasoning and upheld the Oregon law; all-the-while the Court stressed women's specific physiological maternal functions.¹³⁴ Encouraged by the *Muller* outcome, Kelley believed that labor legislation for women might be the entering wedge that would clear the way for labor regulation for both men and women in the future.¹³⁵ Directly after *Muller*, similar hour laws were passed for women around the country.¹³⁶ In 1923, the U.S. Supreme Court delivered a blow to reformers' efforts to provide minimum wage for women workers. Its decision in *Adkins v. Children's Hospital of D.C.*¹³⁷ declared minimum wage for women unconstitutional. The Court held that after the passage of the Nineteenth Amendment in 1920 granting suffrage, women no longer needed gender-specific minimum wage legislation that would restrict their liberty of contract. However, the same Court held that hour-laws are still valid because of women's "maternal functions and also in the fact that historically woman has always been dependent on man."¹³⁸

While working women and middle-class reformers shared the goal of regulating labor, the two groups nonetheless had different experiences of labor. Middle-class reformers were often concerned with domesticity, preservation of maternal roles, and the future of the race. Some historians believe that for reformers like Jane Addams, protective labor regulation was

131. Ann Corinne Hill, *Protection of Women Workers and the Courts: A Legal Case History*, 5 FEMINIST STUD. 246, 252 (1979).

132. WOLOCH, *supra* note 22, at 28.

133. Brandeis Brief, *reprinted in* WOLOCH, *supra* note 22, at 109, 112-26 (explaining the relative weakness of women, and the understanding that all working women as mothers or future mothers need to be protected to ensure the health of future generations); *but see id.* at 114 (citing reports as to the toll long hours of labor have for all workers, men and women).

134. *Muller v. Oregon*, 208 U.S. at 421; *see also* Brandeis Brief, *reprinted in* WOLOCH, *supra* note 22, at 114-26 (explaining the relative weakness of women, and the understanding that all working women as mothers or future mothers need to be protected to ensure the health of future generations); *but see id.* at 114 (citing reports as to the toll long hours of labor have for all workers, men and women).

135. WOLOCH, *supra* note 22, at 43. For discussion of the "entering wedge" strategy and how it played out, *see* Renan Barzilay, *supra* note 2, at 181.

136. *See* JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN, GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS 81-84, 133-140 (2001).

137. 261 U.S. 525, 553 (1923).

138. *Id.* For Kelley's reaction to the decision, *see* Susan D. Carle, *Gender in the Construction of the Lawyer's Persona*, 22 HARV. WOMEN'S L. J. 239, 259 (1999) (reviewing SUSAN WARE, PARTNER AND I: MOLLY DEWSON, FEMINISM, AND NEW DEAL POLITICS (1987)); *see generally* Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, The First Equal Rights Amendment, and Adkins v. Children's Hosp. 1905-1923*, 78 J. AM. HIST. 188 (1991); Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

primarily a means to preserve some of the elements of middle-class domesticity.¹³⁹ Working-class women reformers primarily believed that labor regulation would “compensate” them for their unequal bargaining power and would steer the way for general regulation of working conditions.¹⁴⁰ Mary Anderson, a working-class reformer, explained it was possible to enact such legislation for women because of great apprehensibility regarding their capacity for procreation:

All these kinds of regulatory laws have been obtainable for women because women’s special needs were more evident to the public than were the needs of other workers, and there was widespread appreciation of the importance of conserving the health of the actual and potential mothers of future generations.¹⁴¹

There was, however, general agreement, as one contemporary scholar noted, that labor legislation is concerned “both with women’s economic position and with their changing position in the family and society.”¹⁴² Labor regulation was thus embedded with family construction.

By the 1930s, increasing numbers of working wives were participating in the labor force.¹⁴³ Yet many believed that working mothers and wives would further undermine the institution of marriage, as working wives would no longer need their husbands’ economic support, especially if they were to be paid a reasonable wage.¹⁴⁴ Others thought that the family might dissolve altogether:

[t]he dissolution of the family is going on so fast, and the old vilification of the woman who asserts her claim to motherhood without the slavery of marriage is dying out so fast, that we shall doubtless live to see a very widespread modification of public opinion on the subject . . . This, with the daily increasing economic self-dependence of women is greatly undermining the status of marriage.¹⁴⁵

Working-class woman and shirtwaist organizer, Mollie Schepps, echoed the anxiety that women’s work in the marketplace would end marriage and undermine the family. She believed women’s working conditions ought to be made better by regulating labor regardless of their impact on marriage.

139. See MUNCY, *supra* note 49, at 162-63; see generally GWENDOLYN MINK, *THE WAGES OF MOTHERHOOD: INEQUALITY IN THE WELFARE STATE, 1917-1942* (1996), LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935* (1994).

140. Renan Barzilay, J.S.D. Dissertation, *supra* note 57.

141. Anderson, *Should There Be Labor Laws for Women?*, *supra* note 109, at 3, 8; see also *supra* note 114 and accompanying text.

142. ELIZABETH FAULKNER BAKER, *PROTECTIVE LABOR LEGISLATION* 16 (STUDIES IN HISTORY ECONOMICS AND PUBLIC LAW, VOLUME 116) (1925).

143. COTT, *supra* note 36, at 167.

144. See ORLECK, *supra* note 32, at 102.

145. SKLAR, *NATION’S WORK*, *supra* note 28, at 182.

In response to claims that women need not work but instead rely on their husband's providership, Schepps said:

There are some . . . who claim that if women's salaries were made equal to men's, women would be more likely to work outside the home, thus degrading the sanctity of marriage. 'If long, miserable hours and starvation wages are the only means men can find to encourage marriage . . . it is a very poor compliment to themselves.'¹⁴⁶

As part of their continuing quest to regulate labor, women also advocated for the establishment of a federal administrative body to collect data on women's working conditions. In 1920, Congress held hearings over the establishment of such a body, the Women's Bureau in the Department of Labor. These hearings also demonstrated how conflated labor regulation was with growing concerns over the future of the family and women's maternal functions.¹⁴⁷ Congressman John Raker, a Democrat from California, spoke of women's delicate maternal functions, which merited their protection by the state.¹⁴⁸ The Congressman stated that when women leave work "they must leave it with strong, healthy minds and bodies, so that they may do their functions . . . and contribute to the vitality of coming generations."¹⁴⁹ When the Women's Bureau was finally established, Mary Anderson was appointed as its head, and served as Director of the Bureau from its establishment in 1920 throughout the New Deal.¹⁵⁰

Studies conducted by the Women's Bureau showed that by the 1930s, women comprised a quarter of the market place labor force, still clustered, however, in a few occupational fields—predominately domestic and personal services. Of those females who were professionals, mostly were teachers and nurses, when the Depression struck.¹⁵¹

D. *Husband as Breadwinner and Wife as Dependent in Federal Labor Regulation*

Ten years after the establishment of the Women's Bureau, the United States entered the Great Depression. During the Depression women continued to increase their numbers in the workforce, as they had in

146. ORLECK, *supra* note 32, at 102.

147. JUDITH SEALANDER, AS MINORITY BECOMES MAJORITY: FEDERAL REACTION TO THE PHENOMENON OF WOMEN IN THE WORK FORCE, 1920-1963, at 18-19 (1983) (discussing the hearings concerning the establishment of the Women's Bureau).

148. *Id.* at 18.

149. *Id.* (citing *Women's Bureau Hearings: Hearing on S. 4002 and H.R. 1134 Before the H. Comm. on Labor*, 66th Cong. 11 (1920)).

150. See generally Renan Barzilay, *supra* note 2, at 171-72, 191-95.

151. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULLETIN NO. 87, WOMEN IN THE ECONOMY OF THE UNITED STATES, A SUMMARY REPORT, 5 (1937).

previous decades.¹⁵² Most working-women were married, middle-class, middle-aged white women,¹⁵³ who entered the labor market as their husbands' employment opportunities became increasingly scarce.¹⁵⁴ For the most part, wage-earning women were able to find employment in a narrow range of occupations that tended to offer the lowest pay and fewest opportunities for advancement.¹⁵⁵ Out of every ten working women, three were in clerical or sales occupations, two were factory operatives (especially in the garment industries), two were employed as domestic servants, one was a professional (usually a nurse or teacher), and one worked in personal service jobs (such as cooks, waitresses, and beauticians).¹⁵⁶ African American women were two times more likely to be employed than white women, and they overwhelmingly labored as domestics and agricultural workers.¹⁵⁷

Given that the Great Depression was a time of dire unemployment, women's work came under massive heat. Many opposed women's marketplace employment saying that women took jobs away from men: heads of families who needed them most.¹⁵⁸ Others continued to voice the "pin money" argument, according to which women's employment was secondary to men's as women worked for luxuries while men worked to support their families.¹⁵⁹ In response to such claims, in 1932, Congress enacted a law that prohibited married women from being employed by the government if their husbands held federal jobs.¹⁶⁰

Amidst the economic downturn, Anderson, Addams, NCL activists, and former reformer turned Secretary of Labor Frances Perkins, used President Roosevelt's election and the national crisis as an opportunity to advance their goal of providing "decent" labor standards through regulation. Women reformers continued to be active advocates of labor reform in the states. In 1933, the NCL decided to renew its efforts to enact minimum wages for women after the *Adkins* decision.¹⁶¹ The NCL drafted a minimum wage bill to adhere to the requirement of the *Adkins* majority.¹⁶² The bill

152. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULLETIN NO. 168, EMPLOYED WOMEN AND FAMILY SUPPORT I (1939).

153. WEINER, *supra* note 21, at 81-89.

154. WOMEN'S BUREAU, *supra* note 151, at 1.

155. *Id.*

156. Suzanne B. Mettler, *Federalism, Gender & the Fair Labor Standards Act of 1938*, 26 POLITY 635, 641 (1994).

157. *Id.*

158. COTT, *supra* note 36, at 172.

159. See Renan Barzilay, J.S.D. Dissertation, *supra* note 57, at 236-40; ANDERSON, WOMAN AT WORK, *supra* note 101, at 155.

160. GROSSMAN & FREIDMAN, *supra* note 71, at 69.

161. LANDON R.Y. STORRS, CIVILIZING CAPITALISM: THE NATIONAL CONSUMERS' LEAGUE, WOMEN'S ACTIVISM, AND LABOR STANDARDS IN THE NEW DEAL ERA 180 (2000).

162. Renan Barzilay, *supra* note 2, at 201.

became law in New York in 1933 and similar bills were passed thereafter in several states,¹⁶³ including Washington, whose bill stood at the center of the soon-to-be-famous *West Coast Hotel* litigation.

In March 1937, the Supreme Court reversed its previous decisions on labor regulations,¹⁶⁴ upholding minimum wage legislation for women in *West Coast Hotel Co. v. Parrish*.¹⁶⁵ The decision held that women's circumstances in the market and the public interest warranted accepting minimum wage regulation for women. *West Coast Hotel* cited *Muller* as precedent, and the Court also held that there was no inherent barrier to the state's power under the Constitution to restrict individuals' freedom of contract.¹⁶⁶ That meant that such laws may be enacted for both women and men. Reformer's "entering wedge" seemed to be working.

After the ground-shifting *West Coast Hotel* decision, the prospects of a national wage and hour bill were promising. Despite Roosevelt's belief that wages would not go back to previous levels, he now needed a measure to reunite the Democratic Party after the schism caused by his court-packing plan.¹⁶⁷ He turned to his Secretary of Labor, Frances Perkins to begin drafting a wage and hour bill that would become a basis for the FLSA.¹⁶⁸ The FLSA was a centerpiece of New Deal Labor Legislation advanced by President Roosevelt during the Great Depression. Its major provisions established a minimum-wage floor, and maximum-hours with an overtime provision, for employees engaged in interstate commerce.¹⁶⁹ However, its goals were not just the spreading of work and saving the economy. The FLSA was also designed to promote "decent standards" by reinstating the "decent" family, with its husband-as-breadwinner and the wife-as-dependent model.

During the Congressional debates reformers' discourse on "decent standards" permeated the legislative history.¹⁷⁰ The President addressed

163. STORRS, *supra* note 161 at 178.

164. *See, e.g., Adkins*, 261 U.S. 525; *Morehead v. New York*, 298 U.S. 587, 618 (1936) (holding minimum wage law unconstitutional), *overruled in part by Olsen v. Nebraska*, 313 U.S. 236, 244 (1941).

165. 300 U.S. 379 (1937). There are different accounts as to what led to this decision. *See, e.g., JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND NEW DEAL YEARS* 242-43 (2004) (claiming that jurisprudential developments and social transformations led to the Supreme Court decision).

166. *West Coast Hotel*, 300 U.S. at 393-94, 400 (overruling *Adkins*, 261 U.S. 525).

167. *See* RONALD EDSFORTH, *THE NEW DEAL: AMERICA'S RESPONSE TO THE GREAT DEPRESSION* 257-62 (2000); FRANCES PERKINS, *THE ROOSEVELT I KNEW* 252-56 (1946).

168. PERKINS, *supra* note 167, at 256-66.

169. *See* A.B.A., *supra* note 8, at 11-16; Douglas & Hackman, *Act as Finally Passed*, *supra* note 8, at 29.

170. On the multiple goals of saving the economy and providing standards of labor and living, *see generally* Paul H. Douglas & Joseph Hackman, *The Fair Labor Standards Act of 1938: The Background and Legislative History of the Act*, 53 POL. SCI. Q. 491 (1938); *see also* *Fair Labor Standards Act of 1937: J. Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Educ. and Labor and the H.*

Congress, urging favorable consideration of the bill¹⁷¹ in order to “maintain wage increases and the purchasing power.”¹⁷² The NCL led lobbying efforts for the FLSA, seeing it as an embodiment of the NCL’s work over several decades to promote decent standards of labor.¹⁷³ For example, when the Joint Committee of the Senate Committee on Education and Labor met on June 2, 1937 for hearings on the FLSA, Lucy Mason of the NCL stated that “[w]hen a floor is put beneath wages and a ceiling to hours, decent employment practices will be protected.”¹⁷⁴ Mason continued emphasizing the idea of decent living by saying: “there are too many instances of longer hours and wages not sufficient to yield decent living.”¹⁷⁵ Additionally, John Lewis from the Committee for Industrial Organization (CIO), one of the largest labor organizations in America at the time, stated that attempts to establish minimum wages were based on a “standard of living . . . embodying elements of decency and comfort.”¹⁷⁶ Participants at the Congressional hearings wanted to establish wages that were “necessary to maintain a decent standard of living,”¹⁷⁷ achieve a “decent living,”¹⁷⁸ and create the “conditions . . . adequate to maintain even a rudimentary minimum standard of living.”¹⁷⁹

Not only did the productive meanings pertaining to a limitation on hours and a floor under wages, the discourse on decency also held repressing meanings pertaining to the “decent family”—or a family in which gender roles were fixed: the husband was the provider and the wife stayed at home. Women were in large part the initiators of wage and hour regulation and, for a good deal of time, its primary subjects. However, by the time the national government was ready to enact national labor standards, in the midst of the Depression, the focus of public concern about unemployment was on working men, who were understood as providers for their families.¹⁸⁰

Indeed, almost two decades after suffrage and with women increasingly entering the marketplace workforce, the crisis of the Depression created increased anxiety about the prospects of male

Comm. on Labor, 75th Cong. 396 (1937) [hereinafter Hearings] (statement of Courtenay Dinwiddie, Nat’l Child Labor Comm., arguing that substandard wages and hours were both “indefensible from the humanitarian standpoint and economically destructive”).

171. PERKINS, *supra* note 167 at 257.

172. *Id.* at 259.

173. STORRS, *supra* note 161, at 189-90.

174. *Hearings, supra* note 170, at 406 (statement of Lucy Randolph Mason).

175. *Id.*

176. *Id.* at 275 (statement of John Lewis, CIO); *see also id.* at 200 (statement of Secretary of Labor Frances Perkins).

177. *Id.* at 92 (statement of Robert Johnson, President, Johnson & Johnson).

178. *Id.* at 220 (statement of William Green).

179. H.R. REP. NO. 2738, at 28 (1938) (Conf. Rep.).

180. For the latter point, *see* COTT, *supra* note 36, at 172-73.

breadwinners to uphold their traditional gender roles and a “decent” family. A speaker representing employees said during the Congressional debates over the FLSA that:

I know of nothing that is a greater burden on the mind of the employed worker and his family than constantly, day by day, to be facing the possibility of dismissal from employment through the introduction of labor-saving devices, or changes in industry It is a day-by-day worry that impacts heavily upon the wife, the children, and the wage earner himself.¹⁸¹

During the FLSA Congressional Hearings, remarks such as those abounded, suggesting underlying assumptions about the family and anxiety about change in the traditional gendered roles of its members. This shows that there was much more that was regulated in the FLSA than hours and wages.

Such anxieties about the traditional gender roles in the family are clearly present in the legislative record. John Lewis, representing CIO, stated in support of the FLSA that the bill would reinstate the worker, understood as male, as his family’s provider: “The labor movement with which I am associated is interested in securing for every American unskilled or semiskilled worker a living wage—that is to say, a minimum income upon which he can maintain himself and his family at a level of healthy and decent living”¹⁸²

Lewis continued to explain that labor regulation should promote the male-as-breadwinner family model cherished by the American public:

It is possible, for instance, that a cotton-mill family, in which the husband, the wife, and say three adolescent children, are all employed in the mill, may obtain a very good income by their combined efforts. But this practice is destructive to all that we cherish most in our American institutions. Normally, a husband and father should be able to earn enough to support his family I am violently opposed to a system which by degrading the earnings of adult males, makes it economically necessary for wives and children to become supplementary wage earners, and then says “[s]ee the nice income of this family.”¹⁸³

Throughout the legislative debates over the Act there was an underlying concept of family promoted; a concept in which the husband was provider and he was the major actor in the market place. This is evident by remarks that the law refers to the “[t]he worker and his family,”¹⁸⁴ and is intended for the worker to “provide a minimum standard of living to maintain himself and his family.”¹⁸⁵ In a statement made by the Department of

181. *Hearings, supra* note 170, at 306 (statement of John Lewis, CIO).

182. *Id.* at 275.

183. *Id.*

184. *Id.* at 427 (statement of L. E. Oliver, Executive Vice President, Labor’s Non-Partisan League).

185. *Id.* at 10 (statement of Robert H. Jackson, Department of Justice).

Justice, a fair wage was considered “what the man ought to get . . . to keep him alive . . . if the man was going to live in a decent way.”¹⁸⁶ And it was argued on the record that the minimum wage should be such that “a man could maintain his wife and children.”¹⁸⁷ As one of the speakers put it: “[w]e ought to establish a wage that is a reasonable minimum for a man who is head of an average American family”¹⁸⁸ so that the law will in fact “prevent the continuation of wages that are so low that it is impossible for families to live in decency and reasonable comfort.”¹⁸⁹ And later, “[i]f anyone believed that the head of the family, with a wife and two children, and that is the average for the nation, can exist decently on less than \$16 a week, let us hear from those people.”¹⁹⁰ A traditional model of family, and gender roles, with the husband as breadwinner and his wife as domestic homemaker was thus promoted and reinforced as “decent” in the Congressional debates.

Understanding the legislative debates as geared towards the husband-as-breadwinner family model, it should come as no surprise, then, that a great many of women workers were ultimately excluded from the benefits of the FLSA.¹⁹¹ While jurisprudential explanations pertaining to the Federal government’s power to regulate commerce in accordance with the commerce clause have been offered for women’s relative exclusion from the Act,¹⁹² attention to the aforementioned debates reveals that family, and particularly the gendered divisions of labor in the decent family, provide additional meaning to their exclusions. When the FLSA was passed in 1938, it embodied the core vision of the women reformers: it limited working hours for both men and women and set a minimum wage.¹⁹³ But the Act prescribed a national requirement for payment of minimum wages and for limitation on work hours for workers whose occupations were judged to be in the flow of “interstate” commerce.¹⁹⁴ While the principle of decent working standards was established by the federal government in the Act, it importantly applied only to those who were working in “interstate commerce,” leaving out of its scope many African Americans, immigrants and women, who were working in commercial activities deemed

186. *Id.* at 45-62; *see also id.* at 63 (question of Rep. Kent Keller); *id.* at 323-24 (statement of Isador Lubin).

187. *Id.* at 95 (statement of Robert Johnson, President, Johnson & Johnson).

188. *Id.* at 98.

189. *Id.* at 307 (part of a question by the Chairman).

190. *Id.* at 120 (statement of Robert Johnson, President, Johnson & Johnson).

191. SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* 195 (Cornell Univ. Press 1998).

192. *Id.* at 177 (claiming, *inter alia*, that “the contours of ‘interstate commerce’” explain how many women were excluded from coverage under FLSA).

193. *See* STORRS, *supra* note 161, at 177.

194. Douglas & Hackman, *Act as Finally Passed*, *supra* note 8, at 29, 33, 37.

“intrastate.”¹⁹⁵ A month after the Act’s passage, the Women’s Bureau applauded the advances made for the four million women workers employed in industries to which the law applied, mainly the garment and textile industries.¹⁹⁶ It also pointed to the large portions of female wage earners, almost five million, who were outside the Act’s “interstate” realm: they included retail workers, laundry and cleaning operatives, cannery workers, waitresses, hotel and restaurant employees, beauticians, agricultural laborers, household employees, and many clerical workers.¹⁹⁷

Women were disproportionately excluded from the realm of the FLSA. Their exclusion may be explained not only due to the jurisprudential framework of interstate commerce, but also by pointing to the anxiety reflected in the legislative debates over the future fate of the traditional familial gender roles. The Act was ultimately aimed at those seen as breadwinners—heads of families—husbands—and it rested on a particular concept of family, one in which the husband is breadwinner and his wife is not a *real* worker. Importantly, while the *West Coast Hotel* decision, which cleared the way for the FLSA, relied on *Muller*’s limitation on excess hours for women, the FLSA was aimed primarily at *real* workers as its beneficiaries. The FLSA did not prohibit excess hours but rather required overtime pay. The FLSA was thus aimed primarily at heads of households and reinstated a particular mode of familial gender roles and power dynamics.

Some women reformers who had lobbied for labor regulation no doubt shared this traditional idea of family decency. Many preached that all mothers breastfeed their children, and insisted that mothers should not rely on outside help for their rearing.¹⁹⁸ Indeed most women reformers were part of this middle-class culture which considered it a tenant of life “that when a woman married—or certainly no later than her first pregnancy—she would quit her job.”¹⁹⁹ Julia Lathrop, Hull House alumna and Director of the Children’s Bureau, could not have been clearer: “Let us not deceive ourselves: the power to maintain a decent family living standard is the primary essential of child welfare. This means a living wage and wholesome working life for the man, a good and skillful mother at home to keep the house and comfort all within it.”²⁰⁰ Middle-class reformers such as Lathrop believed that a full time career could not be sustained successfully

195. METTLER, *supra* note 191, at 177; Eileen Boris, *The Quest for Labor Standards in the Era of Eleanor Roosevelt: The Case of Industrial Homework*, 2 WIS. WOMEN’S L. J. 53, 61 (1986).

196. *The Federal Wage-Hour Law and Women Workers*, WOMAN WORKER (U.S. Dept. of Labor, Women’s Bureau, Wash., D.C.), 1938, at 3.

197. *Id.*

198. MUNCY, *supra* note 49, at 162.

199. Carol Sanger, *Leaving Children for Work*, in MOTHER TROUBLES: RETHINKING CONTEMPORARY MATERNAL DILEMMAS 105 (Julia E. Hanigsberg & Sara Ruddick eds., 1999).

200. MUNCY, *supra* note 49, at 162.

by a wife and mother.²⁰¹ Scholars, therefore, often depict the progressive reformers, the Hull House residents who formed, staffed, and led bureaucratic agencies, as “maternalists” who “deplored the labor-force participation of married women and made the protection of mothers and children their political priority.”²⁰²

Most late nineteenth and early twentieth century women reformers accepted a traditional gendered system of labor and family, which saw earning as the sole responsibility of husbands and unpaid domestic labor as the only proper long term occupation for women.²⁰³ Rather than a system of labor and family which enabled both men and women to take care of their families while at the same time engaging in paid labor.²⁰⁴ According to leading scholars, the most prominent activists’ adherence to this ideology blinded them to the need for broader governmental policies that would enable women to work to support families, such as better jobs, job training, and wage subsidies.²⁰⁵ This may explain how repressive decency went relatively unchallenged.

However, scholarly attention primarily to middle-class reformers has perhaps obscured some ambiguity with regard to the idea of the traditional “decent” family, ambiguity more vocally expressed by working-class reformers.²⁰⁶ Mary Anderson, Director of the Women’s Bureau and a former factory worker, envisioned wage work as an important component of women’s lives, identity and independence. Her idea of a “decent” family was therefore somewhat different from that of fellow reformers.²⁰⁷ During the Depression and New Deal, wives with paying jobs became the target of economic discrimination, on the widely accepted theory that the unemployment crisis would be solved if married women left the marketplace labor force.²⁰⁸ Anderson attempted to dispose the “pin money” theory under which such laws were considered.²⁰⁹ Anderson thought the “pin money” theory was the basis for two forms of discrimination: the first was the opposition to married women’s employment; the second was the lower wages women earned in comparison to men. Anderson was

201. *Id.*

202. MOLLY LADD-TAYLOR, *MOTHER-WORK: WOMEN, CHILD WELFARE AND THE STATE, 1890-1930*, at 75 (1994).

203. GORDON, *supra* note 139, at 53.

204. *Id.* at 53-59.

205. *Id.* at 135-37, 142, 236-38.

206. Class makes a difference in how women are able to view their maternal obligations. For poor, black women, for whom work has not been optional, staying at home with children was for them much less a part of the community expectation. *Id.* at 135-40.

207. Renan Barzilay, J.S.D. Dissertation, *supra* note 57, at 167-91, 229-42.

208. And so as “late as 1939, legislators in twenty-six states were considering bills to bar married women from state jobs.” COTT, *supra* note 36, at 172-73.

209. See ANDERSON, *WOMAN AT WORK*, *supra* note 101, at 104, 139-40.

concerned with both the tendency to do away with married women's work and to lower women's wages.²¹⁰

While most women in the middle-class reform network did not advocate that married women should work, and many insisted that employment is incompatible with wifehood, Anderson found the discrimination against married women's employment especially bothersome, claiming that "[a]mong all the discriminations against women, I think the agitation against the employment of married women is one of the most unjust and unsound."²¹¹ Recollecting, Anderson says: "all through my life I have had to meet the question of whether or not married women should work for wages. The opposition to their employment always becomes very acute when there was a shortage of jobs."²¹² Despite opposition and an acute shortage of jobs, Anderson publicly defended the married women who were working for wages during the Depression.²¹³ Amidst "a growing movement in the United States to bar married women from gainful employment,"²¹⁴ Anderson argued that "American women are eager to grasp opportunities for work and careers or for marriage, home and children, or both."²¹⁵ Anderson encountered a great deal of opposition to her promotion of married women's employment during the Depression.²¹⁶ Indeed, married women's employment undermined the core of the traditional middle-class "decent" family in which the husband was breadwinner alone and the wife was homemaker.

210. See Statement from October 4, 1932, *microformed on Anderson Papers, supra* note 109, at reel 1, frames 481-82; see also ANDERSON, *WOMAN AT WORK, supra* note 101, at 104, 139-40. Under Mary Anderson's guidance, the Women's Bureau investigated the share of wage-earning women in family support. The investigation reflected that many women were supporting their families and themselves. In Women's Bureau investigations, Mary Anderson found "that over half" of the women reported of had given all earnings to their family support, and some were heads of families of two or more persons. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULLETIN NO. 63, THE SHARE OF WAGE-EARNING WOMEN IN FAMILY SUPPORT IN 1935 (1936); WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULLETIN NOS. 84-85, WOMEN IN THE ECONOMY OF THE UNITED STATES OF AMERICA (1937).

211. ANDERSON, *WOMAN AT WORK, supra* note 101, at 155. Anderson continued: "It is based on the false theory that all married women have someone to support them. That is a theory that we in the Women's Bureau have proved time and again is not true." *Id.*

212. *Id.* at 155.

213. Robert Crawford, About Well-Known Folk in Books, Art, Politics, D.C. STAR article, no date available, *microformed on Anderson Papers, supra* note 109, at reel 4, frame 740.

214. Drew Pearson & Robert S. Allen, Washington Daily Merry-Go-Round, June 14, 1939, *microformed on Anderson Papers, supra* note 109, at reel 1, frames 845-46.

215. Vylla P. Wilson, *Women's Bureau Chief, 66 Today, Lauds America for Opportunities*, TELEPHONE REPUBLIC, Aug. 27, 1938, *microformed on Anderson Papers, supra* note 109, at reel 4, frame 723.

216. Memorandum from Mary Anderson (June 9, 1939), *microformed on Anderson Papers, supra* note 109, at reel 1, frame 840. As an organizer already, she was frustrated that many young girls don't join unions because they believed they would soon get married. She did not share the feeling, claiming that "I thought as a young girl, that I would get married too, but somewhere I lost myself in my work and never felt that marriage would give me the security I wanted." ANDERSON, *WOMAN AT WORK, supra* note 101, at 65.

Working-class reformers like Anderson and Rose Schneiderman, developed a more ambivalent stance on the relationship between labor and family, envisioning greater equality between the sexes and valuing women's labor-force participation.²¹⁷ In line with the belief in promoting better wages for working women, they pushed for the section in the FLSA prohibiting sex discrimination in setting the minimum wage.²¹⁸ Schneiderman had been working in the National Recovery Administration (NRA) board in 1933; she and Anderson saw first-hand how women were prescribed lower wages than men when NRA boards established codes.²¹⁹ By the time Perkins' bill had reached Congress, women were no longer the main focus of the nation's unemployment concern, so advocates had to be assertive in order to ensure that women reaped some benefits of the Act. Anderson, by then a seasoned administrator who had objected to the NRA discriminatory codes, pushed for the section prohibiting sex discrimination in setting the minimum wage under the FLSA.²²⁰ While most female dominated jobs did not fall under the purview of interstate commerce, for those who worked in manufacturing the assertion of equal minimum wages was a crucial aspect of the bill. For Anderson it was essential that the FLSA prohibit sex classification so that when administrative committees met to set higher wages, they could not set lower, differential pay for women (as they had in under the NRA).²²¹ Anderson was instrumental in inscribing a provision in federal law for establishing equal wages.

During the FLSA's Congressional Hearings, the Secretary of Labor was repeatedly asked whether wages would be the same for women and men. In an important dialogue between Frances Perkins and Senator La Follette, Perkins explained that minimum wages would be the same for both men and women:

Secretary Perkins: I mean the minimum wage should be fixed for the occupation and not according to the age or sex of the employee.

Senator La Follette: For the occupation?

Secretary Perkins: Yes.²²²

This was not an obvious move. Years later, Anderson claimed that the clause prohibiting differential pay according to sex in establishing minimum wage, as found in section 8(c) of the Act, was nearly jeopardized.

217. See ORLECK, *supra* note 32, at 6.

218. ANDERSON, *WOMAN AT WORK*, *supra* note 101, at 147-49; GORDON, *supra* note 139, at 195.

219. See ANDERSON, *WOMAN AT WORK*, *supra* note 101, at 145-6; ORLECK, *supra* note 32, at 152, Renan Barzilay, J.S.D. Dissertation, *supra* note 57, at 242.

220. The original text of section 8(c) of the Fair Labor Standards Act of 1938 in its relevant part reads: "No classification shall be made . . . on the basis of age or sex." 29 U.S.C. § 208(c) (1938), *repealed* by Pub.L. 110-28, Title VIII, § 8103(c)(1)(A), 121 Stat. 189 (2007).

221. ANDERSON, *WOMAN AT WORK*, *supra* note 101, at 147-49.

222. *Hearings*, *supra* note 170, at 187 (Statement of Secretary of Labor Frances Perkins).

Anderson's recollection of the exchange between Perkins and Senator La Follette is telling:

It was an anxious time for me while the hearings on the bill were going on. The secretary of labor was going to appear and the solicitor of the department, Gerard [Gerald] Reilly, was working up her testimony. I talked to him and said, "Well, Gerry, I think we had better put in something for her to say about the same minimum for men and women" Unfortunately, when she came to that part she left out the two lines When the hearing was over, I nearly died because not a word has been said about the same minimum for men and women. The newspaperwomen all rushed up to me and asked why she left that out. I answered "God Knows! Go up and ask her" But before they had a chance to, Senator Robert La Follette asked if she did not think that women should have the same minimum as men. She said, "Yes," and I heaved a sigh of relief. As she went out she said to me, "I fixed that all right, didn't I?"²²³

Understanding the addition of this provision against the background of debates, offers an even more complex reading of 'decency' in the FLSA, suggesting nonetheless a less stable conception of the traditional family, at least among working-class women reformers.

III.

PERFORMING INTERPRETATION

In light of the fact that labor law has taken part in the reproduction of a particularly gendered, dated, and contested family model, and that the FLSA's major provisions on hours and wages have gone basically unmodified, it is time to redesign labor law to better correspond with current ideas about gender roles within the family.

For example, the Patient Protection and Affordable Care Act²²⁴ recently added an important provision to the FLSA requiring reasonable break time for nursing mothers.²²⁵ This provision was enacted to encourage working mothers, to extract breast milk for their infants during work, on the grounds that nursing contributes to infants' health. It requires employers to provide "reasonable" breaks for working mothers to extract breast milk for her nursing child for a period of up to one year after the child's birth. The provision specifies that breastfeeding breaks do not count as compensable time unless otherwise designated by the employer, meaning that such breaks, while allowed, are unpaid. The provision also requires larger employers (those with 50 or more employees) to provide a location, other

223. ANDERSON, *WOMAN AT WORK*, *supra* note 101, at 147-48.

224. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered titles of the U.S. Code).

225. FLSA § 4207, 29 U.S.C. § 207(r)(1)(A) (2010). The provision applies only to those workers who are covered in the FLSA. *See* 29 U.S.C. § 203(e)(1) (2006).

than a bathroom, that is shielded from view and free from intrusion by co-workers or the public, which may be used by an employee to extract breast milk. Smaller institutions are exempt from the location provision, if complying would create an “undue hardship.” The 2010 FLSA provision takes an important step towards bringing federal regulation in line with contemporary conceptions of gender and work. The 2010 provision has acknowledged that the family has changed: working mothers, even mothers of very small children, comprise an important part of the labor force.²²⁶ The familial gender hierarchy of the 1930s, while far from disappearing, has decreased, to the contentment of feminists and civil-rights activists.

But the FLSA’s exclusions, and the fact that long hours are not prohibited by law (as was in *Muller*) but merely penalized by overtime pay, contribute to the way the labor market regards its workers, and to the persistence of a dated family model. Long hours, for example, correspond with the so-called “ideal” worker norm. Long hours at work necessarily mean that one may either work or take care of one’s family, not both. Today’s labor market still regards a worker without familial care-taking responsibilities (usually husbands), as the normative worker, a real worker, and an ideal worker.²²⁷ Hence, the labor market is still based on the male-breadwinner woman-homemaker family model.

However, this gendered family model is a focus of growing critique for its detrimental effects on women (and men).²²⁸ Labor policies that envision a more gender egalitarian family model have come into place in other countries,²²⁹ and feminist scholars in the U.S. have, for some time now, urged a robust reconfiguration of the family-work matrix. The 2010 amendment to the FLSA takes a step towards such reconfiguration: a “wedge,” if you will, in the labor market’s attitude toward questions of accommodating familial care-taking. The amendment redirects focus to health, to workers’ well-being, and to acknowledging that work places need to take into consideration responsibilities for families. The next step must

226. U.S. DEP’T OF LABOR & U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 13 (2009); VALERIE JARRETT, WHITE HOUSE REPORT ON WOMEN AND CHILDREN 8-13, 27, 31-35 (2011). It is similarly important to make sure that women will not be discriminated against in hiring and promotion now that this provision is in effect.

227. See Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER & SOC’Y 39 (1990); see also JOAN C. WILLIAMS, UNBENDING GENDER, WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

228. See generally JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER (2010) (critiquing the ideal-worker norm of long hours as harmful to both men and women).

229. THE POLITICS OF PARENTAL LEAVE: CHILDREN, PARENTING, GENDER AND THE LABOUR MARKET 159-60 (Sheila Kamerman & Peter Moss eds., 2009); Rosmary Crompton & Clare Lyonette, *Work-Life ‘Balance’ in Europe*, 49(4) ACTA SOCIOLOGICA 379, 381,385 (2006); Rebecca Ray, Janet Gornick & John Schmitt, *Who Cares? Assessing Generosity and Gender Equality in Parental Leave Policy Designs in 21 Countries*, 20 J. OF EUR. SOC. POL’Y 196, 201-6 (2010).

involve robust recognition of parental (not only maternal) responsibilities, which will make it feasible and practical for men and women to take active and meaningful parts in the labor market and the family.

CONCLUSION

The history of the FLSA demonstrates that entangled within the regulation of labor was a vision of who should work in the market, and of the nature of family. Looking closely at this entangled history, it becomes evident that labor legislation did much more than regulate hours and wages. It regulated family. Through deciding on wages and hours of work, labor regulation inscribed the husband-breadwinner wife-homemaker model into law. Federal labor regulation knowingly, albeit indirectly, intervened in the marital relationship to decide who would be “doing the dishes.”

The constant concern with family, in the context of regulating labor, challenges the prevailing notion that law, especially federal law, does not actively construct the family dynamics or the inner workings of marriage relationships. In fact, as this narrative shows, constructing modes of family life and regulating the family should be more clearly understood as longstanding goals of federal labor regulation. Since this is the case, labor regulation can be used and revised to better suit today’s families and contemporary ideas about men and women’s participation in the labor market and in the family.

