

The Constitutional Status of the *Family and Medical Leave Act*¹
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Depending on one's point of view, the Rehnquist Court is either increasingly championing the rights of states against the federal government or thwarting Congress's attempts to expand civil rights because members of the Court differ with Congress over policies such as affirmative action, gun control, or creating private rights of action for victims of violence against women. Regardless of what one thinks about the cause, these legal changes generated doubt about whether the Supreme Court would uphold the constitutionality of the hard-won legislative victory, the *Family and Medical Leave Act of 1993 (FMLA)*, against Nevada's challenge in *Nevada v. Hibbs* (2003).² Women's rights leaders "expected the worst" (Greenhouse 2003). Examining the opinions in *Hibbs* gives us insight into the Court's most recent attempt to wrestle with the constitutional issue of the appropriate roles of the Court and Congress in interpreting and enforcing the 11th and 14th Amendments. More importantly for our purposes, however, the opinions and the briefs give us insight into how the Court conceptualizes the purposes and legitimacy of the policy choices reflected in the *FMLA*. The case represents a clear triumph of the equal treatment approach, championed by Ruth Bader Ginsburg as director of the American Civil Liberties Union's Women's Rights Project in the 1970s, but also includes some worrying restrictions about the possibility of extending benefits. In this essay, I examine the significance of the new federalism doctrine, analyze the legal opinions in *Hibbs*, and offer commentary on the revised history of protective legislation, the state of equal protection analysis for gender-based discrimination, and some worrying potential limitations to Congress's ability to expand the *FMLA*.

The only way Congress can abrogate the Eleventh Amendment's grant of immunity for states against suits by citizens in federal courts is if it is enforcing the equal protection clause of the 14th Amendment.³ Congress can legislate prophylactically, i.e., it may act to prohibit what may not have been actionable under the 14th Amendment (a state's gender-neutral policy of allowing no medical leave might survive constitutional scrutiny, for example), in order to remedy and deter discrimination. In the past, the Court has upheld the Voting Rights Act's prohibition of literacy tests because they have racially discriminatory effects. More recently, however, the Supreme Court has developed a more restrictive interpretation of Congress's role in promoting equal protection. The Supreme Court has held that only the Court can interpret what the Fourteenth Amendment means, not Congress, and thus in enforcing the equal protection clause, Congress may not substantially redefine states' obligations. Moreover, the Court has raised Congress's burden of justification to approach what is required for a judicial finding of intentional state discrimination. Congress may not merely rely on its own legislative knowledge and expertise as well as testimony from experts to determine what it should do to promote greater equality, but it must meet a very high standard of proof as

¹ Thanks to Chie Michihiro for her research assistance on this essay. Thanks, too, to Martha Chamallas and Donna Lenhoff for their helpful comments.

² Seven circuits had held that the *FMLA* was not enacted pursuant to a valid exercise of Congress' section 5 power.

³ Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions" of the amendment.

to the nature of discrimination in the past and the necessity for a particular policy response. Post and Siegal call this new development the enforcement model, and argue that it is a sharp departure from settled understandings about separation of powers, the role of Congress, and the interpretation of the 14th Amendment (2003).⁴

Hibbs raises questions at this intersection of issues of federalism and equal protection. William Hibbs worked for Nevada's Human Services Department's Welfare Division. He sought family leave to care for his wife who was recovering from a car accident and neck surgery. The Department allowed Hibbs to take intermittent leave but denied his request for additional catastrophic leave⁵ and counted the catastrophic leave they had granted him against his 12-week *FMLA* leave. After a hearing, the Department then fired him when he failed to return to work. He sued Nevada under the *FMLA* and the district court granted summary judgment (deciding the case without a trial) holding that the *FMLA* was unconstitutional under the Eleventh Amendment and that Hibbs's Fourteenth Amendment Rights had not been violated.

Hibbs appealed to the Ninth Circuit Court of Appeals. Noting that seven other circuits has held that the *FMLA* was not a valid exercise of Congress's 14th Amendment powers (section 5), the court distinguished *Hibbs* from the other cases because at issue was family leave, not leave taking for one's own illness. Moreover, it distinguished *Hibbs* from other cases holding that Congress had exceeded its section 5 powers because at issue in the cases were age or disability discrimination. The Supreme Court has held that the Fourteenth Amendment subjects state sanctioned gender discrimination, unlike age and disability discrimination, to heightened scrutiny, requiring states to offer an "exceedingly persuasive" justification (*Craig v. Boren* and *U.S. v. Virginia*). The burden of proof lies with the states who challenge the *FMLA* to show Congress had no reason to act.

Section e of the Court of Appeal's unanimous opinion was written by the woman member of the panel of three, Judge Marsha Berzon, as a separate concurring opinion which the panel adopted it as part of the opinion. Clinton appointed Berzon in 2000, and it took two years for the Senate to confirm her. She was Justice Brennan's first female law clerk. A former associate general counsel for the AFL-CIO who had argued cases before the U.S. Supreme Court such as *UAW v. Johnson Controls*, as well as a former Vice President of the Northern California ACLU, she knew the *FMLA* history inside out as she had represented the AFL-CIO in strategy sessions. Noting that the legislative history of the *FMLA* contained substantial evidence of a long history of state-sponsored discrimination, Berzon acknowledged that neither Title VII of the Civil Rights Act of 1964 (prohibiting employment discrimination) nor subjecting state-sponsored gender discrimination to heightened scrutiny under the equal protection clause had ended employers' practices of granting caretaking leave to women only, if at all. Berzon faulted state protective legislation, not just societal preferences, with cementing a gendered division of labor where women shouldered the burden of caring for family members and employers consequently saw them as less reliable employees. Berzon also argued that the documented judicial history striking down gender-based discriminatory state laws bolstered Congress's case that widespread state discrimination still existed.

⁴ See also Resnik (2001).

⁵ Catastrophic leave in this case consists of sick days other employees donated to Hibbs.

Emphasizing the culpability of the states, section e makes no mention of the fact that prior to 1971, the Supreme Court not only sanctioned state-sponsored discrimination as constitutionally permissible, but affirmatively promoted the underlying ethos of separate spheres and biologically-determined and God-given gender roles. Gone, too, from the history, is the story of how women divided on the question of protective legislation (Baer 1978, Kenney 1992). Social reformers turned to gender-specific labor protections only after it became clear that gender-neutral labor laws had no chance of surviving constitutional challenge. Until the Supreme Court finally declared state protective legislation invalid under Title VII, many labor women actively supported protective legislation. The Ninth Circuit's account renders women as merely victims of states' stereotypical thinking. This historical account represents the triumph of second-wave feminists' position that anyone who favored protective legislation for women was not merely misguided, by not a feminist at all, excluding nearly all progressive social reformers of the early 20th century⁶ and labor women as feminists and embracing the position of Alice Paul and the National Women's Party.

Also absent from the court's spare history is the Supreme Court's equivocation even post-1971 (when it recognized for the first time that gender-based laws MIGHT be subject to "more exacting scrutiny" than the previously-applied rational basis test in *Reed v. Reed*) about whether biological differences justified maternity leave for mothers but not fathers. The court does not mention the notorious holding in *Geduldig v. Aiello* that discrimination on the basis of pregnancy was not sex discrimination but merely distinguishing between pregnant and non-pregnant persons. Congress reacted swiftly and amended Title VII to define pregnancy discrimination as sex discrimination, although the ruling still stands as the interpretation of the Constitution. Absent, too, from the discussion in *Hibbs* are the precedents that hold that states may constitutionally distinguish between men and women when they are not "similarly situated," as the courts argued was the case with respect to statutory rape, eligibility for combat, preferences for different kind of sales work, and the ability to legitimate one's child. On an encouraging note, the Court does hold that Congress's actions to eradicate gender discrimination are presumed constitutional (6).

Nor does the court mention Justice Marshall's majority opinion in *Cal Fed v. Guerra*, holding that Title VII is a floor below which benefits cannot fall, not a ceiling above which they may not rise, as a justification for upholding California's law requiring maternity leave (caretaking leave, not recovery from childbirth) for women but not men. The policy debate in the 1970s and 1980s among feminists about how best to overcome gender discrimination yet recognize difference was intense. As director of the ACLU Women's Rights Project, Ruth Bader Ginsburg was firmly in the equal treatment camp, advocating for gender-neutral standards as not only the most defensible in the abstract, but most likely to propel constitutional doctrine forward. Donna Lenhoff and others engineering the Family and Medical Leave Act similarly embraced the equal treatment approach. Like the social reformers before them, the so-called special treatment feminists, such as the California Civil Liberties Union which filed a brief on the opposite side of the American Civil Liberties Union in *Cal Fed*, and feminist legal scholars such

⁶ Linda Gordon, on the other hand, labels these women maternalist feminists. Others have called them social feminists.

as Christine Littleton, have been omitted by the seamless narrative of the march of progress of gender-neutral laws. The only rationale for protective legislation in this revised historical narrative is stereotyped thinking relegating men and women to separate spheres (12).

To conclude, in Judge Berzon's account, states, not federal courts, democratic processes, biological differences, or constitutional strategies, caused a discriminatory labor market of separate spheres based on stereotypical thinking. No feminists supported gender-specific laws, and the 14th Amendment prohibits states from enacting gender-specific laws. Berzon's account is strategically partial. Potentially worrying, however, are Berzon's comments about its narrowness. The *FMLA* provides only for unpaid leave, covers only large employers, excludes the top 10% of employees, and is subject to review by a Commission. By implication, broader legislation might not survive constitutional scrutiny.

The United States filed a brief against granting *certiorari*, arguing that the conflict between the circuits was nascent and the Court should let the circuits develop the arguments further. More importantly, the United States argued that the Ninth Circuit's opinion should stand, and that the Family and Medical Leave Act was constitutional. Once the Supreme Court granted *certiorari*, the United States filed a brief on behalf of Hibbs, inheriting their position from the Clinton Administration.⁷ We have come a long way since George Bush, Sr., vetoed the Family and Medical Leave Act. The Republican Administration's Justice Department is now defending the purposes, effects, and constitutionality of the Act.

The NOW Legal Defense and Education Fund filed a brief on behalf of women's historians. Supporting and expanding on Judge Berzon's history, the brief recounts the long history of state-sponsored sex discrimination based on a gendered division of labor, bolstering Congress's evidence that more than Title VII is necessary to end discrimination. Moreover, it offered evidence that men face enormous hostility when they try to take discretionary caretaking leave.

Chief Justice Rehnquist authored the majority opinion of the Supreme Court's 6-3 decision upholding the Ninth Circuit. He recognized the Court's role in sanctioning state laws that limited women's employment prior to 1971. He noted that Congress documented that state laws continued to provide maternity but not paternity leave long after Congress outlawed employment discrimination, but failed to mention that the Supreme Court had upheld such laws in *Cal Fed*. Because the discrimination continued, Congress could prohibit more than what the 14th Amendment would forbid to deter and remedy discrimination. Moreover, employers often used their discretion to grant parental leave to women only. The gender-based policies many states utilized, according to Congress, were motivated not by the different physical needs of men and women, but rather invalid stereotypes (6-7). Like Berzon, Rehnquist emphasized that the *FMLA* was not an entitlement program and was a middle ground because it required only unpaid leave (9). Furthermore, because most caretakers are women, merely mandating gender neutrality in state laws would be insufficient to end employment discrimination, since

⁷ Bush's Solicitor General and his assistants with aspiration to judicial office may also not have wanted a memorandum with their name on it advocating that the *FMLA* was unconstitutional.

states could deny caretaking leave equally to all. In making this argument, Rehnquist is implicitly endorsing the disparate impact argument for the *FMLA*.⁸ Women's rights leaders wondered if Chief Justice's Rehnquist's opinion had been ghostwritten by Justice Ginsburg, but *New York Times* columnist Linda Greenhouse suggested another explanation. Rehnquist's daughter is a single mother with a high pressure job and occasional childcare problems. Several times during the term, Rehnquist left work early to pick up his granddaughters from school (Greenhouse 2003). (Or perhaps Rehnquist strategically decided to be in the majority and write the opinion, thereby limiting as much as possible the damage to the Court's emerging federalism doctrine.)

Justice Scalia wrote a dissenting opinion, and he and Justice Thomas joined Justice Kennedy's dissent. Kennedy found the evidence of state-sponsored intentional discrimination inadequate, particularly the evidence against Nevada. The evidence Congress developed was principally focused on parenting, not leave to care for a sick family member. His argument is consistent with his other opinions on affirmative action that sets the standard at an (unachievably?) high level for Congress or the states to act to remedy discrimination in contracting, employment, education, radio licenses, redistricting, etc. Finally, *Geduldig* gets a mention: "Our cases make clear that a State does not violate the Equal Protection Clause by granting pregnancy disability leave to women without providing for a grant of parenting leave to men" (14).

Hibbs represents an interesting victory for feminists at a time when the Supreme Court has found it next to impossible for Congress to develop evidence to persuade it that continuing intentional state-sponsored discrimination meriting a legislative remedy exists. *Hibbs* goes against the trajectory of *Garrett* and others that makes it difficult to justify federal legislation. The intermediate scrutiny standard, first enunciated in *Craig v. Boren*, continues to creep toward strict scrutiny since *U.S. v. Virginia*, ironically making it easier for Congress to act to remedy sex discrimination than race discrimination. Chief Justice Rehnquist, who joined Justice Ginsburg's opinion in *U.S. Virginia* stating that sex-based laws require "exceedingly persuasive justification," has come a long way since he called for merely the rational basis standard in *Craig*. The Court ignores (and implicitly repudiates?) its early decisions that pregnancy discrimination is not sex discrimination, that equality laws require a floor not a ceiling, thereby permitting gender-specific laws, and its holdings that the government need not treat men and women alike if they are not "similarly situated." The Court's emphasis on the limited nature of the *FMLA*, however may be worrying, although given the popularity of the law and the fear that to do so would be to be seen to go against women, it is unlikely the Court will limit future advances. Since it is unlikely that Congress will, in the near future, expand the coverage of the *FMLA* to include paid leave, cover employees who have worked for less than a year, or extend to smaller employers, we are in the unhappy position of not yet needing to worry about whether a more expansive *FMLA* would survive constitutional scrutiny.

⁸ The Supreme Court eviscerated the disparate impact potential of the 14th Amendment's equal protection clause when it held that plaintiffs would have to prove intentional discrimination to prevail in *Washington v. Davis*. That is to say, they would have to show that veteran's preferences or literacy examinations not only disproportionately excluded women or African Americans from jobs, but that the government enacted them with the intention of doing so—an almost impossible standard to prove. Since that time, the Court has also been steadily making it more difficult to prove disparate impact under Title VII.

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