ion's silences in deciding whether strictly enforcing statutory checks on the Executive justifies the negative consequences that may result.

I. State Sovereign Immunity

Congress's Enforcement Power Under Section 5 of the Fourteenth Amendment. — Conceptions of gender discrimination have evolved substantially since the passage of Title VII in 1964,[1] yet courts continue to labor with antiquated and oversimplified notions of discrimination.[2] Last Term, in *Coleman v. Court of Appeals of Maryland*,[3] the Supreme Court held that sovereign immunity prevents damages suits against states under subparagraph (D) of § 2612(a)(1) of the Family and Medical Leave Act of 1993 (FMLA),[4] which provided a right of action against state employers who failed to grant up to twelve weeks of unpaid self-care leave for an employee's illness.[5] Although the Court upheld damages suits for failure to provide family-care leave under subparagraph (C) of the same section in *Nevada Department of Human Resources v. Hibbs*,[6] the Court held that self-care leave did not address gender discrimination and therefore did not qualify as a legitimate abrogation of sovereign immunity under Section 5 of the Fourteenth Amendment.[7] Both the plurality and dissenting opinions reflect a restrictive vision of discrimination that overlooks the evolving complexity of gendered work environments, in which a subtler form of discrimination harms men as well as women.

Daniel Coleman began working for the Maryland Court of Appeals in March 2001.[8] On August 2, 2007, he requested sick leave to care for his own illness, which a doctor had documented.[9] His supervisor responded that if Coleman did not resign, then he would be terminated.[10]

After unsuccessfully seeking administrative remedies, Coleman filed suit in the U.S. District Court for the District of Maryland against the Maryland Court of Appeals as well as his two supervisors for vi-

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[1] *See generally* Angela P. Harris, *Theorizing Class, Gender, and the Law: Three Approaches*, LAW & CONTEMP. PROBS., Fall 2009, at 39; Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Serafina Raskin, Note, *Sex-Based Discrimination in the American Workforce: Title VII and the Prohibition Against Gender Stereotyping*, 17 HASTINGS WOMEN'S L.J. 247 (2006).

[2] *See* Valorie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 BERKELEY WOMEN'S L.J. 68, 74 (2002).

[3] 132 S. Ct. 1327 (2012).

[4] 29 U.S.C. §§ 2601–2654 (2006 & Supp. V 2011).

[5] *See Coleman*, 132 S. Ct. at 1332 (plurality opinion).

[6] 538 U.S. 721, 724–25 (2003).

[7] *See Coleman*, 132 S. Ct. at 1334, 1338 (plurality opinion).

[8] Coleman v. Md. Court of Appeals, 626 F.3d 187, 189 (4th Cir. 2010).

[9] *Id.* Coleman subsequently remained in the care of a doctor for ten days. *See* Coleman v. Md. Court of Appeals, Civil No. L-08-2464, 2009 WL 8400940, at *1 (D. Md. May 7, 2009).

[10] *Coleman*, 626 F.3d at 189.

olation of the FMLA.[11] The district court dismissed Coleman's claim because the self-care provision of the FMLA "unconstitutionally abrogated state sovereign immunity."[12] Coleman appealed.[13]

The Fourth Circuit affirmed,[14] determining that the FMLA self-care provision was not a valid abrogation of state sovereign immunity under the Eleventh Amendment.[15] In particular, the court found that self-care damages suits did not meet the "congruence and proportionality" test set out in *City of Boerne v. Flores*[16] because, unlike the family-care provision at issue in *Hibbs*, the self-care provision did not arise out of a focus on preventing gender-based discrimination.[17] Further, the court refused to consider how the self-care provision functioned together with the remaining provisions of the FMLA, in part because *Hibbs* focused solely on one provision of the Act.[18]

The Supreme Court affirmed.[19] Writing for a plurality of the Court, Justice Kennedy[20] initially found that the self-care provision expressed Congress's clear intent to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment.[21] He then considered whether the self-care provision constituted a valid exercise of the Section 5 power to enforce Section 1 of the Fourteenth Amendment.[22] Justice Kennedy examined and rejected each of Coleman's arguments supporting the provision's constitutionality.[23] In doing so, he followed the *City of Boerne* test, by looking to whether the provision addressed conduct that violated the Fourteenth Amendment and whether there existed "congruence and proportionality between the injury to be prevented . . . and the means adopted to that end."[24]

The plurality first rejected Coleman's argument that the self-care provision on its own addressed problems of sex discrimination.[25] Con-

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[11] *Id.* In addition to his FMLA claim, Coleman also brought a Title VII claim for race-based discrimination and a state tort claim for defamation. *See Coleman*, 2009 WL 8400940, at *1–2. The district court dismissed those claims, *id.*, which were not at issue before the Supreme Court, *see Coleman*, 132 S. Ct. at 1332 (plurality opinion).

[12] *Coleman*, 2009 WL 8400940, at *1.

[13] *Coleman*, 626 F.3d at 189.

[14] *Id.* at 194. Chief Judge Traxler wrote the court's opinion, which Judges Shedd and Dever joined.

[15] *Id.* at 191.

[16] 521 U.S. 507, 520 (1997); *see id.* at 519–20.

[17] *Coleman*, 626 F.3d at 192–93.

[18] *Id.* at 193–94.

[19] *Coleman*, 132 S. Ct. at 1338 (plurality opinion).

[20] Justice Kennedy was joined by Chief Justice Roberts and Justices Thomas and Alito.

[21] *See id.* at 1333 (citing Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003)).

[22] *See id.*

[23] *See id.* at 1334.

[24] *Id.* at 1334 (quoting *City of Boerne*, 521 U.S. 507, 520 (1997)) (internal quotation mark omitted).

[25] *Id.* at 1334–35.

sidering the legislative history of the provision, the plurality found "scant evidence" of gender-based stereotypes or discrimination in the provision of sick or disability leave by state employers.[26] Accordingly, the plurality concluded that Congress sought to avoid "discrimination on the basis of illness, not sex."[27] Though Justice Kennedy acknowledged that the self-care provision might benefit women suffering from pregnancy-related disabilities, he found that the sick leave policies already in place cover such problems and thus concluded that the FMLA self-care provision "as a remedy" was not congruent or proportional "to any identified constitutional violations."[28]

Second, the plurality rebuffed Coleman's argument that the self-care provision ensured the FMLA's effectiveness.[29] Coleman argued that Congress adopted the self-care guarantee in order to equalize the statute's distribution of rights between genders. Otherwise, employers might perceive the FMLA as a package of rights for women, thus incentivizing employers to hire men to avoid providing FMLA leave.[30] The plurality rejected this argument because the legislative history lacked any concrete findings or evidence "to suggest the availability of self-care leave equalizes the expected amount of FMLA leave men and women will take."[31] Rather, Congress relied only on "abstract generalities" in attempting to connect the self-care provision to gender discrimination and thus failed to highlight a "sufficient nexus . . . between self-care leave and gender discrimination by state employers."[32]

Finally, the plurality rejected Coleman's argument that the self-care provision aided single parents and thus targeted sex discrimination.[33] Though acknowledging that most single parents are women, Justice Kennedy concluded only that the self-care provision sought to remedy "neutral leave restrictions which have a disparate effect on women."[34] Because disparate impact does not violate the Equal Protection Clause,[35] the self-care provision did not respond to or prevent a constitutional violation and therefore was not proportional to its objectives.[36] The plurality concluded that the self-care provision of the

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[26] *See id.* at 1334.

[27] *Id.* at 1335.

[28] *Id.*

[29] *Id.* at 1335–37.

[30] *See id.* at 1335–36.

[31] *Id.* at 1335.

[32] *Id.* at 1337. Moreover, Justice Kennedy pointed out that Coleman's first argument — that women take more self-care leave than men — contradicts his second — that men will take enough self-care leave to balance the total amount of FMLA leave that women take. *See id.* at 1336.

[33] *Id.* at 1337–38.

[34] *Id.* at 1337.

[35] *See, e.g.*, Washington v. Davis, 426 U.S. 229, 239 (1976).

[36] *See Coleman*, 132 S. Ct. at 1337 (plurality opinion) (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82 (2000); City of Boerne v. Flores, 521 U.S. 507, 519 (1997)).

FMLA failed to identify a pattern of unconstitutional behavior and to create a congruent and proportional remedy, and thus unconstitutionally abrogated state sovereign immunity.[37]

Justice Thomas concurred. He joined the plurality's holding but wrote separately to emphasize his belief that *Hibbs* was wrongly decided because Congress failed to show that the family-care provision was responsive to a proven pattern of unconstitutional state discrimination.[38]

Justice Scalia concurred in the judgment. He asserted that the "congruence and proportionality" test encourages arbitrary decisions based on policy and vague legislative history rather than law.[39] As a replacement test, he advocated a textualist reading of Section 5, under which Congress could abrogate sovereign immunity only when regulating "conduct that *itself* violates the Fourteenth Amendment."[40] Under that test, he concluded the self-care provision "does not come close" to regulating unconstitutional behavior and is thus an impermissible abrogation of state sovereignty.[41]

Justice Ginsburg dissented.[42] Structuring her dissent around the *City of Boerne* requirements for Section 5 legislation, she argued that the self-care provision was a valid response to widespread gender discrimination.[43] First, she relied on the text, social history, and legislative history of the FMLA to assert that it was enforcing a particular constitutional right.[44] The FMLA's text explicitly touted the importance of gender-neutral leave policies because employment regulations applying to a single gender "have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender."[45] The history leading up to the FMLA involved a debate between "[e]qual-treatment" feminists, who sought gender-neutral policies, and "[e]qual-opportunity" feminists, who sought to remedy past discrimination of women specifically.[46] Ultimately, Congress followed the "equal-treatment" strategy with a "gender-neutral leave model" designed to alleviate all discrimination against women, including that which might result from a legislative policy centered on women only.[47] Thus, Justice Ginsburg argued, Congress intentionally passed a gender-neutral self-care provision in-

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[37] *Id.* at 1338.
[38] *See id.* (Thomas, J., concurring).
[39] *See id.* (Scalia, J., concurring in the judgment).
[40] *Id.*
[41] *Id.* at 1339; *see id.* at 1338–39.
[42] Justice Ginsburg was joined by Justices Breyer, Sotomayor, and Kagan in dissent.
[43] *See id.* at 1339–49 (Ginsburg, J., dissenting).
[44] *See id.* at 1340–42.
[45] *Id.* at 1340 (quoting 29 U.S.C. § 2601(a)(6) (2006 & Supp. V 2011)).
[46] *See id.*
[47] *See id.* at 1341.

tended to dispel gender discrimination, thereby avoiding "[l]egislation solely protecting pregnant women[, which would] give[] employers an economic incentive to discriminate against women . . . ."[48]

Second, Justice Ginsburg argued that Congress had ample evidence of state discrimination based on sex in leave policies. She quoted the congressional testimony of several witnesses, who described their experiences of gender discrimination in leave policies.[49] Further, the legislative history included reports of large numbers of complaints about discriminatory leave policies as well as statistics showing that "mothers' earnings fell to $1.40 per hour less than those of women who had not given birth."[50] And Congress heard testimony that the states practiced such discrimination against their female employees, giving limited or no leave to women for maternity-related health reasons.[51] Justice Ginsburg also emphasized that the law should consider pregnancy discrimination to be sex discrimination and thus advocated reversing the contrary holding in *Geduldig v. Aiello*.[52]

Third, applying the Section 5 "congruence and proportionality" test, Justice Ginsburg contended that the self-care provision offered a justifiable response to a widespread problem of unconstitutional discrimination. She concluded that the provision of self-care leave created a coherent framework of protections for women not only when giving birth, but also when recovering from pregnancy-related illness.[53] "Congress sought to ward off the unconstitutional discrimination it believed would attend a pregnancy-only leave requirement" by creating a gender-neutral provision.[54]

Despite reaching contrasting conclusions about the FMLA's responsiveness to unconstitutional discrimination, both the plurality and dissent in *Coleman* discussed the issue using a framework that looks for policies that intentionally reinforce gender stereotypes.[55] Though

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[48] *Id.* at 1342 (quoting S. REP. NO. 101-77, at 32 (1989)).

[49] *See id.* at 1342–44.

[50] *Id.* at 1343 (citing S. REP. NO. 102-68, at 28 (1991); *The Family and Medical Leave Act of 1989: Hearing on H.R. 770 Before the Subcomm. on Labor-Mgmt. Relations of the H. Comm. on Educ. and Labor*, 101st Cong. 356–57 (1989) (report of 9to5, National Association of Working Women)).

[51] *See id.* at 1343–44.

[52] 417 U.S. 484, 496 n.20 (1974); *see Coleman*, 132 S. Ct. at 1344–45 (Ginsburg, J., dissenting).

[53] *See Coleman*, 132 S. Ct. at 1345–46.

[54] *Id.* at 1346.

[55] *See id.* at 1337 (plurality opinion) (finding the FMLA's legislative history lacked "evidence or findings about how the self-care provision interrelates to the family-care provisions to counteract employers' incentives to discriminate against women"); *id.* at 1347 (Ginsburg, J., dissenting) ("The 'pervasive sex-role stereotype that caring for family members is women's work,' Congress heard, led employers to regard required parental and family-care leave as a women's benefit." (citation omitted)).

this inquiry is consistent with equal protection jurisprudence,[56] it overlooks less paradigmatic discrimination that takes subtler forms and harms men as well as women — precisely the types of discrimination the self-care provision targeted.[57] Thus, *Coleman* reflects the rigidity of the framework through which the law views discrimination.

The traditional approach to sex discrimination under the Equal Protection Clause focuses on clear disparate treatment,[58] and the Court's precedents reflect this requirement. *Frontiero v. Richardson*[59] struck down a military practice that made it more difficult for women to claim their husbands as dependents than for men to claim their wives. *Reed v. Reed*[60] invalidated a state law that preferred men for estate administrator positions. More recently, *United States v. Virginia*[61] found it unconstitutional for a state military college to exclude women from admission. Meanwhile, in *Aiello*, the Court upheld the disparate treatment of pregnant women because the practice did not treat all women differently from all men.[62]

It is therefore unsurprising that both the plurality and dissent in *Coleman* sought evidence of intentional disparate treatment in the FMLA's legislative history. Justice Kennedy began by requiring "a well-documented pattern of sex-based discrimination," defined as "facially discriminatory leave policies" or "facially neutral family-leave policies [applied] in gender-biased ways."[63] But the legislative history revealed no such policies or evidence of a "stereotype harbored by employers that women take self-care leave more often than men."[64] This line of reasoning culminated in Justice Kennedy declaring, "States may not be subject to suits for damages based on violations of a compre-

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[56] *See* Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1449 (2000) ("To determine where there is unconstitutional sex discrimination, one need generally ask only two questions: 1) Is the rule or practice at issue sex-respecting, that is to say, does it distinguish on its face between males and females? and 2) Does the sex-respecting rule rely on a stereotype?" (footnote omitted)).

[57] Moreover, courts applying *City of Boerne* to civil rights legislation typically look only at the statute's legislative history, limiting their ability to consider evolving trends of discrimination. *See, e.g.*, Coleman, 132 S. Ct. at 1336–37 (plurality opinion).

[58] *Cf.* Ruth Bader Ginsburg, *Sexual Equality Under the Fourteenth and Equal Rights Amendments*, 1979 WASH. U. L.Q. 161, 166 (noting that parties challenging gender discrimination in the 1970s only "contended against legislative line-drawing based on gross ranking of females as persons concerned with 'the home and the rearing of the family,' males, with 'the marketplace and the world of ideas.'" (quoting Stanton v. Stanton, 421 U.S. 7, 14–15 (1975))).

[59] 411 U.S. 677, 678–79 (1973).

[60] 404 U.S. 71, 74 (1971).

[61] 518 U.S. 515, 519 (1996).

[62] *See* 417 U.S. 484, 496–97 (1974).

[63] *Coleman*, 132 S. Ct. at 1334 (plurality opinion).

[64] *Id.*

hensive statute unless Congress has identified a specific pattern of constitutional violations by state employers."[65]

Justice Ginsburg followed a similar framework by citing evidence of overt disparate treatment and stereotyping to support her conclusion that the self-care provision responds to equal protection violations. She sought to uphold the FMLA as an appropriate "response to pervasive discriminatory treatment of pregnant women" based on "stereotypes of women as lone childrearers."[66] More specifically, she pointed to "evidence that existing sick-leave plans were inadequate to ensure that women were not fired" when recovering from childbirth.[67]

Both opinions maintained a binary inquiry in which there is either intentional discrimination against a woman or no discrimination. This approach is far from ideal, as discrimination today manifests itself in subtler forms.[68] First, the focus on intentional stereotyping fails to deal with the far more common — yet far less visible — problem of subtle gender discrimination in the workplace.[69] Second, this subtler form of discrimination harms both men and women — a fact that legislatures and (more often) courts tend to overlook.[70]

The types of "traditional" discrimination on which the Court's analysis focuses involve rules or policies that overtly treat men and women differently, and which reinforce harmful stereotypes.[71] By contrast, the evolution of "subtler" discrimination, as theorized in feminist scholarship and evidenced by social science, involves a process of gendered treatment that manifests in biases and slanted environments, perpetuating similar harms in new ways.[72] Although openly discrimi-

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[65] *Id.* at 1337.

[66] *Id.* at 1345 (Ginsburg, J., dissenting).

[67] *Id.* at 1346.

[68] *See* Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 95–111 (2003).

[69] *See* Vojdik, *supra* note 2, at 74 ("[T]he treatment of gender in equality jurisprudence needs to be expanded to take into account the practices and policies inside social institutions that are based upon, and perpetuate, the classification of persons according to gender. Formal equality erroneously assumes that gender discrimination is a mistake in classification by individual state actors . . . . Gender is better conceptualized as an institution, a social process of exclusion that distinguishes persons based on their sex . . . .").

[70] *Cf.* Tyson Smith & Michael Kimmel, *The Hidden Discourse of Masculinity in Gender Discrimination Law*, 30 SIGNS 1827, 1830–32 (2005) (arguing that the law's hegemonic and inflexible understanding of masculinity harms both men and women).

[71] *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465–68 (2001).

[72] *See id.* at 468–74; Green, *supra* note 68, at 91 ("[S]ince Title VII of the Civil Rights Act was enacted . . . , we have seen a shift in the ways in which discrimination operates in the workplace. . . . It creeps into everyday impressions of worth and assignment of merit on the job, lurking constantly behind even the most honest belief in equality, perpetuating the very injustice that we decry."). It should be noted that *Washington v. Davis*, 426 U.S. 229, 248 (1976), held that disparate impact does not amount to unconstitutional discrimination. Although a discussion of that precedent is outside the scope of this comment, the arguments set out here certainly gesture

natory employment policies have become rarer,[73] discrimination continues in subtler, yet still tangible forms, in part evidenced by continued gender disparities in the workplace despite the decline of "traditional" discrimination.[74] For example, the pay gap since 1955 has improved from its low of 58.8% in 1975,[75] but it had risen only to 80.2% by 2009.[76] Women also continue to receive promotions at lower rates than men, which further indicates sustained impediments to women's advancement in the workplace.[77] Perhaps even more tellingly, women hold approximately 16.1% of all seats on boards of Fortune 500 companies in the United States[78] and serve as chief executive officers for only nineteen of the Fortune 500 companies.[79]

Contrary to the traditional framework applied in *Coleman*, perpetuation of these harms may be linked to the increasingly subtle discrimination, creating new gendered workplace experiences.[80] These experiences may include a woman losing a promotion "because she had children and [her supervisor] didn't think she'd want to relocate her

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in support of modifying that case. Even given that holding, however, in the context of Section 5 legislation, Congress would likely be able to address discrimination evidenced by disparate impact because it has leeway to address discrimination that *may* be unconstitutional but is not *certainly* so. *See* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 727 (2003) ("Congress may, in the exercise of its Section 5 power, do more than simply proscribe conduct that we have held unconstitutional."); Bd. of Trs. v. Garrett, 531 U.S. 356, 365 (2001) ("Congress' power 'to enforce' the Amendment includes the authority . . . [to] prohibit[] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000)) (internal quotation mark omitted)).

[73] *See* Cynthia L. Estlund, *Work and Family: How Women's Progress at Work (and Employment Discrimination Law) May Be Transforming the Family*, 21 COMP. LAB. L. & POL'Y J. 467, 475 (2000).

[74] *See* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995); *cf.* Raskin, *supra* note 1, at 247 ("[E]xisting conceptions of American sex discrimination law fail to meet the changing forms of sexual discrimination in the workplace.").

[75] *See* IRENE PADAVIC & BARBARA RESKIN, WOMEN AND MEN AT WORK 123 exhibit 6.1 (2d ed. 2002).

[76] BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, REPORT NO. 1025, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2009 7 tbl.1 (2010), *available at* http://www.bls.gov/cps/cpswom2009.pdf.

[77] *See* Francine D. Blau & Jed DeVaro, *New Evidence on Gender Differences in Promotion Rates: An Empirical Analysis of a Sample of New Hires* 22 (Nat'l Bureau of Econ. Research, Working Paper No. 12321, 2006), *available at* http://www.nber.org/papers/w12321.

[78] CATALYST, WOMEN ON BOARDS 1 (2012), *available at* http://www.catalyst.org/file/725/qt_women_on_boards.pdf.

[79] *Women CEOs of the Fortune 1000*, CATALYST (Aug. 29, 2012), http://www.catalyst.org/publication/271/women-ceos-of-the-fortune-1000. According to one study, "68 percent of women surveyed believe gender discrimination exists in the workplace." Samantha Gluck, *The Effects of Gender Discrimination in the Workplace*, CHRON.COM, http://smallbusiness.chron.com/effects-gender-discrimination-workplace-2860.html (last visited Sept. 29, 2012).

[80] *See* Franke, *supra* note 74, at 3; *see generally* Green, *supra* note 68 (arguing that sex discrimination operates less as discrete decisions to exclude than as a "perpetual tug," *id.* at 91).

family."[81] Similarly, "comments on [a female employee's] appearance and attitude as well as a male dominated social atmosphere" may hinder a female employee's advancement.[82] And conceptions of women as unable to balance work and family may lead to lost advancement opportunities, without reaching the level of blatant disparate treatment captured by the traditional definition.[83] Scholars have thus urged the law to view gender as a "social process" that "constructs and signifies relations of power in our society,"[84] and have encouraged the law to "eliminate[] the presumption that the existing workplace is gender neutral."[85] This change would create a fluid understanding of how socialized gender subtly produces harmful work environments.

The self-care provision at issue in *Coleman* was arguably one means of addressing an evolving problem that cannot fit into the predominate discrimination framework. Similarly, the Equal Employment Opportunity Commission (EEOC) now recognizes "'unconscious' or 'reflexive' bias" that "can amount to actionable discrimination."[86] Indeed, some courts have begun to follow this lead in Title VII cases, so that "a plaintiff does not need to prove conscious motivation" to bring a successful discrimination claim.[87] But many courts deciding cases under the Equal Protection Clause have yet to recognize this subtler form of sex discrimination.[88]

As the framework applied in *Coleman* misses this more nuanced understanding of sex discrimination, it also overlooks the harm that stereotyping can cause men.[89] Gender constructions box men into a role that may prove just as restrictive as the feminine role in which women are cast. Commentators have even argued that "courts have stuck to a one-dimensional understanding of masculinity; its definition has been reified into one normative construction, anchored by tradi-

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[81] Lust v. Sealy, Inc., 383 F.3d 580, 583 (7th Cir. 2004).

[82] Dow v. Donovan, 150 F. Supp. 2d 249, 266 (D. Mass. 2001).

[83] *See Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, 2 EEOC Compl. Man. (BNA) § 615, at 11–21 (May 23, 2007), *available at* http://www.eeoc.gov/policy/docs/caregiving.pdf.

[84] Vojdik, *supra* note 2, at 90; *see also* Franke, *supra* note 74, at 3.

[85] Vojdik, *supra* note 2, at 121.

[86] Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1316 (2008).

[87] *Dow*, 150 F. Supp. 2d at 264.

[88] *Cf.* Vojdik, *supra* note 2, at 73 ("While traditional equal protection doctrine has succeeded in eliminating most formal barriers that barred women as a group, it has not led to the inclusion of women within . . . traditionally male workplaces.").

[89] *See* Joan C. Williams, *Beyond the Glass Ceiling: The Maternal Wall as a Barrier to Gender Equality*, 26 T. JEFFERSON L. REV. 1, 14 (2003) ("We need to deconstruct gender, for men as well as for women . . . .").

tional stereotypes."[90] Working fathers who attempt to take on larger caregiving roles face challenges in an environment built around the "masculine ideal-worker expectation" in which work comes first, family and personal well-being second.[91]

More concretely, only 14% of men in the United States "have access to paternity leave with some pay through their employers."[92] Moreover, reinforcement of male stereotypes negatively impacts men's relationships, emotional well-being, and physical health outside the workplace.[93] Finally, between 2007 and 2011, men filed approximately 16% of all harassment cases brought before the EEOC and local Fair Employment Practices agencies.[94] The subtle reinforcement of gender stereotypes can thus have complex detrimental effects on men's well-being, yet existing legal frameworks tend to obscure this dimension of sex discrimination.

Although the classic understanding of sex discrimination may have become rarer, insidious conceptions of gender nevertheless hinder the progression toward true substantive sex equality.[95] Broadening the law's focus beyond overt discrimination against women,[96] and toward a more critical deconstruction of gender, would create opportunities to assess more fully how gendered workplaces can harm both men and women.[97] The self-care provision at issue in *Coleman* arguably ad-

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[90] Smith & Kimmel, *supra* note 70, at 1829. The law thus reinforces conceptions of men as "aggressive, ambitious, analytical, assertive, athletic, competitive, dominant, forceful, independent, individualistic, self-reliant, self-sufficient, and strong." *Id.* at 1830 (emphases omitted).

[91] Williams & Bornstein, *supra* note 86, at 1320; *see also id.* at 1320–21; Chuck Halverson, Note, *From Here to Paternity: Why Men Are Not Taking Paternity Leave Under the Family and Medical Leave Act*, 18 WIS. WOMEN'S L.J. 257, 257 (2003) ("One shortcoming that has not received as much attention is the difficulty fathers have in taking extended periods of paternity leave under the provisions of the FMLA."). *See generally* Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297 (2012).

[92] NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, DADS EXPECT BETTER: TOP STATES FOR NEW DADS 4 (2012), *available at* http://www.nationalpartnership.org/site/DocServer/Dads_Expect_Better_June_2012.pdf?docID=10581.

[93] For example, a 2005 study demonstrated that a "demand for male dominance is harmful to men's relationships." Corinne A. Moss-Racusin et al., *When Men Break the Gender Rules: Status Incongruity and Backlash Against Modest Men*, 11 PSYCHOL. MEN & MASCULINITY 140, 141 (2010). Further, stereotypes that encourage men to be immodest, boastful, or aggressive have been linked to "increased aggression toward women." *Id.*

[94] *Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997–FY 2011*, EEOC, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Sept. 29, 2012).

[95] *See generally* JOAN WILLIAMS, UNBENDING GENDER (2000).

[96] *See* Sturm, *supra* note 71, at 468–78.

[97] *Cf.* David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 141 (2009) ("[F]eminist legal theory has 'done little to examine the more sophisticated and subtle ways in which stereotypes, particularly those stereotypes that have been internalized, affect men.'" (quoting Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1052 (1996))).

dressed this problem by providing gender-neutral leave provisions. The courts, however, are struggling to view a three-dimensional problem through a two-dimensional lens. *Coleman* reflects the need to modernize the law's approach to sex equality with a more nuanced understanding of discrimination.

II. FEDERAL JURISDICTION AND PROCEDURE

A. Federal Preemption of State Law

State Immigration Enforcement. — Congress's failure to pass meaningful immigration reform over the past decade has encouraged both the executive branch and state and local governments to take a series of stopgap measures that address wildly divergent issues. At one extreme, the Obama Administration recently announced that it would stop deporting young illegal immigrants who are not "enforcement priorities."[1] At the other end of the spectrum, many states have introduced or enacted legislation designed to reduce the number of illegal immigrants in their communities.[2] Arizona is one such state. In 2010, it enacted the Support Our Law Enforcement and Safe Neighborhoods Act,[3] better known as S.B. 1070, which made "attrition through enforcement the public policy of all state and local government agencies in Arizona."[4] The Supreme Court has long held that the federal government has exclusive authority to regulate immigration[5] but has also affirmed that states can enact laws that affect immigrants under their inherent police powers when Congress so allows.[6] Thus, S.B. 1070 and its progeny raise salient constitutional questions about the proper role of the states — if any — in combating illegal immigration through enforcement. Last Term, in *Arizona v. United States*,[7] the Supreme Court held that federal immigration law

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[1] Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. 1 (June 15, 2012), *available at* http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf.

[2] *See, e.g.*, Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 459 (2008) (noting that in 2007, "[f]or the first time ever, legislators in all fifty states introduced bills dealing with illegal immigration").

[3] Ch. 113, 2010 Ariz. Sess. Laws 450 (codified as amended in scattered sections of ARIZ. REV. STAT. ANN. tits. 11, 13, 23, 28, and 41).

[4] *Id.* § 1, 2010 Ariz. Sess. Laws at 450.

[5] *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 68 (1941); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875).

[6] *See* De Canas v. Bica, 424 U.S. 351, 355 (1976) ("[T]he fact that aliens are the subject of a state statute does not render it a regulation of immigration . . . ."); *see also* Chamber of Commerce v. Whiting, 131 S. Ct. 1968, 1981 (2011) ("Arizona's licensing law [penalizing employers for hiring illegal aliens] falls well within the confines of the authority Congress chose to leave to the States . . . .").

[7] 132 S. Ct. 2492 (2012).