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### Nevada Department of Human Resources v. Hibbs: Universalism and Reproductive Justice

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Samuel R. Bagenstos\*

## *Nevada Department of Human Resources v. Hibbs:* Universalism and Reproductive Justice

The Family and Medical Leave Act (FMLA) was the first bill signed into law by President Bill Clinton—just two weeks after he took office.<sup>1</sup> Enactment of the statute was a longstanding goal of the Democratic Party.<sup>2</sup> It also represented a legislative victory for what I will call feminist universalism—the notion that sex equality is best served by rules and policies that reject differentiation between women and men. Ten years after Congress enacted the FMLA, the Supreme Court upheld the statute against a constitutional challenge in *Nevada Department of Human Resources v. Hibbs*.<sup>3</sup> The *Hibbs* Court, in a surprising opinion by Chief Justice Rehnquist, relied heavily on feminist universalist arguments. Even at the time of *Hibbs*, though, evidence was accumulating that the FMLA’s universalist approach was not sufficient to achieve the underlying goals of feminist lawyers and activists: disestablishing gender-role stereotypes and promoting equal opportunities for women and men throughout society. *Hibbs* thus represents the triumph of feminist universalism, even as it highlights the limitations of the feminist universalist project.

### THE FMLA AND FEMINIST UNIVERSALISM

Understanding where the FMLA came from—and the constitutional issues in *Hibbs*—requires examining what drew leading American feminists to frame the statute in universalist terms.

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<sup>1</sup> See RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 11 (1995).

<sup>2</sup> See, e.g., *1988 Democratic Party Platform*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=29609> (“We believe that Government should set the standard in recognizing that worker productivity is enhanced . . . by family leave policies that no longer force employees to choose between their jobs and their children or ailing parents . . .”).

<sup>3</sup> 538 U.S. 721 (2003).

*Second-Wave Feminism and the Pregnancy Discrimination Act*

From its start in the early 1960s, second-wave feminism aimed to untether the biological function of reproduction from social roles and social status. Key second-wave texts like Betty Friedan’s *The Feminine Mystique* described a world in which women were largely confined to the tasks of raising children and managing the home. That world, they argued, improperly treated biology as destiny. It imposed significant psychological costs on individual women and deprived women as a group of full and equal status in society. Friedan, for example, wrote that a woman “who has no goal, no purpose, no ambition patterning her days into the future, making her stretch and grow beyond that small score of years in which her body can fill its biological function, is committing a kind of suicide.”<sup>4</sup>

Feminist lawyers pursued three distinct but interlocking strategies to help ensure that a woman’s biology would not be her destiny.<sup>5</sup> One strategy was to seek statutes and judicial rulings that promoted access to contraception and abortion. If women could choose whether and when to have children, they could time their parenting decisions to minimize interference with the educational and job prospects that were essential to full and equal status in the community. A second strategy was to seek federal programs that provided childcare directly. A federally funded network of childcare centers could remove both financial and social barriers to new mothers reentering the workforce. The third strategy focused not on the government but on private employers. Feminist lawyers sought legal regulation of the employment process to bar employers from treating mothers and pregnant women as second-class citizens. And because social stereotypes treated the ideal role of women as mothers and homemakers, this strategy naturally extended to barring discrimination against women in the workplace generally. As Professor Deborah Dinner has explained, “Upending the family-wage system would require more than the right to formal, equal treatment. Feminists also fought for the redistribution of childrearing labor between women and men in the home, as well as the redistribution of the costs of pregnancy, childbirth, and childrearing between the family and society.”<sup>6</sup> The FMLA arose most directly from the third of these—feminist efforts to regulate the workplace.

Feminist lawyers initially relied on Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based not just on race but also on sex.<sup>7</sup> Although the Equal Employment Opportunity Commission (EEOC) and other elites initially treated the law’s

<sup>4</sup> BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 280 (50th anniversary ed. 2013).

<sup>5</sup> For an extensive discussion of the three prongs of this strategy, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 1986–89 (2003).

<sup>6</sup> Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 *HARV. C.R.-C.L. L. REV.* 415, 419 (2011).

<sup>7</sup> 42 U.S.C. § 2000e–2(a) (2012).

prohibition on sex discrimination as an accident or a joke, by the late 1960s the EEOC and the courts had begun to take that prohibition seriously.<sup>8</sup> Advocates used Title VII to challenge employers who attempted to force pregnant women to quit their jobs or take excessive leave.<sup>9</sup> And where the employer was the government—as in the large number of cases involving teachers driven out of their jobs once it became apparent they were pregnant—those lawyers made Fourteenth Amendment claims as well. These efforts had some initial success in the EEOC and the courts.<sup>10</sup>

But the Supreme Court ultimately ruled in 1974's *Geduldig v. Aiello*<sup>11</sup> that discrimination against pregnant women is not inherently sex discrimination for purposes of the Fourteenth Amendment. Two years later, in *General Electric Co. v. Gilbert*,<sup>12</sup> the Court applied the same analysis to Title VII. Rejecting the EEOC's interpretation, the Court held that the statute does not prohibit disparate treatment of pregnant women. As the Court explained, quoting its earlier opinion in *Geduldig*, pregnancy discrimination divides the workplace “into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”<sup>13</sup>

Feminist lawyers immediately responded by urging passage of a new law that would expressly treat pregnancy discrimination as a form of sex discrimination.<sup>14</sup> They succeeded when Congress adopted the Pregnancy Discrimination Act (PDA) in 1978.<sup>15</sup> The PDA contained two key clauses. The first defined sex discrimination to include discrimination on the basis of pregnancy.<sup>16</sup> The second tied employers' treatment of pregnancy to their treatment of other disabilities in the workplace: “[W]omen affected

<sup>8</sup> See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY, 1960–1972*, at 207–11, 229–32 (1990); see also Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1333–58 (2012).

<sup>9</sup> See Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 989–91 (2013).

<sup>10</sup> Cf. Stanley Schair, *Sex Discrimination: The Pregnancy-Related Disability Exclusion*, 49 ST. JOHN'S L. REV. 684, 689–91 (1975) (describing how circuits were split on whether mandatory maternity leave policies for teachers violated the Fourteenth Amendment before the Supreme Court in *Cleveland Board of Education v. LaFleur* struck down a mandatory leave regulation as unconstitutional under the Due Process Clause); Comment, *Mandatory Maternity Leave: Title VII and Equal Protection*, 14 WM. & MARY L. REV. 1026, 1026–27 (1973) (noting that before *LaFleur* and *Geduldig v. Aiello*, “the success of a constitutional attack on mandatory maternity leave policies necessarily depend[ed] upon the jurisdiction in which an action [was] brought”).

<sup>11</sup> 417 U.S. 484 (1974). For discussion of *Geduldig*, see Debbie Dinner, *Sex Equality and the U.S. Welfare Regime: The Story of Geduldig v. Aiello*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* \_\_\_ (Murray, Shaw, & Siegel eds. 2019).

<sup>12</sup> 429 U.S. 125 (1976).

<sup>13</sup> *Id.* at 135 (quoting *Geduldig*, 417 U.S. at 496 n.20).

<sup>14</sup> See Dinner, *supra* note 6, at 469–70.

<sup>15</sup> Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000(k) (2012)).

<sup>16</sup> 42 U.S.C. § 2000e(k) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . .”).

by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”<sup>17</sup> Taken together, these clauses overturned both the holding and the reasoning in *Gilbert*. They required employers who give leave or other accommodations to temporarily disabled employees to do the same for similarly-affected pregnant employees. And they barred employers from treating workers adversely simply because they are pregnant.

The congressional hearings on the PDA included testimony from a number of prominent feminist attorneys. These attorneys explained that the purpose of the law was not just to attack a narrow problem but to eliminate the broad stereotypes and practices that limited women’s workplace opportunities generally. Georgetown Law Professor Wendy Williams, for example, identified employers’ treatment of pregnancy as the keystone of workplace inequality. She testified that “the common thread of justification running through all the policies and practices that discriminate against women in the labor force rested ultimately on one fact: The capacity and reality of pregnancy.”<sup>18</sup> Employers’ “assumptions about pregnancy and its implications for the role of women, and the behavior of women, led to the view that women were marginal workers, not really deserving of the emoluments and pay of real workers.”<sup>19</sup> And because all women of childbearing age are “viewed by employers among the potentially pregnant,” the “stereotype that all women are marginal workers” had broad effects on “hiring, promotion, job assignments, and fringe benefits.”<sup>20</sup>

The PDA rested heavily on the premises of feminist universalism. In particular, the statute seemed to incorporate a “sameness” feminism.<sup>21</sup> The second clause seemed to do so explicitly with its “shall be treated the same” language.<sup>22</sup> So long as women were the same as men, the statute appeared to say, they should be treated the same. Susan Deller Ross, then

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<sup>17</sup> *Id.*

<sup>18</sup> *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 & H.R. 6075 Before the Subcomm. on Emp’t Opportunities of the H. Comm. on Educ. & Labor, 95th Cong. 43 (1977)* [hereinafter *House Hearing*] (statement of Wendy Williams, Professor of Law, Georgetown Law School).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Cf. Dinner, supra* note 6, at 444 (arguing that the turn toward formal equality arguments by feminist lawyers during this period is “better understood not as an ideological competition between difference and sameness feminism, special and equal treatment, but rather as a strategic conflict about how to remedy the economic costs that the family-wage system imposed on women”). *See generally* Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209 (1998) (arguing that by 1970, feminist lawyers had turned decisively toward sameness feminism).

<sup>22</sup> § 2000e(k).

of the American Civil Liberties Union (ACLU),<sup>23</sup> underscored the theme in her testimony on the bill. “Most women are able to work through most of their pregnancies,” she said. “They should be allowed to work like any other able workers.”<sup>24</sup> At the same time, she recognized, “all pregnant women have some period of medical disability” from labor through “3 to 8 weeks after childbirth,” and “[t]hese disabled women should likewise be given the same fringe benefits all other medically disabled workers get.”<sup>25</sup>

Although proponents of the PDA aimed to eliminate important barriers to workplace equality, the model of sameness feminism seemed likely to have a limited impact. It would protect those women who could overcome employer-imposed barriers to succeeding in a man’s world, but it would not change the background conditions that made it a man’s world in the first place.<sup>26</sup>

Of course, most of the PDA’s feminist advocates did not endorse such a narrow and formal approach to equality. Their efforts to secure the availability of abortion and childcare reflected a goal not just to require employers to treat women the same as men, but to change the social structures that created the context for workplace and other inequalities—in particular, the social structures that gave women sole or primary responsibility for childrearing. Still, as attempts to secure public funding for abortion ran aground and the push for a national childcare program stalled, the PDA’s sameness model stood as the most powerful example of legal feminism in the statute books.

To be sure, feminists did not abandon efforts to move beyond the sameness model. As I show in the next section, intra-feminist debates on these questions remained robust—and played a crucial role in the development of the FMLA. And the limitations of a sameness approach were increasingly apparent. Biology aside, social norms meant that women were more likely to take time off to care for newborn children than men. This time off went beyond the “period of medical disability”<sup>27</sup> for which the PDA might provide some protection—it was about childcare, not physical recovery from pregnancy and childbirth. Unless employers were required to give new mothers maternity leave—and protect those new mothers against adverse treatment when they returned—women would face an obstacle to continuing in the workforce that men did not.

### *Pregnancy Leave Laws and the Move Toward the FMLA*

Responding to this problem, activists in some states secured enactment of laws that required employers to provide maternity leave.<sup>28</sup>

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<sup>23</sup> *Susan Deller Ross*, ACLU WOMEN’S RTS. PROJECT, <https://www.aclu.org/files/womensrights/tribute/3.html> (last visited May 18, 2018).

<sup>24</sup> *House Hearing*, *supra* note 18, at 48 (statement of Susan Deller Ross, ACLU).

<sup>25</sup> *Id.*

<sup>26</sup> See Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 *YALE L.J.* 1281, 1287 (1991).

<sup>27</sup> *House Hearing*, *supra* note 18, at 48 (statement of Susan Deller Ross, ACLU).

<sup>28</sup> See Dinner, *supra* note 6, at 474.

Some of these statutes predated the PDA; others, like California's, were enacted later.<sup>29</sup> California's law, in particular, became a major focus of controversy. That law required employers to provide mothers up to four months of leave following childbirth.<sup>30</sup> Although the statute did not require employers to pay new mothers for their maternity leave time, it did prohibit them from firing or demoting new mothers for taking that leave.<sup>31</sup>

As Justice Ginsburg later explained, “[t]he California law sharply divided women’s rights advocates”:

“Equal-treatment” feminists asserted it violated the Pregnancy Discrimination Act’s (PDA) commitment to treating pregnancy the same as other disabilities. It did so by requiring leave only for disability caused by pregnancy and childbirth, thereby treating pregnancy as *sui generis*. “Equal-opportunity” feminists disagreed, urging that the California law was consistent with the PDA because it remedied the discriminatory burden that inadequate leave policies placed on a woman’s right to procreate.<sup>32</sup>

When business groups filed suit to challenge the California maternity-leave mandate as preempted by the PDA, the competing groups of feminists filed competing briefs in the case.<sup>33</sup> Joan Bertin of the ACLU explained the position of the “equal treatment” feminists she represented: “The notion that pregnancy is a special disability is a stereotype, and stereotypes hurt us. The only way to eradicate that is to put pregnancy in the context of the whole range of things that happen to people over a lifetime.”<sup>34</sup> But no less an icon than Betty Friedan took the other side of the argument:

I think the time has come to acknowledge that women are different from men, and that there has to be a concept of equality that takes into account that women are the ones who have the babies. We shouldn’t be stuck with always using a male model, trying to twist pregnancy into something that’s like a hernia.<sup>35</sup>

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<sup>29</sup> See Brief for the National Conference of State Legislators *et al.* as *Amici Curiae* at 16–17, *California Federal Savings & Loan Assn. v. Guerra*, 1986 WL 728371 (June 12, 1986).

<sup>30</sup> See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 275–76 (1987) (describing California’s Fair Employment and Housing Act, which had been amended in 1978 to prohibit employment discrimination on the basis of pregnancy).

<sup>31</sup> *Id.*

<sup>32</sup> *Coleman v. Court of Appeals*, 566 U.S. 30, 48 (2012) (Ginsburg, J., dissenting) (footnote omitted) (citations omitted).

<sup>33</sup> See Tamar Lewin, *Maternity-Leave Suit Has Divided Feminists*, N.Y. TIMES (June 28, 1986), <http://www.nytimes.com/1986/06/28/style/maternity-leave-suit-has-divided-feminists.html>.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

The Supreme Court ultimately upheld the California law on two alternative grounds that, together, might have bridged the internecine conflict among women's rights activists. The first ground, which resonated with the claims of the "equal opportunity" feminists, was that the state's maternity-leave law and the PDA "share a common goal" of "allow[ing] women, as well as men, to have families without losing their jobs."<sup>36</sup> The second, which accepted the "equal treatment" feminists' interpretation of the PDA for purposes of argument, was that employers could comply with both the state and federal statutes by granting four months' maternity leave and also giving "comparable benefits to other disabled employees."<sup>37</sup>

After the Supreme Court's decision, Representative Howard Berman, who had authored the California law when he was in the state legislature, sought to introduce a maternity-leave bill in Congress.<sup>38</sup> Feminist activists, aided in particular by Colorado Representative Pat Schroeder and Donna Lenhoff of the Women's Legal Defense Fund, successfully prevailed on Representative Berman to frame his federal bill consistently with feminist universalism—that is, by avoiding any legal distinction between men and women, whether pregnant or otherwise. That bill eventually became the Family and Medical Leave Act.<sup>39</sup> Rather than being limited to maternity leave, the new law guaranteed both mothers and fathers leave for the birth of a child.<sup>40</sup> It also guaranteed to workers, regardless of their sex, leave to take care of certain family members with "serious health condition[s]"—or to address their own "serious health condition[s]."<sup>41</sup> Covered employers were required to make a total of twelve weeks of unpaid leave available to each covered employee each year for these purposes.<sup>42</sup>

In framing the FMLA as a form of universal job protection, the goal of feminist lawyers was not to deny differences between women and men—or even to reject the proposition that employers should accommodate those differences. The goal was to broaden the frame, so that those differences could be accommodated in a way that didn't target women for special treatment.

Special treatment was seen as harmful to women in two ways. First, it entrenched social stereotypes that limited women's opportunities. A law guaranteeing parental leave to women, but not men, placed the imprimatur of the state on the proposition that taking care of children was women's work. By contrast, a law guaranteeing parental leave to all

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<sup>36</sup> *Cal. Fed.*, 479 U.S. at 288, 289.

<sup>37</sup> *Id.* at 291.

<sup>38</sup> See ELVING, *supra* note 1, at 18–20.

<sup>39</sup> See *id.* at 20–23, 29–34.

<sup>40</sup> 29 U.S.C. § 2612(a)(1)(A) (2012).

<sup>41</sup> *Id.* § 2612(a)(1)(C)–(D).

<sup>42</sup> *Id.* § 2612(a)(1).

parents might shift caretaking patterns by removing an obstacle to men who wished to take time off to care for their family members.<sup>43</sup>

Second, and perhaps more concretely, special treatment encouraged discrimination against women by making them costlier to employ. If the law required parental leave for female but not male employees, an employer would have an incentive to hire only men so it could avoid that mandate. But if both men and women had the right to take leave, perhaps that would blunt the incentive to discriminate.<sup>44</sup> Of course, social norms would likely continue to mean that women would be more likely in practice to take parental or family-care leave. To address that concern, the statute's drafters also included personal-care leave in the FMLA's package of entitlements. The idea was that men would be at least as likely as women to take personal-care leave, so that the statute's new mandate would not, as a whole, give employers much incentive to discriminate against women.<sup>45</sup> The FMLA ultimately passed in this universalist form, though Congress limited the law to fairly large employers.<sup>46</sup>

### WILLIAM HIBBS'S CASE

#### *Hibbs's Accident and His Wife's Surgery*

William Hibbs worked for the State of Nevada's welfare agency.<sup>47</sup> On Mother's Day of 1996, he was driving his Ford pickup truck with his family in Reno when another driver ran a red light and crashed into them.<sup>48</sup> William tore his rotator cuff in the crash, and his two children also experienced minor injuries.<sup>49</sup> His wife, Diane, was not so lucky. She seriously injured her neck and spine—and she required extensive treatment.<sup>50</sup> She had surgery in October 1996, but that did not alleviate her severe pain.<sup>51</sup> By the following spring, as William's lawyers explained in one of their briefs to the Supreme Court, Diane had “suffered a range of serious medical complications, including liver damage and addiction as a result of prescribed pain medication, anxiety attacks, clinical

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<sup>43</sup> See Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 J. GENDER & L. 39, 49–50 (1994).

<sup>44</sup> See Dinner, *supra* note 6, at 475.

<sup>45</sup> See Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 43 (2010).

<sup>46</sup> 29 U.S.C. § 2611(4)(A)(i) (2012) (defining “employer” for the purposes of the act as “any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year”).

<sup>47</sup> Brief in Opposition at \*2, *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368), 2001 WL 34116242.

<sup>48</sup> *Former State Worker Pitted Against Nevada in Supreme Court Family Leave Case*, LAS VEGAS SUN (Jan. 12, 2003, 7:30 AM), <https://lasvegassun.com/news/2003/jan/12/former-state-worker-pitted-against-nevada-in-supre/> [hereinafter *Worker Pitted Against Nevada*].

<sup>49</sup> *Id.* (“Hibbs tore a rotator cuff and his two younger children suffered scrapes and bruises . . .”).

<sup>50</sup> *Id.*

<sup>51</sup> Brief in Opposition, *supra* note 47, at \*3.

depression, and suicidal tendencies, necessitating at one point that she be admitted to a hospital psychiatric unit.”<sup>52</sup>

One condition in particular required further surgery: Diane “had a metal plate with screws in her neck from which the screws stripped and loosened to the point of pressing against her esophagus, requiring her to be extremely careful when moving her body so as to avoid a potentially fatal puncture.”<sup>53</sup> The surgery could not be scheduled until November 1997, however, due to the specialist surgeon’s availability.<sup>54</sup> During the interim period, William sought leave from his job to care for Diane.<sup>55</sup>

William requested the full twelve weeks of leave under the FMLA.<sup>56</sup> On June 23, 1997, his employer granted the request to take unpaid FMLA leave as needed to care for his spouse.<sup>57</sup> William took that leave intermittently until August 5, when he began taking the leave on a full-time basis.<sup>58</sup> On August 11, he began to receive paid leave donated by his coworkers pursuant to a workplace leave-bank program; at that point, he had used approximately three weeks of his twelve-week allocation of FMLA leave.<sup>59</sup> His coworkers donated just over nine weeks of paid leave, which William believed would not count against his FMLA allocation.<sup>60</sup> He planned to take the donated leave until it ran out in October, then revert to unpaid FMLA leave through the end of the year—which would cover Diane’s surgery and initial recovery.<sup>61</sup>

Contrary to William’s expectations, his employer *did* count the donated paid leave against his twelve-week FMLA allocation; under that calculation, his FMLA entitlement expired in October.<sup>62</sup> His employer ordered him to return to work by November 12 or face discipline.<sup>63</sup> When he did not return because he still needed to care for his wife, the employer fired him for being “absent without leave.”<sup>64</sup>

Diane eventually had her surgery in December—one of “a dozen expensive operations in California and Arizona.”<sup>65</sup> William found part-time work for the Federal Department of Housing and Urban Development, and the family had to survive on a combination of Diane’s

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at \*3–4 (citation omitted).

<sup>54</sup> *Id.* at \*4.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at \*5.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at \*4–5.

<sup>61</sup> *Id.* at \*5.

<sup>62</sup> *Id.* at \*5–6.

<sup>63</sup> *Id.* at \*7.

<sup>64</sup> *Id.* at \*7–8.

<sup>65</sup> *Worker Pitted Against Nevada*, *supra* note 48.

disability payments and his \$1,000 monthly wages from that job.<sup>66</sup> The Hibbses paid their bills “by selling off horses, three off-road vehicles, two classic cars, a truck, van, and eventually [William’s] house near Virginia City. The family moved into a \$6,500 mining home that had been abandoned for eight years.”<sup>67</sup>

*Hibbs’s Lawsuit and the Supreme Court’s  
Sovereign Immunity Cases*

In April 1998, William Hibbs filed a lawsuit against the State of Nevada for violating his rights under the FMLA. By counting the banked leave donated by his coworkers against his twelve-week FMLA allocation without giving him sufficient advance notice, he alleged, the state had violated the statute. He also alleged that the state had violated the statute by retaliating against him for invoking his FMLA rights.<sup>68</sup> He sought reinstatement with back pay, plus damages.<sup>69</sup>

The FMLA provides for damages and back pay,<sup>70</sup> as well as injunctive relief.<sup>71</sup> And it treats state government employers, like William Hibbs’s, identically to private employers.<sup>72</sup> When Congress adopted the statute in 1993, there was no legal reason for Congress to draw a distinction between public-sector and private-sector employment. The Supreme Court had held in *Garcia v. San Antonio Metropolitan Transit Authority* in 1985 that Congress can apply the same labor standards laws to state and local government employers as it applies to private employers.<sup>73</sup> And the Court had also held in *Pennsylvania v. Union Gas Co.* in 1989 that there is no constitutional bar to Congress authorizing suits against state governments for damages for violations of federal statutes.<sup>74</sup>

By the time William Hibbs filed his suit, though, a lot had changed. Under the leadership of Chief Justice Rehnquist, the Supreme Court had begun what many have called a “federalism revolution.”<sup>75</sup> In 1996, Chief Justice Rehnquist’s opinion for the Court in *Seminole Tribe of Florida v. Florida* overruled *Union Gas* and held that Congress could not authorize damages suits against states.<sup>76</sup> Rather, the Eleventh Amendment—or at

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Brief in Opposition, *supra* note 47, at \*8.

<sup>69</sup> *Id.*

<sup>70</sup> 29 U.S.C. § 2617(a)(1)(A) (2012).

<sup>71</sup> *Id.* § 2617(a)(1)(B).

<sup>72</sup> *Id.* § 2611(4)(A)(iii) (defining “[t]he term ‘employer’” to “include[] any ‘public agency’”).

<sup>73</sup> 469 U.S. 528 (1985).

<sup>74</sup> 491 U.S. 1 (1989).

<sup>75</sup> See, e.g., MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 249 (2005); Linda Greenhouse, *The Revolution Next Time?*, N.Y. TIMES (Dec. 16, 2010, 8:00 PM), <https://opinionator.blogs.nytimes.com/2010/12/16/the-revolution-next-time>.

<sup>76</sup> 517 U.S. 44 (1996).

least the constitutional “presupposition” that the Eleventh Amendment “confirms”—provided that the state, as sovereign, was immune from such suits.<sup>77</sup>

*Seminole Tribe* reaffirmed the Court’s prior holding that Congress could override a state’s sovereign immunity if it acted under its power to enforce the Fourteenth Amendment.<sup>78</sup> But the very next year, the Court limited the circumstances in which Congress could exercise that power. In its 1997 decision in *City of Boerne v. Flores*,<sup>79</sup> the Court withdrew its prior suggestion that Congress had some authority to determine the *substantive* meaning of the Fourteenth Amendment.<sup>80</sup> Rather, *Boerne* held that Congress’s enforcement power is tied to the Court’s own interpretations of the Fourteenth Amendment: Congress can act to prevent, deter, or remedy conduct that the Court would believe to be in violation of that Amendment, but Congress cannot declare conduct to be a violation of the Amendment if the Court believes that conduct to be constitutional.<sup>81</sup>

#### *The Case in the Lower Courts*

*Seminole Tribe* and *Boerne* posed a problem for Hibbs’s case. They meant that Hibbs could not recover damages from the state for his injuries unless the FMLA was “congruent and proportional” to Fourteenth Amendment violations recognized by the Supreme Court. And the FMLA’s universal framing suggested that the statute went beyond simply prohibiting unconstitutional sex discrimination. If the problem was sex discrimination, a guarantee of 12 weeks of leave for every covered worker would seem to go well beyond solving that problem. A state could avoid unconstitutional discrimination by giving its workers *any* amount of leave—12 weeks, 6 weeks, or even no leave at all—so long as male and female workers got the same thing. Applying that logic, the district court ruled that Hibbs’s FMLA claim against the state was barred by sovereign immunity.<sup>82</sup>

Hibbs appealed to the United States Court of Appeals for the Ninth Circuit. By the time the Ninth Circuit decided the case, seven other federal courts of appeals had addressed the question whether the FMLA was a valid exercise of Congress’s power to enforce the Fourteenth

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<sup>77</sup> *Id.* at 54 (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

<sup>78</sup> *See id.* at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452–56 (1976)).

<sup>79</sup> 521 U.S. 507 (1997).

<sup>80</sup> *See id.* at 527–28 (“There is language in our opinion in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one.”).

<sup>81</sup> *Id.* at 519–20.

<sup>82</sup> Transcript of Motion Nos. 54 and 55, *Hibbs v. Dep’t. of Human Res.*, No. CV-N-98-205-HDM(PHA), 2004 WL 5267600 (D. Nev. June 3, 1999).

Amendment. All of them had held, consistent with the district court's decision, that it was not.<sup>83</sup>

But the Ninth Circuit panel that heard Hibbs's appeal consisted of three of the most liberal judges on the federal appellate bench. The most senior judge on the panel, Judge Stephen Reinhardt, a Carter appointee and former union-side labor lawyer, was perhaps the most outspoken liberal critic of the Rehnquist Court among sitting judges.<sup>84</sup> Not coincidentally, he was also one of the judges whose opinions were the most likely to be reversed by the Supreme Court.<sup>85</sup> The next-most-senior judge, Judge A. Wallace Tashima, a Clinton appointee, was a Japanese-American who had been imprisoned in an internment camp as a child during World War II.<sup>86</sup> The third judge, Judge Marsha Berzon, served as Supreme Court Justice William Brennan's first female law clerk and participated in the drafting of and lobbying for the PDA as a young attorney before going on to a very successful career as one of the nation's most prominent union-side labor lawyers.<sup>87</sup> When President Clinton nominated Judge Berzon to the Ninth Circuit, the Senate dragged its feet for more than two years before finally confirming her by a vote of 64–34.<sup>88</sup>

The Ninth Circuit panel concluded that the FMLA was a valid exercise of Congress's Fourteenth Amendment enforcement power and thus held that Congress properly subjected state employers to monetary liability for violations of the statute. In the portion of the panel's opinion authored by Judge Tashima, the panel held that the FMLA was a congruent and proportional response to sex discrimination in the leave policies of public employers.<sup>89</sup> Judge Tashima endorsed the government's argument that "because women are regarded as having 'the primary responsibility for family caretaking' (both for infants and for sick family members), employers commonly offer less caretaking leave to men than to women." As a result, he explained,

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<sup>83</sup> See *Hibbs v. Dep't. of Human Res.*, 273 F.3d 844, 850 (9th Cir. 2001) (collecting cases), *aff'd sub nom.* *Nev. Dep't. of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

<sup>84</sup> See William Overend, *Stephen Reinhardt of Ninth Circuit: Liberal U.S. Judge Swims Against Conservative Tide*, L.A. TIMES (Aug. 17, 1986), [http://articles.latimes.com/1986-08-17/news/mn-16516\\_1\\_stephen-reinhardt](http://articles.latimes.com/1986-08-17/news/mn-16516_1_stephen-reinhardt).

<sup>85</sup> See Maura Dolan, *Stephen Reinhardt, 'Liberal Lion' of the Ninth Circuit, Dies at Eighty-Seven*, L.A. TIMES (Mar. 29, 2018), <http://www.latimes.com/local/lanow/la-me-ln-reinhardt-20180329-story.html> (noting that, when asked about his response to his opinions' frequent reversals by the Supreme Court, Judge Reinhardt said: "If they want to take away rights, that's their privilege. But I'm not going to help them do it.").

<sup>86</sup> See David Margolick, *Japanese-American Judges Reflect on Internment*, N.Y. TIMES (May 19, 1995), <https://www.nytimes.com/1995/05/19/us/japanese-american-judges-reflect-on-internment.html>.

<sup>87</sup> See *2007 Margaret Brent Awards, Marsha S. Berzon*, AM. BAR ASS'N, <https://www.americanbar.org/content/dam/aba/migrated/women/bios/BerzonBio.authcheckdam.pdf>.

<sup>88</sup> Neil A. Lewis, *After Long Delays, Senate Confirms Two Judicial Nominees*, N.Y. TIMES (Mar. 10, 2000), <http://www.nytimes.com/2000/03/10/us/after-long-delays-senate-confirms-2-judicial-nominees.html>.

<sup>89</sup> *Hibbs v. Dep't. of Human Res.*, 273 F.3d 844, 869–71 (9th Cir. 2001).

this kind of gender-discriminatory leave policy is harmful both to men—because they are not given enough leave to care for their families—and to women—because reduced leave for men forces women to spend more time taking care of their families, and women’s consequently greater needs for caretaking leave make them less attractive job candidates than men.<sup>90</sup>

A flat requirement of twelve weeks’ leave for both male and female employees responded directly to that discrimination.

A concurring opinion authored by Judge Berzon, but joined by the other two members of the panel, went much further. It concluded that the FMLA was a proper response not just to sex-discriminatory leave practices but to the entire edifice of state laws that had, until as late as the 1970s, limited the work opportunities of women and thus reinforced “the stereotypical assumption that women are marginal workers whose fundamental responsibilities are in the home.”<sup>91</sup> Those state laws included protective labor legislation that limited the jobs women could perform or the hours they could work,<sup>92</sup> as well as laws governing workers’ compensation and other public benefits<sup>93</sup>—laws that assumed that women, but not men, were economically dependent on their spouses. Those laws, Judge Berzon argued, continued to shape societal views about the proper roles of men and women.<sup>94</sup> And, as Judge Berzon wrote, the FMLA directly responded to them by requiring that both male and female workers receive twelve weeks of leave for caretaking.<sup>95</sup>

## SUPREME COURT PROCEEDINGS

### *The Court Takes the Case*

The Ninth Circuit’s decision was an obvious candidate for Supreme Court review. By diverging from the rulings of other courts of appeals, the decision created a conflict in the circuits—one of the most common reasons the Supreme Court decides to hear a case.<sup>96</sup> And the decision seemed out of step with the jurisprudence that marked the Rehnquist Court’s “federalism revolution.” Indeed, in the four years that followed *Boerne*, the Court would consider the constitutionality, under Congress’s Fourteenth Amendment enforcement power, of five more statutes—

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<sup>90</sup> *Id.* at 855.

<sup>91</sup> *Id.* at 860.

<sup>92</sup> *Id.* at 861–63.

<sup>93</sup> *Id.* at 863.

<sup>94</sup> *Id.* at 863–65 (noting that even as federal laws began to prohibit gender discrimination, decades of state laws based on “stereotypical beliefs about the appropriate roles of men and women” made up “‘volumes of history’ of sex discrimination in the country”).

<sup>95</sup> *Id.* at 867.

<sup>96</sup> See SUP. CT. R. 10 (noting that the existence of a circuit split can be considered as a factor in whether to grant certiorari); see also H.W. PERRY JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1991) (“Without a doubt, the single most important generalizable factor in assessing certworthiness is the existence of a conflict or ‘split’ in the circuits.”).

including, notably, the Age Discrimination in Employment Act (ADEA) and the employment discrimination prohibitions of the Americans with Disabilities Act (ADA). In each instance, the Court held that the statute was not a valid exercise of Congress’s power to enforce the Fourteenth Amendment.<sup>97</sup> That *Hibbs* had been decided by a notoriously liberal panel on a notoriously liberal circuit—at a time when the Supreme Court was tilting decidedly to the right—was the exclamation point at the end of the sentence.

The State of Nevada accordingly filed a petition for certiorari in the Supreme Court.<sup>98</sup> Even though the George W. Bush administration defended the FMLA and urged the Court to deny review of the Ninth Circuit’s decision,<sup>99</sup> few observers expected the Court to take that path.<sup>100</sup> And indeed, the Court granted certiorari in June 2002, just as it was finishing its 2001 Term.<sup>101</sup> Argument was set for January 2003, with briefing to occur during the summer and fall of 2002.

### *The Oral Argument*

When Nevada’s attorney, Deputy Attorney General Paul Taggart, rose to argue the case on January 15, 2003,<sup>102</sup> he had every reason to expect that the wind would be at his back. The Court had not upheld a statute as valid Fourteenth Amendment enforcement legislation since *Boerne*. And the Court’s post-*Boerne* cases seemed to adopt a requirement that Congress could not adopt such legislation without first establishing “a history and pattern” of constitutional violations by the states.<sup>103</sup> Although Congress plainly adopted the FMLA with sex equality in mind, the legislative history contained very little evidence of discriminatory conduct by state employers (as opposed to private employers).<sup>104</sup> And even if state employers did engage in unconstitutional discrimination in the

<sup>97</sup> See *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001) (ADA); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (ADEA); *United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act); *Dickerson v. United States*, 530 U.S. 428 (2000) (18 U.S.C. § 3501, which pertained to the admissibility of criminal confessions); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (Patent and Plant Variety Protection Remedy Clarification Act).

<sup>98</sup> *Petition for a Writ of Certiorari, Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368).

<sup>99</sup> Brief for the United States in Opposition, *Hibbs*, 538 U.S. 721 (No. 01-1368).

<sup>100</sup> See, e.g., Edward Walsh, *Court Takes Up Family Medical Leave Act; Decision Could Restrict Federal Laws on States*, WASH. POST, June 25, 2002, at A6.

<sup>101</sup> *Nev. Dep’t of Human Res. v. Hibbs*, 536 U.S. 938 (2002).

<sup>102</sup> Transcript of Oral Argument at \*1–3, *Hibbs*, 538 U.S. 721 (No. 01-1368), 2003 WL 145272.

<sup>103</sup> *Garrett*, 531 U.S. at 368 (holding that the employment provisions of the ADEA did not validly enforce the Fourteenth Amendment, in significant part because Congress did not identify such a pattern of constitutional violations by the states).

<sup>104</sup> Justice Kennedy’s *Hibbs* dissent emphasized the point. He urged the FMLA’s legislative history was “devoid of any discussion of the relevant evidence” of a pattern of unconstitutional state activity. 538 U.S. at 746–49 (Kennedy, J., dissenting). *But see id.* at 730–35 (majority opinion) (“According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits.”).

granting of leave, the statute's universalism seemed to present a serious problem of proportionality: Why would the proper remedy for discrimination be a mandate that all workers receive twelve weeks of leave, rather than a mandate that whatever leave is granted to members of one sex must be granted to members of the other sex as well? Not surprisingly, Taggart emphasized these points in his argument.

About nine and a half minutes into Taggart's time, Justice O'Connor hit him with the question that would occupy much of the rest of his argument: what to do with the problematic case of *Fitzpatrick v. Bitzer*.<sup>105</sup> *Fitzpatrick* involved Congress's 1972 extension of Title VII of the Civil Rights Act to state employers.<sup>106</sup> Title VII prohibits, among other things, sex discrimination in employment.<sup>107</sup> Yet Congress did not amass any evidence of unconstitutional sex discrimination by state employers in 1972. Indeed, under the Supreme Court's jurisprudence at the time it was not at all clear what, if any, sex discrimination in employment violated the Fourteenth Amendment. Nevertheless, in the 1976 *Bitzer* case—in an opinion written by then-Justice Rehnquist—the Court upheld Title VII's extension to the states as valid Fourteenth Amendment enforcement legislation.<sup>108</sup> The *Bitzer* Court had reached that result with virtually no analysis, but even the Rehnquist Court's "Federalism Revolution" cases declined to call *Bitzer* into question.

Justice O'Connor asked Taggart whether *Bitzer* "would stand up" under his argument.<sup>109</sup> After all, she noted, in *Bitzer*, "the Court unanimously found Title VII was a valid abrogation of the Eleventh Amendment immunity, and there was no inquiry into the history of gender discrimination, it was just accepted."<sup>110</sup> Taggart responded that Title VII would survive even on his analysis because it "closely hewed" to the Court's interpretation of the Equal Protection Clause.<sup>111</sup> But Justice Ginsburg then jumped in to note that "part of [his] argument was, if the discrimination doesn't exist anymore in the State, even if it did at one time, then the provision would have to sunset."<sup>112</sup> Noting that "as far as [T]itle VII is concerned, many States, the vast majority of States have their own [T]itle VII laws," she concluded that "at this point in time," under Taggart's reasoning, *Bitzer* "would have to go."<sup>113</sup>

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<sup>105</sup> 427 U.S. 445 (1976).

<sup>106</sup> Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 103 (1972) (codified as amended at 42 U.S.C. § 2000e(a) (2012)) (amending Title VII's definition of "persons" counting as employers to include "governments," "governmental agencies" and "political subdivisions").

<sup>107</sup> 42 U.S.C. § 2000e-2(a) (2012).

<sup>108</sup> 427 U.S. at 456.

<sup>109</sup> Transcript of Oral Argument, *supra* note 102, at \*10.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at \*11.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

Justice Scalia threw Taggart a lifeline, suggesting that it was “general knowledge” that sex discrimination by state employers was widespread in 1972,<sup>114</sup> but that did not help. Justice Breyer asked Taggart whether he accepted the proposition that sex discrimination by state employers remained widespread in 1993, when the FMLA was passed.<sup>115</sup> When Taggart said that he did not, Justice Breyer remarked that he could not “see the distinction with Title VII. It’s goodbye if I accept that argument, I think.”<sup>116</sup> Although he spent some time at the end discussing the proportionality of the twelve-week requirement, the risk his position posed to Title VII had dominated his half of the oral argument.

In the Supreme Court, William Hibbs was represented by Cornelia T.L. Pillard, a Georgetown Law Professor and experienced Supreme Court advocate whom President Obama would later appoint to the United States Court of Appeals for the D.C. Circuit.<sup>117</sup> Chief Justice Rehnquist pressed her on the record of state discrimination in the granting of leave; Pillard responded with citations to the legislative history.<sup>118</sup> Justice Scalia suggested that it was entirely appropriate for states to give maternity leave to mothers without giving paternity leave to fathers, because only mothers had to recover physically from childbirth; Pillard responded that the states that offered maternity leave provided it for periods of time that vastly exceeded the time necessary to recover from pregnancy.<sup>119</sup> At that point, Justice Ginsburg stepped in to underscore that such long leave periods suggested that the states were indulging sex-role stereotypes regarding who does or should care for children.<sup>120</sup> Pillard seized the chance to reinforce the basic feminist argument for universalism in family and medical leave: “It’s precisely these assumptions that have caused State employers and other employers to discriminate against women in hiring, promotion, and retention, and against men in the dispensing of leave, and these are really two sides of the same coin.”<sup>121</sup>

The final advocate to speak was Viet Dinh. Dinh was Pillard’s Georgetown Law colleague, but at the time he was on leave to serve as Assistant Attorney General for Legal Policy. Throughout the “Federalism Revolution,” the Bush administration’s Department of Justice had felt an institutional obligation to strongly defend the constitutionality of federal laws—a position that had put its lawyers at odds with the Rehnquist

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<sup>114</sup> *Id.* at \*13.

<sup>115</sup> *Id.* at \*14.

<sup>116</sup> *Id.* at \*14–15.

<sup>117</sup> *Professor Cornelia “Nina” Pillard Confirmed to D.C. Circuit*, GEO. L. (Dec. 12, 2013), <https://www.law.georgetown.edu/news/press-releases/professor-nina-pillard-confirmed-dc-circuit.cfm>.

<sup>118</sup> Transcript of Oral Argument, *supra* note 102, at \*26–28.

<sup>119</sup> *Id.* at \*28–31.

<sup>120</sup> *Id.* at \*31.

<sup>121</sup> *Id.* at \*31.

Court in some cases. Dinh spent much of his time at the lectern defending the appropriateness of the twelve-week leave period chosen by Congress.<sup>122</sup>

In an article reviewing the oral argument the next day, longtime *New York Times* Supreme Court reporter Linda Greenhouse suggested that the outcome of the case was still unclear. But she said that Justice O'Connor's questions about the case's implications for Title VII "offered a hint" of hope that Justice O'Connor might join the four more liberal Justices to uphold the FMLA. As Greenhouse observed, "it was hardly a secret in the courtroom that Justice O'Connor represented the[] only hope of picking up a fifth vote against a further expansion of state immunity."<sup>123</sup>

### *The Court's Decision*

When the Court issued its decision on May 27, 2003, Justice O'Connor had indeed joined the four more liberal Justices to uphold the FMLA as valid Fourteenth Amendment enforcement legislation. But there was a surprise sixth vote for that position: Chief Justice Rehnquist, who had been the leader of the Court's federalism revolution. In an even more surprising turn, Chief Justice Rehnquist wrote the opinion for the Court. His opinion squarely endorsed the feminist universalist premises that underlay the statute. He explained that Congress had adopted the statute as a response to sex discrimination that was driven by "mutually reinforcing stereotypes":

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.<sup>124</sup>

The universal twelve-week leave mandate, Chief Justice Rehnquist concluded, directly responded to both sides of this cycle of stereotypes: "By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace

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<sup>122</sup> Transcript of Oral Argument, *supra* note 102, at \*38–48.

<sup>123</sup> Linda Greenhouse, *The Supreme Court: Checks and Balances; Medical Leave Act Is Debated in Major Federalism Case*, N.Y. TIMES (Jan. 16, 2003), <http://www.nytimes.com/2003/01/16/us/supreme-court-checks-balances-medical-leave-act-debated-major-federalism-case.html>.

<sup>124</sup> Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

caused by female employees, and that employers could not evade leave obligations simply by hiring men.”<sup>125</sup>

Distinguishing the Court’s earlier opinions involving the ADEA and the ADA, Chief Justice Rehnquist’s opinion explained that “age- or disability-based distinctions” triggered only minimal rational basis scrutiny under the Fourteenth Amendment.<sup>126</sup> Gender discrimination, by contrast, “triggers a heightened level of scrutiny.”<sup>127</sup> It is thus “easier for Congress to show a pattern of state constitutional violations,” Chief Justice Rehnquist noted, in the gender discrimination context.<sup>128</sup> By making this move, Chief Justice Rehnquist effectively shielded all of Title VII—not just its sex discrimination provision—from challenge, as the statute bars discrimination based on race, sex, and religion, all forms of discrimination that trigger heightened constitutional scrutiny.

Justice Souter, joined by Justices Ginsburg and Breyer, filed a brief concurrence. Justice Souter emphasized that, by joining Chief Justice Rehnquist’s majority opinion, he should not be understood as embracing the broader federalism jurisprudence on which that opinion relied.<sup>129</sup> Justice Stevens concurred in the judgment only. He argued that Congress had power under the Commerce Clause to abrogate Nevada’s sovereign immunity, so he did not have to reach the question whether the FMLA was proper legislation to enforce the Fourteenth Amendment.<sup>130</sup>

Justices Scalia, Kennedy, and Thomas all dissented. The principal dissent, authored by Justice Kennedy, argued that Congress simply had not developed a sufficient record of unconstitutional state gender discrimination in the specific context of leave programs.<sup>131</sup> Justice Kennedy contended that the record amassed by Congress focused primarily on the actions of the private sector, not of states; that the evidence of state action simply involved the failure to provide adequate leave rather than sex-based discrimination under the Fourteenth Amendment; and that a universal 12-week mandate was not appropriately tied to any constitutional violation.<sup>132</sup> Justice Scalia added a brief dissent of his own to argue that, even if the FMLA validly abrogates state sovereign immunity in general (a proposition he rejected), Nevada should still have the opportunity to demand proof that it—and not other states—had committed sufficient constitutional violations to warrant abrogation of its sovereign immunity.<sup>133</sup>

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<sup>125</sup> *Id.* at 737.

<sup>126</sup> *Id.* at 735.

<sup>127</sup> *Id.* at 736.

<sup>128</sup> *Id.*

<sup>129</sup> *See id.* at 740 (Souter, J., concurring).

<sup>130</sup> *See id.* at 740–741 (Stevens, J., concurring in the judgment).

<sup>131</sup> *Id.* at 744–59 (Kennedy, J., dissenting).

<sup>132</sup> *See id.* at 746–756.

<sup>133</sup> *See id.* at 741–744 (Scalia, J., dissenting).

## THE AFTERMATH

In the immediate aftermath of the Court's decision, much of the commentary surrounding *Hibbs* focused on Chief Justice Rehnquist's surprising defection from his usual states'-rights position. Had Chief Justice Rehnquist begun to drift from the very federalism revolution that had been the centerpiece of his chief justiceship?

Greenhouse, for her part, suggested that the answer was “[n]ot evolution, perhaps, but life.” She noted that Chief Justice Rehnquist's daughter was “a single mother who until recently held a high-pressure job and sometimes had child-care problems.” “Several times” during the Term the Court decided *Hibbs*, Chief Justice Rehnquist was called upon to “le[ave] work early to pick up his granddaughters from school.” These experiences, she offered, may have given him a newfound “solicitude for the usefulness of the Family and Medical Leave Act in erasing the ‘pervasive sex-role stereotype that caring for family members is women’s work.’”<sup>134</sup>

Yale Law Professor Robert Post, by contrast, suggested that the answer could be found in the topic that drew extensive discussion at oral argument—the concern that a ruling against the FMLA might call Title VII into question.<sup>135</sup> Title VII is the centerpiece of the Civil Rights Act of 1964, a statute that many across the political spectrum regard as something close to sacred.<sup>136</sup> Although Chief Justice Rehnquist's own jurisprudence had generally sought to narrow the application of Title VII, he might well have worried that encouraging a frontal attack on the constitutionality of the statute would invite widespread charges that the Court was acting illegitimately.<sup>137</sup>

But the future was not as kind to the feminist universalism that the Court endorsed in *Hibbs*. The year after the Court's decision in *Hibbs*, George Washington University Law Professor Michael Selmi wrote that it was “clear” that the FMLA had “not accomplished its goals with respect to combating stereotypes or discrimination against women in the

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<sup>134</sup> Linda Greenhouse, *Ideas & Trends: Evolving Opinions; Heartfelt Words from the Rehnquist Court*, N.Y. TIMES (July 6, 2003), <http://www.nytimes.com/2003/07/06/weekinreview/ideas-trends-evolving-opinions-heartfelt-words-from-the-rehnquist-court.html>.

<sup>135</sup> See Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 11–41 (2003).

<sup>136</sup> See, e.g., Norbert Schlei, *Foreword* to BARBARA SCHLEI & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW vii (2d ed. 1983) (“The Civil Rights Act of 1964 was the most important civil rights legislation of this century. Title VII of that Act . . . has been its most important part.”).

<sup>137</sup> One model for this type of analysis employed by Chief Justice Rehnquist is his treatment of the decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Chief Justice Rehnquist, a longstanding critic of *Miranda*, consistently voted to narrow its application and to introduce and broaden exceptions to it. But when a frontal challenge to *Miranda* came before the Court in 2000, Chief Justice Rehnquist wrote the opinion for the Court rejecting the challenge. “*Miranda*,” Chief Justice Rehnquist observed, “has become embedded in routine police practice to the point where the warnings have become part of our national culture.” *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

workplace.”<sup>138</sup> If anything, he argued, “the statute has likely exacerbated both, though probably only to a socially insignificant degree.”<sup>139</sup>

The universalist approach of the FMLA has had two evident limitations. First, even though the statute provides parental and family-care leave to all covered workers without regard to their gender, female workers continue to take the leave far more frequently than do male workers.<sup>140</sup> This pattern of female-dominated leave-taking persists across the world.<sup>141</sup> Some countries have made progress in addressing this imbalance, but have done so only by adopting policies that cut against the FMLA’s universalist structure: either (a) abandoning universalism by specifically requiring fathers to take certain periods of leave; or (b) setting aside some leave periods for each parent, which may not be transferred to the other parent and will be forfeited if the assigned parent does not take them.<sup>142</sup> In contrast to those approaches, which effectively single out fathers and impose some cost on them for failing to take parental leave, the FMLA’s universal model does little to alter the reality that women, far more than men, take that leave in our current world. That reality, in turn, is likely to entrench the stereotype that women, not men, take care of newborn children—despite the formally universal coverage of the statute.<sup>143</sup> To the extent that the feminist supporters of the FMLA thought that a universally framed law would avoid encouraging employers to discriminate against women, the actual pattern of leave-taking suggests that the law has fallen short of that goal.<sup>144</sup>

The drafters of the FMLA anticipated that women would likely continue to take more parental leave than men (though they do not seem

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<sup>138</sup> Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL’Y 65, 67 (2004).

<sup>139</sup> *Id.*

<sup>140</sup> See Wen-Jui Han & Jane Waldfogel, *Parental Leave: The Impact of Recent Legislation on Parents’ Leave Taking*, 40 DEMOGRAPHY 191, 198 (2003) (“Our results for men indicate that the FMLA and state leave laws have not been associated with more leave taking or longer leaves by recent fathers. There is little or no indication in our data that more fathers take leaves or that they take longer leaves when they are entitled to more weeks of leave.”).

<sup>141</sup> See Ariane Hegewisch & Janet C. Gornick, *The Impact of Work-Family Policies on Women’s Employment: A Review of Research from OECD Countries*, 14 COMMUNITY, WORK & FAM. 119, 127–28 (2011) (“In principle, in many countries mothers and fathers are able to share their parental leave entitlement, yet in most countries women are not only more likely to take up leave but are also the sole participants in leave.”).

<sup>142</sup> See *id.* at 127 (noting, for example, Portugal’s obligatory five-day leave policy for new fathers, as well as Iceland’s nine-month-per-child system, which provides three months for each parent and three months that may be divided among them).

<sup>143</sup> See Samuel R. Bagenstos, *Universalism and Civil Rights (With Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2864–66 (2014) (arguing that whether a law is understood as universal will often depend on its social meaning and impact on the world rather than its formal coverage).

<sup>144</sup> The effect cannot be great, however, as empirical evidence suggests that the FMLA, overall, had “no significant impacts . . . on women’s employment or wages in the years after the policy went into effect.” Maya Rossin-Slater, *Maternity and Family Leave Policy* 12 (IZA Inst. of Labor Econ., Discussion Paper No. 10500, 2017), <http://www.nber.org/papers/w23069.pdf>.

to have anticipated just how great the disparity would be). That is why they included self-care leave, along with parental and family-care leave, in the statute's twelve-week mandate. As we have seen, because the drafters expected that both men and women would take self-care leave, they believed that the FMLA as a whole would not give employers a meaningful incentive to discriminate against members of either gender.

To a large extent, the drafters' expectation has proven true. Leave to address an employee's own serious health condition has accounted for more than half of the leave taken under the FMLA.<sup>145</sup> But this has led to the second problem with the statute's universalist framing. Many employers complain that accommodating self-care leave is extremely burdensome, especially because such leave is likely to be taken intermittently and unpredictably, thus impeding efforts at workforce planning.<sup>146</sup> Because the statute ties self-care leave together with parental and family leave, employer discontent with self-care leave has fed a backlash against the FMLA as a whole. This backlash, in turn, creates obstacles to enacting in the United States the sorts of paid family leave policies embraced by most other industrialized countries—and it is precisely this type of leave that is most likely to open up employment opportunities to women.<sup>147</sup> The FMLA's universalist framing thus may be making it harder to adopt policies that could be more effective in promoting workplace equality.

The Supreme Court's most important post-*Hibbs* decision on the FMLA, in fact, involved the self-care leave provision. In *Coleman v. Court of Appeals of Maryland*, decided in 2012, the Court considered whether the self-care leave provision of the FMLA validly enforced the Fourteenth Amendment.<sup>148</sup> With Chief Justice Rehnquist and Justice O'Connor no longer on the bench, their replacements, Chief Justice Roberts and Justice Alito, joined the three *Hibbs* dissenters to hold that the self-care provision was not a proper exercise of the enforcement power.<sup>149</sup> Justice Kennedy's plurality opinion did not question *Hibbs*. But it held that the FMLA's self-care provision, unlike the family-care provision at issue in *Hibbs*, lacked a sufficient connection to gender discrimination.<sup>150</sup> In dissent, Justice Ginsburg cogently explained the universalist position taken by the statute's drafters—that the self-care provision was necessary to ensure that the FMLA did not lead to discrimination against women.<sup>151</sup> The *Coleman* decision thus further highlights the limits of the FMLA's feminist universalism.

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<sup>145</sup> See, e.g., Suk, *supra* note 45, at 19.

<sup>146</sup> See *id.* at 21–22.

<sup>147</sup> See *id.* at 46–49 (noting in particular that the “generous” maternity and parental leave policies available in France and Sweden are possible precisely because they are prioritized above and separated from other types of medical and family leave).

<sup>148</sup> 566 U.S. 30 (2012).

<sup>149</sup> *Id.* at 37–39, 44–45.

<sup>150</sup> See *id.* at 33–42.

<sup>151</sup> See *id.* at 47–51 (Ginsburg, J., dissenting).

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*Hibbs* ultimately is a case with a mixed legacy. For the Supreme Court to embrace the key arguments of feminist universalism represented a triumph for an important school of thought within legal feminism. For the Court's opinion to be written by Chief Justice Rehnquist of all people was almost delicious. But the triumph came at a time when the limitations of the FMLA's approach were becoming apparent. To achieve the goals of justice and equality in and out of the workplace, feminists have increasingly realized that it is necessary to move beyond the universalist paradigm.