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Job Security Without Equality: The Family and Medical Leave Act of 1993

Joanna L. Grossman*

Mr. Murphy. I say to be careful. You know some of us guys really don't want this protection. We might have to stay home and take care of the kids. [Laughter.]

*Mrs. Schroeder. There is an honest man.*¹

Eight years after it first considered a bill to require employers to provide parental leave to their employees,² Congress enacted the Family and Medical Leave Act of 1993 (FMLA),³ a withered version

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1. *Parental and Disability Leave: Joint Hearing on H.R. 2020 Before the Subcomm. on Civil Serv. and the Subcomm. on Comp. and Employee Benefits of the House Comm. on Post Office and Civil Serv. and the Subcomm. on Labor Mgmt. Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 99th Cong. 16 (1985) (statements of Rep. Murphy and Rep. Schroeder) (quoted in RONALD D. ELVING, *CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW* 49 (1995)).

2. The first federal parental leave bill was introduced by Representative Patricia Schroeder in 1985. See *Parental and Disability Leave Act of 1985*, H.R. 2020, 99th Cong., 131 CONG. REC. 8318 (1985) (presenting the bill); see also ELVING, *supra* note 1, at 18–42 (describing the work of activists and legislators leading up to the introduction of H.R. 2020); Emily A. Hayes, Note, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1517 (2001) (describing the original bill and the impetus for its introduction).

3. *Family and Medical Leave Act of 1993*, Pub. L. No. 103-03, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2612–2654 (2000)). A version of the FMLA was introduced in every Congress between 1985 and 1993. See *Family and Medical Leave Act of 1993*, S. 5, 103d Cong. (1993); *Family and Medical Leave Act of 1993*, H.R. 1, 103d Cong. (1993); *Family and Medical Leave Act of 1991*, S. 5, 102d Cong. (1991); *Family and Medical Leave Act of 1991*, H.R. 2, 102d Cong. (1991); *Family and Medical Leave Act of 1990*, S. 2973, 101st Cong. (1990); *Family and Medical Leave Act of 1989*, S. 345, 101st Cong. (1989); *Family and Medical Leave Act of 1989*, H.R. 770, 101st Cong. (1989); *Parental and Medical Leave Act of 1988*, S. 2488, 100th Cong. (1988); *Parental and Medical Leave Act of 1987*, S. 249, 100th Cong. (1987); *Family and Medical Leave Act of 1987*, H.R. 925, 100th Cong. (1987); *Parental*

of its earliest predecessor. At its core, the FMLA requires employers to give employees a limited amount of unpaid leave when necessary to accommodate personal illness or family caregiving responsibilities.

When it enacted this legislation, Congress purportedly had a vision: Employers would offer caretaking leave to men and women on equal terms, men and women would take leave and share the burden of caring for children, employers would perceive male and female employees as equally (un)attractive, and women would achieve equality both as parents and as workers. At least that's the vision attributed to Congress by the Supreme Court last term when it considered the constitutional validity of applying the Family and Medical Leave Act of 1993 to the states in *Nevada Department of Human Resources v. Hibbs*.⁴

This vision, however, is complicated by the assumption that men would, if they could, take unpaid leave from their jobs in order to help care for their children or other family members. There was virtually no basis for making that assumption in 1993, when Congress passed the bill that would ultimately become law, and not much greater of one today.⁵ Indeed, the advocates and congressional proponents of a federal leave law recognized that any such law would function primarily to provide job security for working mothers.

If men do not take caretaking leave, the nature of women's equality that might be captured through the FMLA is quite different than that envisioned by the Supreme Court. If only mothers take leave, then the FMLA only accommodates women's caretaking, protection that gives them a measure of job security but at the same time preserves employers' incentive to prefer male employees. It also does nothing to equalize the burdens of caretaking themselves. The FMLA thus promotes motherhood without promoting equal parenthood and promotes mothers' working without promoting equality for working women. The FMLA's failure to account for the

and Medical Leave Act of 1986, S. 2278, 99th Cong. (1986); Parental and Medical Leave Act of 1986, H.R. 4300, 99th Cong. (1986); Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong. (1985). Leave legislation passed both houses of Congress twice, but both times President George H.W. Bush vetoed it. See Hayes, *supra* note 1, at 1516.

4. 538 U.S. 721, 123 S. Ct. 1972 (2003).

5. See *infra* text accompanying notes 99–103, 229–36 (describing available empirical data on leave-taking patterns by men).

fact that men do not tend to take time away from work for parenting or other caretaking tasks precludes it from making a meaningful contribution to gender equality. Thus, on the tenth anniversary of the FMLA, we have only limited cause for celebrating a statute whose contribution to women's true equality has been largely symbolic.

This essay reevaluates the passage and implementation of the FMLA against the egalitarian ideal described by the Supreme Court in *Hibbs*. Part I examines the *Hibbs* opinion, the Court's conclusion that states can be sued for money damages in federal court for violating the family care provisions of the FMLA, and the vision of the Act's contribution to equality that dictated that holding. Part II examines the data available to both legislators and advocates during the process of constructing and enacting family leave legislation, with a particular focus on existing knowledge about patterns of paternal leave-taking. Part III begins the process of reevaluation, looking first at the legislative history of the FMLA and the advocacy that led to its original and repeated introductions into both houses of Congress. This part identifies a central assumption, shared by both opponents and proponents of the final Act and its predecessor bills, that federally mandated leave would primarily accommodate the leave-taking needs of mothers. Part IV examines the FMLA's impact on leave policies and leave-taking, noting the replication of prior gendered, leave-taking patterns. Finally, Part V launches a critique of the FMLA from the standpoint of anti-subordination theory. Through that lens, the FMLA's ability to enhance equality for women seems quite constrained.

I. THE SUPREME COURT'S VISION OF THE FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act of 1993 gives certain employees the right to twelve weeks of *unpaid* leave per year if needed to care for a newborn or newly adopted child, to care for a seriously ill family member, or to attend to one's own serious health condition.⁶ To be eligible, an employee must have worked at least

6. See 29 U.S.C. § 2612(a)(1), (c) (2000); 29 C.F.R. § 825.100(a) (2003). Comprehensive data on coverage and implementation of the FMLA is available in reports

1,250 hours in the previous year⁷ for an employer who employs at least fifty workers within a seventy-five-mile radius of where the employee requesting leave reports to work.⁸

Because the leave is unpaid, the FMLA protects three basic rights: the right to be restored into the same position following the period of leave,⁹ the right to the continuation of benefits throughout the leave,¹⁰ and the right to not be penalized for taking an authorized leave.¹¹ Denial of leave under the FMLA and retaliation for taking leave can be enforced through private suits¹² or suits by the U.S. Department of Labor brought on an employee's behalf.¹³ Compensatory damages, as well as an assortment of equitable remedies, are available to successful plaintiffs.¹⁴

Though these rights are related, courts have analyzed claims under

commissioned by the Department of Labor in 1995 and 2000. The 2000 report consists of two telephone surveys: the 2000 Survey of Employees, a telephone survey with 2,558 completed interviews, and the 2000 Survey of Establishments, a telephone survey with 1,830 completed interviews. The employee survey includes both public- and private-sector employees, while the establishment survey includes only private-sector employers. According to the 2000 survey, 58.3% of all employees in the U.S. labor force work for establishments covered by the FMLA, though only 10.8% of private employers are covered. *See* DAVID CANTOR ET AL., DEP'T OF LABOR, BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS 2000 UPDATE 3-2 to 3-3 (2000) [hereinafter FAMILY AND MEDICAL LEAVE SURVEYS 2000].

7. *See* 29 U.S.C. § 2611(2)(A)(ii) (2000) (defining "eligible employee"); 29 C.F.R. § 825.110(a)(2) (2003). Only 61.7% of employees are both eligible and in the employ of a covered establishment. *See* FAMILY AND MEDICAL LEAVE SURVEYS 2000, *supra* note 6, at A-2-21 tbl.A2-3.1.

8. *See* 29 U.S.C. § 2611(4)(A)(i) (2000) (defining "employer"); *see also id.* § 2611(2)(B)(ii) (2000) (defining those employees excluded from coverage); 29 C.F.R. § 825.110(a)(3) (2003).

9. *See* 29 U.S.C. §§ 2611(2)(B)(iii), 2614(a)(1)(A) (2000); 29 C.F.R. § 825.214(a) (2003).

10. *See* 29 U.S.C. §§ 2614(a)(2), 2614(c)(1) (2000); 29 C.F.R. § 825.209 (2003).

11. *See* 29 U.S.C. § 2615(a)(1) (2000) (making it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided"); § 2615(a)(2) (making it "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this subchapter").

12. *See* 29 U.S.C. § 2617(a)(2) (2000); 29 C.F.R. § 825.400(a)(2) (2003).

13. *See* 29 U.S.C. § 2617(b) (2000); 29 C.F.R. § 825.400(a)(1) (2003).

14. Potential remedies include compensatory damages for lost wages, benefits, and other monetary losses, as well as equitable relief and attorneys' fees and costs. *See* 29 U.S.C. §§ 2617(a)(1), 2617(a)(3) (2000); 29 C.F.R. § 825.400(c) (2003).

each differently.¹⁵ Section 2614 of the FMLA guarantees the right to return to the same job following a leave as long as the leave was authorized by statute and the employer would not otherwise have discharged the employee or eliminated her job if she had *not* taken the leave.¹⁶ Retaliation claims generally proceed under the same rubric as a Title VII disparate treatment claim.¹⁷

Legally speaking, the FMLA has been relatively uninteresting. Most cases have raised technical questions, easily resolved by courts.¹⁸ The only significant test for the FMLA has been a series of Eleventh Amendment challenges to the application of the statute's various provisions to state employers.¹⁹

The Supreme Court raised the profile of the FMLA by agreeing to hear one such case last term, a challenge by the State of Nevada to the constitutionality of allowing William Hibbs to sue the State of Nevada for damages in federal court for its alleged violation of the family care provision of the FMLA.²⁰ Ultimately rejecting Nevada's challenge,²¹ the Supreme Court endorsed an inspiring interpretation of the FMLA as an Act was conceived and implemented in order to promote equality for women. The question for the Court in *Hibbs* was whether state governments can be taken to task for their failure to honor rights given by the FMLA when dealing with their own

15. Courts often characterize the right to take leave as a "prescriptive" protection of the FMLA and the right not to be retaliated against for taking leave as a "proscriptive" protection. See, e.g., *Thomas v. Pearle Vision, Inc.*, 251 F.3d 1132, 1139 (7th Cir. 2001).

16. See, e.g., *Kohls v. Beverly Enters. Wis., Inc.*, 259 F.3d 799, 806-07 (7th Cir. 2001) (rejecting plaintiff's FMLA claim where there was insufficient evidence to disprove employer's claim that she would have been terminated regardless of her leave).

17. See, e.g., *Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 64 n.2 (1st Cir. 2002).

18. See, e.g., *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 858 n.1 (5th Cir. 2002) (noting the inapplicability of the FMLA to a plaintiff who had been employed by the defendant-employer for less than twelve months); *Rowe v. Laidlaw Transit, Inc.*, 244 F.3d 1115, 1118 (9th Cir. 2001) (allowing employer to count undesignated leave against employee's twelve-week allotment); *Harris v. Union Pac. R.R.*, 141 F.3d 740 (7th Cir. 1998) (finding that the FMLA is not implicated by plaintiffs' claim that they should get severance benefits for company-wide layoffs that took place during leave period).

19. See, e.g., *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 229 (3d Cir. 2000) (personal illness provision); *Kazmier v. Widmann*, 225 F.3d 519 (5th Cir. 2000) (personal illness and family care provisions).

20. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972, 1977 (2003).

21. See *id.*

employees. The challenge was practically significant for the many employees eligible for FMLA protections who work for state employers.²²

Plaintiff William Hibbs was an employee in the Welfare Division of the Nevada Department of Human Resources, a unit of Nevada's state government.²³ He sought unpaid leave from his job to care for his ailing wife.²⁴ Nevada granted him the leave under both the FMLA and a "catastrophic leave" policy, but later fired him anyway.²⁵ Hibbs sued under the FMLA, but Nevada argued for dismissal on the grounds that the sovereign immunity provided by the Eleventh Amendment precluded Hibbs's action. The trial court agreed with Nevada, but the U.S. Court of Appeals for the Ninth Circuit reversed.²⁶ The Supreme Court agreed to hear the case because the Ninth Circuit's conclusion was at odds with several other federal appellate cases raising Eleventh Amendment challenges to FMLA enforcement,²⁷ one of which had involved the same family care provision at issue in *Hibbs*.²⁸

The Eleventh Amendment provides nonconsenting states (and state agencies) with immunity from suits for money damages brought in federal court.²⁹ Such suits can be brought only if a state voluntarily waives immunity or if Congress abrogates states' immunity.³⁰

22. Unfortunately, the available surveys on FMLA coverage do not differentiate between public- and private-sector employees, though both are covered by the Act. Although estimates of the number of private-sector employees who are covered exist, there is no data from which to make parallel estimates for public-sector employees. See FAMILY AND MEDICAL LEAVE SURVEYS 2000, *supra* note 6, at 3-2. However, data from the Employee Benefits Survey, conducted in 1997 by the Department of Labor and Statistics, revealed that of those surveyed, ninety-three percent of public sector employees were covered by unpaid family leave policies, whether or not they were required by state or federal law. *Current Labor Statistics*, MONTHLY LABOR REVIEW 39, 76 (July 2003).

23. See *Hibbs*, 123 S. Ct. at 1976.

24. *Id.*

25. The parties disputed, among other points, whether the two kinds of leave should be concurrent or consecutive. See *Hibbs v. Dep't of Human Resources*, 273 F.3d 844, 848-49 (9th Cir. 2001), *aff'd*, 123 S. Ct. 1972 (2003).

26. *Id.* at 873.

27. See, e.g., *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000) (finding that Congress had not validly abrogated states' Eleventh Amendment immunity with respect to enforcement of the personal illness leave provision).

28. *Kazmier v. Widmann*, 225 F.3d 519, 526, 529 (5th Cir. 2000).

29. See *Hibbs*, 123 S. Ct. at 1976.

30. See *id.*

To validly abrogate the states' Eleventh Amendment immunity, Congress must first unequivocally express its intent to do so.³¹ Congress clearly expressed such intent in the FMLA, authorizing suits against any "public agency" in federal or state court, and defining "public agency" to include state governments and their subdivisions.³²

Second, Congress must act pursuant to a valid exercise of power. The Court's precedents make clear that Congress may only validly abrogate state immunity when it acts pursuant to Section Five of the Fourteenth Amendment.³³ When it enacted the FMLA, Congress relied both on the Commerce Clause, which does not empower it to abrogate states' immunity, and on its Section Five power when it enacted the FMLA.³⁴ The issue for the Court in *Hibbs*, then, was whether Congress acted within its Section Five power when it enacted the family leave provisions of the Statute.³⁵

Section Five gives Congress the "power to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment that guarantee, among other things, equal protection under the laws. Thus, Section Five has been the source of a number of anti-discrimination statutes.³⁶ It clearly permits Congress to prohibit unconstitutional behavior by the states.³⁷ But Congress clearly went beyond this standard with the FMLA, since employees have no substantive constitutional right to mandatory leave—certainly not one that

31. *See id.*

32. *See* 29 U.S.C. §§ 203(x), 2611(4)(A)(iii), 2617(a)(2) (2000).

33. *See Hibbs*, 123 S. Ct. at 1976; *see also* Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 786–89 (1991) (citing Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).

34. *See* 29 U.S.C. §§ 2601(b)(4)–(5) (2000); *see also* S. REP. NO. 103–3, at 16 (1993) (stating the FMLA "is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment"); H.R. REP. NO. 103-08, pt. 1, at 29 (1993) (same).

35. Technically, only the family-care provision *Hibbs* tried to invoke was at issue before the Court. A challenge to the parenting provision would almost certainly come out the same way, though a challenge to the employee sick-leave provision might not. *See, e.g.,* Brockman v. Wyoming Dep't of Family Servs., 342 F.3d 1159, 1163–66 (10th Cir. 2003) (holding that the *Hibbs* decision does not apply to the FMLA provision regarding personal sick leave, 29 U.S.C. § 2612(a)(1)(D), because the legislative history of the Act did not address gender-based discrimination by state employers against individuals requiring time off for personal illness).

36. *See* U.S. CONST. amend. XIV, § 5.

37. *See Hibbs*, 123 S. Ct. at 1976–77.

dictates the precise terms for leave mandated by the Statute. However, Section Five gives Congress greater power than simply proscribing unconstitutional conduct.³⁸ The Supreme Court has interpreted it to allow Congress to proscribe constitutional conduct as well, if necessary to deter unconstitutional conduct.³⁹

To validly reach facially constitutional behavior, Congress must act based on a history of constitutional violations *and* design a remedy that is both proportional and congruent to the identified injury.⁴⁰ Thus, the crucial questions in *Hibbs* were whether Congress enacted the FMLA in response to a history of state-sponsored gender discrimination and, if so, whether the Act was an appropriate response to that history. The Court found both prongs of this test to be met and ultimately upheld Hibbs's right to sue his employer for its alleged violation of the FMLA.

The Court's inquiry into the validity of Congress's action begins with the observation that the "FMLA aims to protect the right to be free from gender-based discrimination in the workplace."⁴¹ This is a valid statutory purpose, according to Eleventh Amendment jurisprudence, only if it is formed in response to a "pattern of constitutional violations on the part of the States in this area."⁴²

The history of state-sponsored discrimination against women in the workplace is well-established. For the better part of the twentieth century, states enacted and maintained laws designed to minimize their ability to work outside the home or participate in public life and to maximize their obligations as mothers. Illinois refused to permit women to act as lawyers.⁴³ Michigan refused to allow women to tend bar.⁴⁴ Oregon limited the number of hours women could do wage-earning work in certain environments.⁴⁵ Florida encouraged women to avoid jury service.⁴⁶

38. See *id.* at 1977.

39. See *id.*

40. See *id.*

41. *Id.* at 1978.

42. *Id.*

43. See *Bradwell v. Illinois*, 83 U.S. 130 (1872).

44. See *Goesaert v. Cleary*, 335 U.S. 464 (1948).

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

46. See *Hoyt v. Florida*, 368 U.S. 57 (1961).

The cases in which each of these practices was unsuccessfully challenged in the Supreme Court are legendary for their broad and sweeping pronouncements about the importance of preserving women's reproductive capacity, encouraging their exclusive devotion to raising children and other domestic pursuits,⁴⁷ and reinforcing their unfitness for many forms of paid employment.

With hindsight, however, these cases seem shocking. And measured against the standards of modern equal protection cases, each of these practices would fail to pass constitutional muster. Thus, in *Hibbs*, they form the backbone of the claim that women have suffered a history of constitutionally injurious employment discrimination.⁴⁸

It was to this history that Congress responded when it enacted Title VII in 1964—another statute for which Congress successfully abrogated the states' Eleventh Amendment immunity.⁴⁹ But, the Supreme Court noted in *Hibbs*, "state gender discrimination did not cease."⁵⁰ It persevered, among other ways, when states continued "to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits."⁵¹

The record before Congress showed that states, like private sector employers, tended to utilize policies that created and perpetuated a society in which women were largely responsible for family caretaking either because leave was only available to women or because no leave was available.⁵²

The Court also noted Congress's reliance on a Bureau of Labor Statistics survey showing that while thirty-seven percent of private-

47. Justice Bradley's concurrence in *Bradwell* is, of course, the most quotable (and quoted) on this point, as he invoked the "law of the Creator" to justify excluding women from the legal profession. *Bradwell*, 83 U.S. at 141 (Bradley, J., concurring).

48. See *United States v. Virginia*, 518 U.S. 515, 532–33 (1996) (holding that to analyze gender-based classifications, the "reviewing court must determine whether the proffered justification is 'exceedingly persuasive,'" a burden that "is demanding and [] rests entirely on the State").

49. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); see also *Hibbs*, 123 S. Ct. at 1978.

50. 123 S. Ct. at 1978.

51. *Id.* at 1979.

52. See *id.* at 1979 n.3 (discussing the results of a fifty-state survey presented at *The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor*, 99th Cong., 2d Sess., 33 (1986)).

sector employees had access to maternity leave, only eighteen percent had access to paternity leave.⁵³ A fifty-state survey available to Congress demonstrated that public-sector employees had access to maternity and paternity leave in proportions similar to those in the private sector.⁵⁴

Several states, according to data before Congress, explicitly offered leave only for women that far exceeded any period of physical disability.⁵⁵ According to the Court, fifteen states gave women up to one year of maternity leave without providing men any comparable leave.⁵⁶ Beyond the first six weeks, this leave is clearly for parenting rather than delivering a child, and yet only women were given the opportunity to do it. This pattern, the Court concluded, indicates that "stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread."⁵⁷

The Court also took into account pervasive, discriminatory implementation of facially neutral leave policies.⁵⁸ Evidence before Congress showed that male employees received discriminatory treatment when they requested supposedly available paternity leave, and to the extent leave was left to the discretion of supervisors, that pattern of discrimination was exacerbated.⁵⁹

The Court in *Hibbs* noted the practical effect of these discriminatory leave policies. Leave policies that either formally allow or in fact result in the allowance of maternity leave, but not paternity leave, further the same core stereotype that kept nineteenth-century women out of the legal profession and twentieth-century women out of demanding jobs and jury pools: "women's family

53. *Id.* at 1979. These numbers are somewhat misleading because the thirty-seven percent does not differentiate between leave available for childbirth and leave available for mothering—both of which are included in the general term "maternity." To the extent the policies provided only for childbirth leave, it is not at all surprising—nor reflective of gender stereotypes—that men did not have access to the same leave.

54. *See id.* at 1979 n.3.

55. *See id.*

56. *See id.*

57. *Id.* at 1979.

58. *See id.* at 1980.

59. *See id.*

duties trump those of the workplace.”⁶⁰ Disparate leave policies, to the extent they do not correspond with any actual disability from childbirth, assume women will take on parenting responsibilities and, commensurately, that men will not.⁶¹ This assumption then reinforces the role of women as primary caretakers and discourages men’s participation in caregiving activities, even when they have an affirmative desire to take them on.

Facially neutral policies can have the same stereotyping and habit-reinforcing effects as discriminatory ones. An employer who offers no leave makes it almost impossible for women to continue working while having children because almost all women require some time off for childbirth and at least some need medically necessary leave during pregnancy as well. If women take time off for these reasons—and do not have job protection—the no-leave policy has the effect of reinforcing the pattern of women as primary caregivers beyond the usual period of disability.⁶² Even for women who are capable of returning to work immediately, someone needs to care for the newborn child, and a variety of social and economic pressures influence a couple’s decision in favor of the mother’s filling that role.⁶³

The disparate leave-taking patterns affect women’s status not only as parents, but also as workers. In the case of women-only leave policies or gender-neutral, no-leave policies, women become less attractive to employers because they are likely to cost more in terms of time off, lost productivity, and replacement workers, as well as make quicker exits from the workforce. Men, whether they are predisposed to or not, are unlikely to take time off from work to fulfill parenting obligations.

These “mutually reinforcing stereotypes,” the *Hibbs* Court noted, “created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered

60. *Id.* at 1979.

61. *See id.* at 1979 n.5 (noting that it is common for collective bargaining agreements to grant “maternity” leave for six months to a year—to women only).

62. *See id.* at 1982–83.

63. *See generally* Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. FEMINISM 177, 185 (2000) (noting that the “penalties attendant to parental leave that fathers fear are both concrete and intangible”); *see also infra* text accompanying notes 104–14.

employers' stereotypical views about women's commitment to work and their value as employees."⁶⁴ Because the cycle was at least in part state sponsored or created, the "pervasive sex-role stereotype that caring for family members is women's work"⁶⁵ justified a Congressional remedy.⁶⁶

The Court also found that the FMLA directly combats gender discrimination—a second, necessary component of its Eleventh Amendment analysis.⁶⁷ Two characteristics of the FMLA were important to the Court's conclusion that the Act is both "congruent and proportional to the targeted violation":⁶⁸ that employers are required to offer leave at all and that the Act makes leave available on a gender-neutral basis.⁶⁹

By insisting that employers make leave available (which no other federal statute requires⁷⁰), the FMLA improves the chances that women who in fact perform the majority of caregiving work—both for children and other family members—can continue wage-earning despite these responsibilities. A law that insists on gender equality in the provision of leave, but does not set a minimum amount of leave, would "exclude far more women than men from the workplace,"⁷¹ since they would be more likely to opt out of the workforce due to caregiving needs.

By equalizing the availability of leave for both sexes, the Court observed, the FMLA encourages men to share in parenting and caregiving obligations.⁷² That inducement "attacks the formerly state-

64. *Hibbs*, 123 S. Ct. at 1982.

65. *Id.* at 1979.

66. *See id.* at 1982.

67. *See id.*

68. *Id.* (quoting *Bd. of Trustees v. Garrett*, 531 U.S. 356, 374 (2001)). The Court's recent Eleventh Amendment jurisprudence established this standard for evaluating the validity of Section Five legislation. One effect of *Hibbs*, unrelated to its impact on leave policies, is that it reinforces this newly minted standard. Whether this is the correct standard for Section Five analysis or an appropriate application of the standard is beyond the scope of this Article. For recent commentary on these questions, see generally 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 (2003).

69. *Hibbs*, 123 S. Ct. at 1982.

70. *See infra* text accompanying notes 142–47, 240–50 (discussing the protections given by Title VII, as amended by the Pregnancy Discrimination Act).

71. *Hibbs*, 123 S. Ct. at 1983.

72. *Id.* at 1982.

sanctioned stereotype that only women are responsible for family caregiving.”⁷³ It targets the “fault line between work and family,” the Court explained, where “sex-based overgeneralization has been and remains strongest.”⁷⁴ Congress, the Court concluded, sought to remove the stigma borne by female employees as the predominant leave-takers and reduce “employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.”⁷⁵

The Supreme Court’s vision is thus inspiring, not only because it perceives the workplace inequality that results from the discriminatory allocation of parenting leave to women but not men, but more importantly because it acknowledges the broader equality interest in reallocating the underlying caregiving burdens. Were this vision to come to pass, there would be greater cause for celebration indeed. Instead, the next sections examine why it did not, and why this failure should have come as no surprise.

II. PARENTING, LEAVE POLICIES, AND LEAVE-TAKING PATTERNS BEFORE THE ENACTMENT OF THE FMLA

Empirical data available prior to enactment of the FMLA demonstrated two things: women almost always take time away from work for childbirth and new parenting, even if their employers *do not* guarantee that they will have a job to return to;⁷⁶ and men rarely take time off for new parenting, even if their employers *do* guarantee job restoration.⁷⁷

Whether women work outside the home in paid employment or not, they perform the majority of caretaking tasks for children.⁷⁸ A

73. *Id.* at 1982–83.

74. *Id.* at 1983.

75. *Id.* at 1982 (noting that the FMLA tells employers that they cannot “evade leave obligations simply by hiring men”).

76. *See infra* notes 96–98, 225–28 and accompanying text.

77. *See infra* notes 99–103, 229–36 and accompanying text.

78. *See* ARLIE RUSSELL HOCHSCHILD, *THE SECOND SHIFT* 271–78 (1989); Cahn, *supra* note 63, at 185 (citing survey of children who reported that their mothers performed the bulk of the tasks related to their care and noting that “[a]lthough the allocation of work within the family is becoming more equal, women still perform a disproportionate share of childcare”); Martha Fineman, *The Nature of Dependencies and Welfare “Reform”*, 36 SANTA CLARA L. REV. 287, 293–94 (1996); Ann Shalleck, *Foundational Myths and the Reality of Dependency*:

1992 telephone survey found, for example, that, according to both male and female respondents, women assume primary responsibility for raising minor children in sixty to seventy percent of households.⁷⁹ These numbers reflect not only the descriptive fact that women do more child care and "family work," but also a normative judgment that this unequal burden is appropriate.⁸⁰ As Deborah Rhode has observed, "[d]espite increasing public support for gender equality in social roles, most men and women still believe that fathers should be the primary breadwinners and that mothers should be the primary caretakers."⁸¹

Gendered leave-taking patterns both reflect and reinforce underlying caretaking patterns, as the "time immediately following childbirth has also been shown to be a critical period in shaping both men's and women's perceptions of parental competence and determining the long-term division of childrearing responsibilities."⁸² Parents who take leave early in their parenting journey are more likely to assume long-term caregiving responsibilities (and thus

The Role of Marriage, 8 AM. U. J. GENDER SOC. POL'Y & L. 197, 201 (2000). See generally JOAN WILLIAMS, UNBENDING GENDER 71 (2000) (collecting data).

79. See Ellen Galinsky & James T. Bond, *Work and Family: The Experience of Mothers and Fathers in the Labor Force*, in WHERE WE STAND: WOMEN AND WORK 79, 94 (Cynthia Costello & Barbara Kivimae Krimgold eds., 1996). Other surveys show similar results. See generally KATHARINE T. BARTLETT, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY (2002) (reviewing available research).

80. See BARTLETT, *supra* note 79, at 353 (noting that "while working women do twice as much family work as men, only one-quarter to one-third see this arrangement as unfair") (citing Mary Clare Lennon & Sarah Rosenfield, *Relative Fairness and the Division of Housework: The Importance of Options*, 100 AM. J. SOC. 506, 507 (1994)).

81. Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 842 (2002); see also WILLIAMS, *supra* note 78, at 26-27.

82. Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 124 (1998) (citing Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1056-57 (1994)); see also Susan Deller Ross, *Legal Aspects of Parental Leave: At the Crossroads*, in PARENTAL LEAVE AND CHILD CARE: SETTING A RESEARCH AND POLICY AGENDA 93, 99 (Janet Shibley Hyde & Marilyn J. Essex eds., 1991). Ross writes:

If we exclude men from the experience of caring for newborns [by denying job-guaranteed paternity leave], are we not reinforcing the norms that drive them ever more into seeking fulfillment at work? And if men put their major emotional energies into work, does that not increase the pressure on their wives to play the most significant role at home? One can see the vicious cycle this creates.

Ross, *supra*, at 99.

engage in leave-taking behavior as well), while those who eschew early parenting are likely to continue in that mode and unlikely to make future requests for leave.⁸³ This pattern becomes gendered, since women almost automatically take some leave when they give birth to or adopt children and then assume greater long-term caretaking responsibilities than their male counterparts. Leave-needers, over the long haul, are thus predominantly women. Surveys conducted prior to passage of the FMLA revealed these interlocking leave-taking and care-taking patterns.⁸⁴

Before federal law mandated leave under the FMLA, employers made it available, and employees took it, on predictably gendered terms. The most comprehensive study of leave-taking in the United States prior to enactment of the FMLA was done by the Families and Work Institute (FWI).⁸⁵ In 1988, FWI commissioned a report on the effects of relatively new parental leave statutes that had been enacted in four states.⁸⁶ Around that time, each of the four had enacted a leave law that bore at least some resemblance to the subsequently enacted FMLA.⁸⁷

Before enactment of those leave laws, eighty-three percent of surveyed employers reported that they offered some form of job-guaranteed leave for disabilities relating to childbirth. The average leave period was eleven weeks.⁸⁸ Most employers also reported that they permitted between six and nine additional weeks, unpaid, of

83. Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1056–57 (1994).

84. *Id.* at 1058 (citing LINDA HAAS, EQUAL PARENTHOOD AND SOCIAL POLICY: A STUDY OF PARENTAL LEAVE IN SWEDEN 158–60 (1992) (presenting the results of her study of the effect of the liberal use of Sweden's paid parental leave policy by fathers)).

85. See JAMES T. BOND ET AL., FAMILIES AND WORK INSTITUTE, BEYOND THE PARENTAL LEAVE DEBATE: THE IMPACT OF LAWS IN FOUR STATES (1991) (studying parental leave laws in Minnesota, Oregon, Rhode Island, and Wisconsin).

86. *Id.* at 17.

87. The primary differences between these state laws and the FMLA, passed five years later, were the length of mandatory leaves and the number of employers covered. See *id.* at 18–19.

88. See *id.* at 29. The numbers given in this section reflect an average for the four states, even though in some cases a wide range existed from the highest to lowest values. See *id.* These leave periods are slightly more generous than both the medically recommended period of leave—six weeks for vaginal birth and eight weeks for caesarean birth—and the average maternity-related disability insurance claim of ten weeks. See *id.* at 30.

post-disability parenting leave.⁸⁹ Although only a quarter of these employers had formal policies guaranteeing the availability of these leave periods,⁹⁰ the combination of formal policies and informal practices meant that many employers were accommodating at least the minimal needs of biological mothers. Sixty-five percent of employers were in full compliance with the applicable state's leave requirements *before* enactment of the statute.⁹¹ Adoptive parents were also given job-guaranteed leave by seventy-one percent of employers (before any state mandate that they do so).⁹²

The needs of biological fathers were also accommodated by employers, but to a lesser extent. While sixty percent of employers reported offering job-guaranteed leave to new fathers (8.2 weeks, on average), only nineteen percent had a formal policy for providing it.⁹³ Fewer employers provided job-guaranteed leave for biological fathers than for adoptive parents,⁹⁴ and only thirty-four percent of employers were already providing paternity leave at a level required by the law before it was enacted.⁹⁵

The FWI study also examined the effect of state parental leave statutes on leave-taking patterns. It found that biological mothers took leave at an almost identical rate pre- and post-statute, and the length of leaves post-statute were no longer than before.⁹⁶ Both before and after mandatory leave policies were put in place, mothers took an average of two weeks leave before childbirth and twelve weeks afterwards,⁹⁷ leading the study authors to conclude that leave policies had little impact on the leave-needing or leave-taking patterns of biological mothers.⁹⁸

89. *See id.* at 29.

90. *See id.*

91. *See id.* at 39.

92. *See id.* at 43–44.

93. *See id.* at 41.

94. *See id.* at 43. This again reflects an assumption that mothers will take parenting leave—even if they do not require maternity-related disability leave—more often than fathers.

95. *Id.* at 42.

96. *See id.* at 63, 65. Biological mothers that did not take leave at the time of childbirth did not just keep working—twelve percent quit to stay home with the child, five percent quit for some other reason, and one percent were fired or laid off.

97. *See id.* at 65.

98. *See id.* at 64–65.

The impact of leave laws on leave-taking behavior by biological fathers was slightly greater. According to the FWI study, the percentage of fathers who took leave associated with the birth of a child increased from seventy to seventy-five percent.⁹⁹ But only around twenty percent of these fathers were forced to take unpaid leave, as most were able to draw from accrued vacation, sick, or personal leave. The average length of leave increased, however, by only one day—from 3.7 days to 4.7 days—after enactment of the mandatory leave laws.¹⁰⁰ (According to survey responses of women, men actually do help when they are on leave, rather than going elk hunting as one Oregon legislator cautioned during the debate over the state's mandatory leave law.).¹⁰¹

Other studies confirm that almost no men take leave formally classified as parental, paternity, or family leave, even when their employers' policies provide for it. A 1986 survey found that while thirty-seven percent of 322 respondents offered some form of parental leave to their male employees, not a single male employee took the available leave in over eighty-five percent of those establishments.¹⁰² Later surveys confirm the same pattern.¹⁰³

99. See *id.* at 77.

100. See *id.* at 77–78.

101. See *id.* at 78 (reporting on the opponents of Oregon leave legislation). The study concluded that ninety-seven to ninety-eight percent of fathers used their parental leave time to care for their wives or newborn children, rather than abusing the leave by using the time “pursuing their own interests.” *Id.*

102. See CATALYST, REPORT ON A NATIONAL STUDY OF PARENTAL LEAVES 37 (1986); see, e.g., Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 755–56 (2000); Young, *supra* note 82, at 113 (summarizing available data on paternal leave-taking); Janet Shibley Hyde et al., *Fathers and Parental Leaves: Attitudes and Experiences*, J. FAM. ISSUES, 616, 635 (1993) (citing study indicating that if they were offered paid paternity leave, thirty-eight percent of men predicted that they would take an average of eleven weeks, while thirty-five percent would take as much as a year off).

103. In another study, new fathers took an average of five days of leave, and seventy-one percent of those who took leave took five days or less. Most of these days were taken as vacation or personal days, rather than parental leave days. See Janet Shibley Hyde, *Women and Maternity Leave: Empirical Data and Public Policy*, 19 PSYCHOL. WOMEN Q. 299, 307–09 (1995); CHILDREN'S DEFENSE FUND—MINNESOTA, *Parental Leave in Minnesota: A Survey of Employers*, in REESTABLISHING THE VALUE OF FAMILIES: A GUIDE TO PUBLIC POLICY 3 (2000), at <http://www.cdf-mn.org/PDF/Publications/ParentalLeave.pdf> (surveying 185 employers employing 64,000 workers in Minnesota and revealing that of the men who took parental leave in 1998, 56.4% were away from the office for less than a week, 30.8% took one to two weeks, 10.3% took three to six weeks, and only 2.6% took the full twelve weeks they were allowed); see also JAMES A. LEVINE & TODD L. PITTINSKY, WORKING FATHERS: NEW

Men do not take parental leave for a variety of familiar reasons. External factors are significant. Men may “worry they’ll be ‘daddy-tracked.’”¹⁰⁴ Employers may react to requests for paternity leave with scorn or laughter.¹⁰⁵ Even self-professed family-friendly workplaces may quietly discourage paternity leave or impliedly threaten men with career damage for taking leave made available by their own policies.¹⁰⁶ Men fear that taking paternity leave will lead to retaliation or the loss of professional reputation,¹⁰⁷ and conduct like that alleged in *Knussman v. Maryland* reinforces those fears. In *Knussman*, a state trooper requesting paternity leave was told by his supervisor that “God made women to have babies,” and unless the trooper’s wife was “in a coma or dead,” he could not take the leave available to primary caregivers.¹⁰⁸ Although societal expectations have

STRATEGIES FOR BALANCING WORK AND FAMILY 127–28 (1997) (describing the media interest in whether Microsoft’s Bill Gates would take paternity leave after the birth of his daughter in 1996; the final announcement was that Gates would take “several days off”); Millicent Brown, *Blair’s Baby Policy*, SUNDAY MIRROR, Apr. 9, 2000 (reporting on British Prime Minister Tony Blair’s plans to go into “holiday mode,” which entails working a few hours each day, following the birth of his fourth child, despite urging from some groups to take a full-fledged paternity leave).

104. See Melissa Fletcher Stoeltje, *The Time Has Not Quite Arrived for Paternity Leave for Fathers*, SAN ANTONIO EXPRESS-NEWS, July 25, 2002, at F1.

105. See Jeff Kramer, *Regretfully, Daddy’s Back on the Job*, ORANGE COUNTY REGISTER, Feb. 17, 2003 (noting the “snickers of disdain or worse” that a father’s request for paternity leave might engender); Mary Kane, *Paternity Leave Gains Acceptance in Work World; New Dads Take Time to Bond with Babies*, TIMES-PICAYUNE, June 16, 2002, (Money), at 1 (reporting story of one employee whose manager “just kind of chuckled and thought I was playing a practical joke on him” when he asked for paternity leave).

106. See Susan Chira, *Fathers Who Want Time Off for Families Face Uphill Battle*, N.Y. TIMES, Oct. 21, 1993, at C6 (quoting James Levine: employers counsel fathers that “Real men—upwardly mobile men—don’t take leave”); Melinda Ligos, *The Fear of Taking Paternity Leave*, N.Y. TIMES, May 31, 2000, at G1 (reporting anecdotal evidence of employer discouragement of paternity leave).

107. See Diane E. Lewis, *Giving Men Benefit of Fatherhood: More Companies Are Offering Paid Work Leaves to Male Employees*, BOSTON GLOBE, June 22, 2003, at J1 (noting that the “fear may be justified,” given stories like that of a professional football player who incurred a fine of \$11,000 for skipping a game in order to be present at his child’s birth). The justification for these fears may lessen as society evolves. See Rosemarie Feuerbach Twomey & Gwen E. Jones, *The Family and Medical Leave Act of 1993: A Longitudinal Study of Male and Female Perceptions*, 3 EMPLOYEE RTS. & EMP. POL’Y J. 229, 244, 248 (1999) (indicating that in 1992 men had a greater impression that taking leave would harm their careers, but in 1998 women anticipated a stronger likelihood of damage). For a more expansive treatment of these issues, see generally SUZANNE BRAUN LEVINE, *FATHER COURAGE: WHAT HAPPENS WHEN MEN PUT FAMILY FIRST* (2000).

108. See *Knussman v. Maryland*, 272 F.3d 625, 629–30 (4th Cir. 2001). Determining

presumably evolved since then, a 1986 survey of CEOs and human resource directors revealed that sixty-three percent of respondents answered “none” to the question of what would be a reasonable length of time for paternity leave.¹⁰⁹

Even where paternity leave is not overtly or covertly discouraged, it is still viewed, at the very least, as unusual. For example, when a prominent New York Times reporter took a month of paternity leave, the newspaper’s honest explanation for his absence in his column space was described by another reporter as “miraculous.”¹¹⁰

Beyond the external pressures, internal or personal factors can play a role in inhibiting men from taking leave. For many men, it is not “inwardly” acceptable to take time off to care for one’s children,¹¹¹ and they may find it emasculating to take time designated as “paternity leave.”¹¹² The fact that men who do take leave following the birth of a child rarely classify it as *paternity* leave evidences this phenomenon.¹¹³ Leave-taking men often try to have their leave classified as vacation or personal leave, rather than paternity leave, to avoid negative reactions from the employer or even co-workers as well as having to come to terms with their own desire to be home with children.¹¹⁴

whether Knussman qualified as the primary caregiver was important to determine eligibility for paid versus unpaid leave under a Maryland statute. *Id.* at 628–29.

109. See DEBORAH RHODE, *JUSTICE AND GENDER* 122 (1989) (discussing survey); see also LEVINE & PITTINSKY, *supra* note 103, at 133 (quoting Malcolm Forbes: “New daddies need paternity leave like they need a hole in the head”); Colin Harrison, *Here’s Baby. Dad Stays Home. Dad Gets Antsy*, N.Y. TIMES, Aug. 31, 1993, at A17.

110. Stoeltje, *supra* note 104, at F1 (noting the rarity of a “high-profile man working in a notoriously competitive field” taking paternity leave).

111. See Harrison, *supra* note 109, at A17; see also Kane, *supra* note 105 (quoting Professor Joseph Pleck: “Men don’t classify it in their own minds as paternity leave”).

112. See Ligos, *supra* note 106, at G1 (noting one father’s reticence to take paternity leave for fear “that his co-workers would question his machismo” and another’s being told that he was “less of a man for wanting to care for [his] child”). England reports a drastic increase in paternity leave-taking—from nine percent in 1999 to forty-four percent in 2002. See Sarah Westcott, *Paternity Leave Gets Thumbs Up From Dads*, THE EXPRESS, June 8, 2002, at 11. Part of the increase in leave-taking—and decrease in stigma—may come from the fact that England’s Prime Minister took a quasi-paternity leave after the birth of his fourth child. See *id.*

113. See *supra* note 103.

114. See Kane, *supra* note 105 (citing family studies Professor Joseph Pleck, who claims that men go “undercover” to avoid the perception that they have taken formal paternity leave).

This record, reflecting gender-based allocations of caregiving and leave-taking, was solidly established by the time the 103d Congress undertook consideration of the bill to mandate family and medical leave that would ultimately become law.

III. ADVOCACY, LEGISLATIVE HISTORY, AND STRUCTURE OF THE FMLA: A BILL TO ACCOMMODATE MOTHERHOOD

As the first law signed by President Clinton, the FMLA was read as a symbol of Washington's change in power.¹¹⁵ In just one month, H.R. 1 sailed through both houses of Congress and earned a presidential signature—something that had not been accomplished in the previous seven years of Republican administrations. The FMLA was heralded as proof of the promised “end of gridlock” and a strong endorsement of Clinton's “People First” campaign.¹¹⁶

However, FMLA's symbolic power surpassed its substance, since during the intervening years between introduction of the original bill by Representative Pat Schroeder in 1985 and passage of the ultimate Act in 1993, Congress had considerably weakened an already minimalist law.

The enacted version of the FMLA was very much a compromise, passed after both houses of Congress considered and rejected numerous bills, and after bills they could agree upon were subjected twice to a presidential veto.¹¹⁷ The first bill introduced guaranteed eighteen weeks of parental leave every two years *and* twenty-six weeks for employee illness or disability every year.¹¹⁸ It applied to all

115. See Donna Lenhoff & Claudia Withers, *Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace*, 3 AM. U. J. GENDER & L. 39, 40 (1994) (noting the record speed with which President Clinton signed the bill after taking office, in contrast to “a carefully worded campaign promise by George Bush” and “two Bush vetoes” in the preceding years).

116. See ELVING, *supra* note 1, at 11–13 (describing the bill signing ceremony for the FMLA).

117. See *id.* (describing in detail the legislative history of the FMLA).

118. See Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong., §§ 102(a), 103(a) (1985); 131 CONG. REC. 8318 (Apr. 17, 1985) (Rep. Schroeder pointed out that the twenty-six weeks for temporary disability leave was meant to cover any pregnancy disability absence, leaving the eighteen weeks of parental leave strictly for the time spent taking care of the child.).

employers with at least one employee.¹¹⁹ Bills in subsequent years reduced the number of covered employers,¹²⁰ reduced the length of leave available,¹²¹ and combined medical and family leave into a single, and ultimately shorter, allotment.¹²²

The final bill lost some of the power of earlier bills and added nothing to overcome their deficiencies. The general limitations of the Act—measured against the goal of accommodating workers' caretaking obligations and serious illnesses—have been widely noted. The leave provided is relatively short, unpaid,¹²³ and nearly forty percent of employees in this country either work for employers who are not covered or are themselves not eligible for leave under the

119. See Parental and Disability Leave Act of 1985, H.R. 2020, 99th Cong., § 101(3) (1985).

120. See, e.g., Family and Medical Leave Act of 1987, H.R. 925, 100th Cong., § 102 (1987) (exempting employers with less than fifteen employees within 200 miles of facility); Family and Medical Leave Act of 1989, H.R. 770, 101st Cong., § 101(5)(a) (1989) (applying, for the first three years, to employers with at least fifty employees within a seventy-five mile radius, and then to employers with at least thirty-five employees within that same distance).

121. See, e.g., Family and Medical Leave Act of 1989, H.R. 770, 101st Cong., §§ 103(a)(1), 104(a)(1) (1989) (proposing ten weeks of family leave during a twenty-four month period and fifteen weeks of medical leave within a twelve month period).

122. See, e.g., 136 CONG. REC. 9986 (1990) (adopting an amendment to the Family and Medical Leave Act of 1989, H.R. 770, proposed by Rep. Gordon and Rep. Weldon, to change the total leave time for both family leave and medical leave to twelve weeks within a twelve month period).

123. Proponents decided early on not to push for paid leave because it seemed to be a political impossibility. See ELVING, *supra* note 1, at 30. Annual "Employee Benefits Surveys" conducted by the Bureau of Labor Statistics report that only one to two percent of employees have access to paid maternity or paternity leave, and these numbers are the same for small and large companies. Those employers that do offer paid leave do so only for full-time employees. See Jane Waldfogel, *Family Leave Coverage in the 1990s*, MONTHLY LABOR REV. Oct. 1999, at 13, 14 tbl.1 (reporting data on the percentage of private-sector employees with family leave coverage from 1990 to 1997). As a result of the 1996 FMLA study finding that the decrease in income prevented more parents from taking leave, President Clinton directed the Department of Labor to explore the use of unemployment compensation for parental leave. Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37210, 37210 (June 13, 2000) (codified at 20 C.F.R. pt. 604). Birth and Adoption Unemployment Compensation (BAA-UC), if a state adopts it, has to be applied to all employees granted leave for the birth or adoption of a child, regardless of their employer's size. *Id.* at 37212. A federal court dismissed an effort to have the regulation declared invalid in 2002 because the rule had not been adopted by any state and the court did not foresee its adoption in the near future. See *LPA Inc. v. Chao*, 211 F. Supp. 2d 160, 166 (D.D.C. 2002). In December of 2002, the Department of Labor solicited comments about recalling the BAA-UC. Unemployment Compensation—Trust Fund Integrity Rule: Birth and Adoption Unemployment Compensation; Removal of Regulations, 67 Fed. Reg. 72,122 (proposed Dec. 4, 2002).

statute. The combined force of these limitations, as many commentators have noted, is a powerful blow to the statute's effectiveness.¹²⁴

The specific limitations of the Act—measured against a goal of gender equality—are less widely noted, and yet just as glaring. Despite the virtually unrefuted evidence available to Congress that men do not tend to avail themselves of paternity leave very often, it built nothing into the FMLA to encourage them to do otherwise.¹²⁵ To the contrary, it builds in disincentives; or at least incentives for any particular set of parents to prefer maternal over paternal caregiving.

For example, to the extent available parental leave is unpaid, there exists a clear incentive for a couple to prefer maternal leave over paternal leave, given the likelihood that a husband out-earns his wife.¹²⁶ Considering also that a biological mother will undoubtedly take at least some time off because of childbirth, it makes practical sense in many cases for her to continue on leave for the “parenting” portion, rather than forcing both spouses to suffer the potential adverse consequences of taking leave.

Other provisions of the FMLA reinforce traditional leave-taking patterns as well. For example, employers are permitted to deny leave

124. See generally Stephanie C. Bovee, *The Family Medical Leave Act: State Sovereignty and the Narrowing of Fourteenth Amendment Protection*, 7 WM. & MARY J. WOMEN & L. 1011 (2001); Ruth Colker, *Hypercapitalism: Affirmative Protections for People With Disabilities, Illness and Parenting Responsibilities Under United States Law*, 9 YALE J.L. & FEMINISM 213 (1997); Cristina Duarte, *The Family and Medical Leave Act of 1993: Paying the Price for an Imperfect Solution*, 32 U. LOUISVILLE J. FAM. L. 833 (1994); Maxine Eichner, *Square Peg in a Round Hole: Parenting Policies and Liberal Theory*, 59 OHIO ST. L.J. 133 (1998); Hayes, *supra* note 2; Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 (2001); Malin, *supra* note 82; Selmi, *supra* note 102; Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395 (1999); Joseph Willis, *The Family and Medical Leave Act of 1993: A Progress Report*, 36 BRANDEIS J. FAM. L. 95 (1997–98); Young, *supra* note 102; Marc Mory & Lia Pistilli, Note, *The Failure of the Family and Medical Leave Act: Alternative Proposals for Contemporary American Families*, 18 HOFSTRA LAB. & EMP. L.J. 689 (2000–2001).

125. See Young, *supra* note 82, at 143–44 (noting the lack of incentives in the FMLA for men to take parental leave); Selmi, *supra* note 102, at 755–56 (summarizing studies showing that “few men avail themselves of family leave”).

126. See Michelle Conlin, *Look Who's Bringing Home More Bacon*, BUS. WK., Jan. 27, 2003, at 85 (reporting that despite the progress made since the 1980s, two-thirds of men still earn more than their wives).

to “key employees,” defined as the most highly paid ten percent of the workforce, if they can show that granting leave would cause the employer a substantial hardship.¹²⁷ Because of gender-imbalanced power structures in the workplace, this primarily exempts men (and deprives them of leave), and, for the women it does affect, the exemption reinforces the notion that mothering is inconsistent with employment success.¹²⁸ The key employee exception also deprives employees of high-ranking role models who could, by taking leave, stymie the notion that doing so is a sign of inadequate commitment to work.¹²⁹

The only feature of the FMLA that might potentially force men to shoulder more caretaking responsibilities than they otherwise would is the family illness provision, which permits an employee to take leave only to care for his or her *own* parent—and not to care for a mother- or father-in-law.¹³⁰ Thus, in some cases, the burden of the “sandwich generation,” those middle-age women who might find themselves simultaneously caring for either young or “boomerang” children, and elderly parents,¹³¹ may be shared by men.

127. See Family and Medical Leave Act of 1993, 29 U.S.C. § 2614(b) (2000); 29 C.F.R. §§ 825.216(2)(c), 825.217–825.219 (2003).

128. See Young, *supra* note 82, at 144. The exception for key employees also sends “a powerful message to all other male and female employees: If you want to be part of the highest paid bracket, do not expect to take parental leave.” *Id.*

129. See Stoeltje, *supra* note 104, at F1 (quoting Jodi Grant of the National Partnership for Women and Families, who stated that “[a]pproval from higher-ups is key in combating societal stigmas about paternity leave . . . [i]t helps when someone senior takes paternity leave and then later gets promoted”).

130. See 29 U.S.C. §§ 2611(7), 2612(a)(1)(C) (2000); 29 C.F.R. § 825.113(b) (2003) (requiring leave to be for a biological parent and not for a parent “in law”).

131. Although the term “sandwich generation” is gender-neutral, the burdens it describes fall mostly on women in their fifties “who must work to support both younger and older family members, including so-called ‘boomerang children’ who have returned home as adults because they cannot make it on their own, as well as frail parents or in-laws.” Mary Murray, *Survey Counters Stereotypes, Finds Life Begins at 50 for Many*, L.A. TIMES, Feb. 4, 1991, at 3B. See also Ronald Kotulak, *Study Finds Midlife ‘Best Time, Best Place To Be,’* CHI. TRIB., Feb. 16, 1999, at 1N (citing study by Orville Brim, which found that “[t]wenty percent of midlifers have grown children at home, 5 percent have their parents living with them, 6 percent are taking care of grandchildren full time, and 10 percent have another family member or friend living at home”); Jane Glenn Haas, *If You Don’t Care Now, You Will . . .*, ORANGE COUNTY REG., May 18, 2003 (citing a study by The National Alliance for Caregiving, which estimates that forty-one percent of middle-aged women “juggle kids, spouse, home—and now an aging parent”).

Post-enactment litigation has given little or no opportunity to reinforce the FMLA's supposed role in promoting gender equality. Most cases have raised technical issues that do not call for courts to consider the FMLA's commitment to equality, or analyze its underlying purpose at all. FMLA cases have rarely involved the Act's substantive protections, but instead have raised procedural issues like the availability of jury trial¹³² or the validity of regulations governing the technical administration of employee leaves.¹³³

The first (and perhaps only) true gender discrimination claim under the FMLA was *Knussman*, discussed above,¹³⁴ a case challenging the denial of a state trooper's request for paternity leave.¹³⁵ The jury found that the supervisor who denied the request had created, in effect, an "irrebuttable presumption that the mother is the primary care giver, and therefore entitled to greater employment benefits."¹³⁶ The appellate court recognized this approach as reminiscent of the many state statutes struck down on Equal Protection Clause grounds during the 1970s—statutes that had presumed men to be unfit to raise children¹³⁷ and presumed women to be especially or exclusively fit for the task.¹³⁸ But *Knussman* sets no new legal ground and, if anything, reminds us how entrenched the cultural bias against paternity leave remains.

This statutory structure, then, simply does not account for the main obstacle to equality for working mothers—the reluctance of men to share caretaking tasks and draw on available leave to do so.

132. See, e.g., *Frizzell v. Southwest Motor Freight*, 154 F.3d 641, 643 (6th Cir. 1998) (holding that the FMLA creates a right to jury trial).

133. See, e.g., *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 581–82 (7th Cir. 2000) (holding invalid an administrative regulation forcing employers to give FMLA leave to ineligible employees who requested it unless the employer responded promptly to inform the requesting employee that leave was unavailable); see also *McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1307–08 (11th Cir. 1999) (holding invalid an administrative regulation requiring employers to notify employee at the beginning of leave period if available paid leave is to run concurrently with FMLA leave).

134. See *supra* text accompanying note 108.

135. See generally *Knussman v. Maryland*, 272 F.3d 625 (4th Cir. 2001).

136. *Id.* at 635.

137. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972) (invalidating statute presuming unmarried fathers unfit for custody purposes).

138. See, e.g., *Caban v. Mohammed*, 441 U.S. 380 (1979) (invalidating statute giving unwed mothers, but not unwed fathers, the power to veto a proposed adoption of their children).

This failure seems odd, given the law's origins and the goals of its drafters and congressional proponents.

The FMLA was pioneered by lawyers at the Women's Legal Defense Fund,¹³⁹ and shepherded through seven years on Capitol Hill by a non-governmental working group they led.¹⁴⁰ Feminists pitched the idea of federal leave legislation in gender-neutral terms and took great pains over the years to fight back "mere motherhood" bills.¹⁴¹

The legal landscape at the time parental leave was first proposed at the federal level provides important context for the shape the proposals took. Congress had enacted the Pregnancy Discrimination Act (PDA) in 1978, an amendment to Title VII.¹⁴² The PDA established that pregnancy discrimination was a form of sex discrimination and that pregnant employees were to be treated like workers with comparable temporary disabilities.¹⁴³

Part of the impetus for federal leave legislation was a case working its way through the federal court system in the early 1980s. At issue in *California Federal Savings & Loan Association v. Guerra*¹⁴⁴ was whether the State of California could require employers to give women four months leave for childbirth without running afoul of the second clause of the PDA.¹⁴⁵ Feminists split over this case, disagreeing about whether it should be interpreted to require that employers treat pregnant women exactly the same as comparably disabled workers, or simply no worse. One camp, led by NOW Legal Defense and Education Fund, advocated for "equal treatment" laws that would prohibit employers from singling out pregnant women for especially advantageous leave provisions. The equal treatment feminists insisted that permitting special treatment of pregnant women would promote harmful stereotypes about women that had historically been used to their disadvantage and would likely

139. This organization is now called The National Partnership for Women and Families. See <http://www.nationalpartnership.org> (last visited Apr. 19, 2003).

140. See ELVING, *supra* note 1, at 29 (describing the origins of the working group).

141. *Id.* at 38–39 (citing one example of the working group's objection to a mothers-only proposal).

142. See Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2000)).

143. See Pub. L. No. 95-555, 92 Stat. 2076 (1978).

144. 479 U.S. 272 (1987).

145. See *id.* at 284.

be used to do so in the future.¹⁴⁶ The opposing position (which eventually carried the day in the Supreme Court's decision in *Guerra*¹⁴⁷) was premised on the idea that accommodating pregnancy was itself a necessary component of equality, regardless of how any other group of workers was treated.

In 1984, a district judge in California struck down the provision because it violated Title VII's promise of equal treatment by guaranteeing leave only to women.¹⁴⁸

The push for federal leave legislation was catalyzed by this decision, although Congressional proponents and feminist advocates saw the problem it produced in different terms. Representative Harold Berman, a legislator from California who had been responsible, as a state legislator, for the California law that had just been declared invalid,¹⁴⁹ thought federal legislation was necessary to "require employers to grant leaves for new mothers."¹⁵⁰

The feminists working behind the scenes, however, were adamant that any legislation must reflect the equal treatment principles fought for in *Guerra*. Their commitment to equal treatment grew from two main concerns: that special treatment for women would engender negative consequences in the long run and that accommodating maternity alone would mean other leave needs would never be met since they were less compelling to legislators.¹⁵¹ The feminist advocates, some of whom had worked on the PDA passed six years earlier, saw its limitations—that employers could refuse leave to pregnant women as long as they refused it to comparably disabled

146. See Brief Amici Curiae of the National Organization for Women (NOW) et al., in Support of Neither Party, *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (No. 85-494); see also Wendy Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 366-70 (explaining and advocating for the equal treatment approach to pregnancy leave laws, in contrast to the special treatment approach).

147. 479 U.S. at 284-90 (1987).

148. See Cal. Fed. Sav. & Loan Ass'n v. Guerra, 33 Empl. Prac. Dec. 34,227, 34 Fair Empl. Prac. Cas. (BNA) 562 (C.D. Cal. 1984); see also ELVING, *supra* note 1, at 19-23 (discussing the impact of the district court's decision on the push for federal leave legislation).

149. See ELVING, *supra* note 1, at 18-19.

150. *Id.* at 19.

151. See ELVING, *supra* note 1, at 23.

employees—and pushed for parental legislation to cure that problem.¹⁵²

The bills were thus drafted and pitched in gender-neutral terms. Leave legislation was designed, the advocates indicated, not to accommodate motherhood, but to more generally accommodate the need of all employees to balance work and family responsibilities in an era where a majority of mothers with young children work.¹⁵³ Leave legislation, they argued, gives “employees job security and health-insurance in situations when they must put their family needs before their job responsibilities.”¹⁵⁴

Through its many iterations, the proposed leave legislation remained gender-neutral—guaranteeing men and women an equal right to take family and medical leave. But even as the virtues of equal treatment were being espoused, and gender-neutral bills were taken under consideration, the need to accommodate motherhood was the force driving the legislation forward. Pediatrician T. Berry Brazelton was a repeat witness in Congressional hearings on the importance of mother-baby bonding to children’s development.¹⁵⁵ Films of a new mother bonding with her baby were a part of his usual presentation.¹⁵⁶ Other aspects of the early sets of hearings made clear that most supporters of leave legislation were concerned with motherhood rather than parenthood. One expert surprised the audience by talking about the dangers of separating “parents” and “infants” during the first months of life, as if either parent would do.¹⁵⁷ Indeed, some members of Congress expressed concern as later bills enlarged to provide leave to care for sick family members that the “aura” of motherhood would be lost and the legislation would lose its appeal.¹⁵⁸

152. *See id.* at 22.

153. *See* Lenhoff & Withers, *supra* note 115, at 48.

154. *Id.* at 49.

155. *See* ELVING, *supra* note 1, at 40, 46.

156. *See id.* at 50.

157. *Id.* at 27 (describing testimony of psychologist Edward Zigler).

158. *Id.* at 78. In fact, the addition of family care provisions improved the legislations enactability because it attracted the interest and support of the powerful AARP, whose members liked the idea of their grown children being able to take time off to care for them. *Id.* at 78, 118, 157, 165.

Even NOW LDEF, the leader of the equal treatment camp staked out in *Guerra*, played on the trope of motherhood, sending members of Congress cards on mother's day urging their support for leave legislation.¹⁵⁹ And Jane O'Grady, a well-known labor advocate from the AFL-CIO who had played an integral part in the passage of Title VII after "sex" had been added to defeat the bill,¹⁶⁰ appealed to younger men in Congress who had "younger professional women for wives."¹⁶¹

Formal attempts were made to offer maternity-only substitutes for gender-neutral leave bills, including one notable effort by Senator Dan Quayle.¹⁶² But these attempts were stymied by those who insisted the bill formally protect more than just motherhood. And when leave legislation (H.R. 770) first made it through both houses of Congress in 1990, near Mother's Day, (to be subsequently vetoed by President Bush), Representative Pat Schroeder proudly observed: "We finally did something real besides chocolate and cards."¹⁶³

Note the difference between the role of gender neutrality for parental leave advocates and the role it played in *Hibbs*. For the advocates, neutrality permitted women both to gain protection for motherhood and avoid the special treatment "trap."¹⁶⁴ For the Supreme Court, neutrality was central to Congress's purpose of achieving gender equality.¹⁶⁵ By making sure men had the *right* to take caregiving leave without losing their jobs, a gender neutral leave law would encourage men to assume greater caregiving responsibilities, thereby equalizing the burdens between mothers and fathers, and making both women and men unattractive to employers seeking to minimize the costs of temporary employment interruptions.

159. See *id.* at 105. NOW LDEF ultimately pulled out from working on the bill in protest over its diminishing coverage and the lack of paid leave. *Id.* at 225.

160. See CHARLES W. WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 109, 113, 122–23 (describing efforts of Jane O'Grady and "O'Grady's Raiders" to get members to the floor for the ultimately successful vote on Title VII).

161. See ELVING, *supra* note 1, at 154.

162. See *id.* at 109. The coalition for leave also convinced Democrat Tim Penny not to introduce his so-called "Mother's Day Amendment," which would have provided only for maternity leave. *Id.* at 175–80.

163. *Id.* at 181–82.

164. *Id.* at 224.

165. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 123 S. Ct. 1972 (2003).

and early exits from the workforce. Men's access to leave, in this view, should be a benefit *to women*, as well as to men, who might enjoy being more involved with their children.

Yet many proponents in Congress seemed to support the notion of a mandatory leave law in spite of its neutrality, which seemed to strike them as unnecessary. The feminist advocates were then in the odd position of having to sell members on the idea of neutrality itself. The appeal they made was not—as the Supreme Court re-envisioned it—a pitch for fatherhood. Instead of pointing out that men would be able—and perhaps more inclined—to take paternity leave if the law required employers to provide it, they emphasized the value of mandatory sick leave. They pointed to the “800,000 men [who] stand to benefit from the law each year,”¹⁶⁶ an estimate from a GAO Report predicting that while one-half of the total FMLA leaves would be taken by men,¹⁶⁷ *none* of them would be taken to care for newborn or newly adopted children.¹⁶⁸

The leave legislation was pushed for its neutral family-friendliness rather than its feminism, and most advocates believed an imperfect law to be better than no law.¹⁶⁹ Family-friendliness versus equality as a touchstone made for a more politically palatable law.¹⁷⁰ Pro-family was the message the bill carried, without carrying any normative conception of an egalitarian family or an egalitarian workplace. President Clinton reinforced this styling of the law, pronouncing at the signing ceremony that “American workers will no longer have to choose between the job they need and the family they love.”¹⁷¹ For feminist advocates, the FMLA, as enacted, came to be accepted as a placeholder, which laid the groundwork for a better bill in the future once legislators and the public got used to the idea of a

166. Lenhoff & Withers, *supra* note 115, at 49 (describing the feminist lobbying effort for leave legislation).

167. *See id.* at 51.

168. *Id.*; *see also* 139 CONG. REC. 1730 (Feb. 2, 1993).

169. NOW LDEF rejected this strategy and ultimately withdrew from advocacy for the FMLA. *See* ELVING, *supra* note 1, at 225.

170. *See* Nina J. Easton, “I’m Not a Feminist but . . .”: *Can the Women’s Movement March Into the Mainstream?*, L.A. TIMES, Feb. 2, 1992, (Magazine), at 12 (describing the emergence of “family-friendly” feminism and its role in the push for leave legislation).

171. Statement on Signing the Family and Medical Leave Act of 1993, 1 PUB. PAPERS 50 (Feb. 5, 1993).

mandatory leave law. They would claim only “fairly modest” success in dealing with the myriad conflicts that employees face between work and family when the FMLA became law.¹⁷²

In the end, the feminists prevailed in insisting that men be permitted to take parenting leave. But the idea that they *might actually take* parenting leave was relegated to an unlikely consequence rather than a legislative goal.¹⁷³ The advocates who had played such an important role in drafting leave legislation, stated, after the FMLA was signed into law, only that the Act “may help” break down stereotypes about child care as “women’s work,” and that it “may even encourage men to help care for their families.”¹⁷⁴ But, they stated, “[r]egardless of whether the FMLA encourages men to shoulder more family caretaking responsibilities, men will use the FMLA a great deal.”¹⁷⁵ (This statement turned out to be prescient, as men routinely invoke the provisions of the FMLA when they face serious illnesses, but hardly ever to take care of their children.¹⁷⁶).

While Congress ultimately passed a gender-neutral leave law, its vision of equality was distinctly less inspired than that attributed to it by the Supreme Court in *Hibbs*. Although its formal findings in the FMLA as enacted include a statement that “it is important for the development of children and the family unit that fathers and mothers be able to participate in early childrearing,”¹⁷⁷ legislative debate of the various proposed leave laws give little support for the idea that it was designed to bring about equal parenthood.

The desire to avoid discrimination against women was bandied about on both sides of the aisle. Republicans feigned concern that if a parental leave law was passed, women would suffer discrimination at the hands of employers who would refuse to hire them at all. Democrats argued that if leave legislation did not pass, women would suffer discrimination at the hands of employers who would refuse to

172. See Lenhoff & Withers, *supra* note 115, at 39–40.

173. Many commentators assumed the contrary—that men would take parental leave if offered. See, e.g., Ross, *supra* note 82, at 104 (“the FMLA provides . . . family leave that a significant number of men will take”).

174. Lenhoff & Withers, *supra* note 115, at 49.

175. *Id.* at 50.

176. See *infra* text accompanying notes 220–21.

177. 29 U.S.C. § 2601(a)(1) (2000).

take them back following leave for childbirth, parenting, or leave to satisfy caretaking obligations. Both sides seemed to agree that women would take care of children; they disagreed about the likely consequences of mandating that their jobs be held while they did this.

For example, while H.R. 1, the bill that would ultimately become law, was under consideration in the House of Representatives, the late and venerable Representative Patsy Mink noted in support of it: "Women will be the greatest beneficiary of this bill. Women constitute the largest providers as single parent families. They lose their jobs today if their children need them at home. Their job stability will be assured under this bill."¹⁷⁸

Arguing against the bill, Representative Boehner displayed concern for the gender discrimination the FMLA would create: "What do you tell the young women denied a place in the work force because a small employer cannot afford the risk of hiring her for fear that she will be gone 12 weeks a year?"¹⁷⁹ Representative DeLay expressed the same concern: "Moreover, the worst victims of this bill are the very people its sponsors propose to help: It invites discrimination against women of child bearing age and will thwart the ascension of women into the more prominent positions of our society."¹⁸⁰ Representative Dunn, speaking against the bill "as a woman," made her assumptions explicit, noting the likely discrimination against women that would follow: "I believe we all appreciate that it is the women of America who will almost always take on the burden of providing the care for children, for the elderly, and for the aged and the sick."¹⁸¹

Some of the assumptions about women as leave-takers are biologically driven, since women are likely to require a medically related leave following childbirth and, if breastfeeding, are likely to have a more compelling need for early parenting leave.¹⁸² But many

178. 139 CONG. REC. 1986 (1993) (debating H.R. 1 on the floor of the house).

179. *Id.* at 1989.

180. *Id.* at 1993.

181. *Id.* at 1999. Representative Dunn noted a survey showing that forty-five percent of small businesses indicated that they would "be more hesitant to hire . . . young women who may have to ask to take leave to care for young children." *Id.*

182. Breastfeeding does create a wrinkle for any theory of equal parenting, since fathers and mothers are obviously not fungible in this regard. For discussion of the need for employers

of the statements in debate clearly contemplated that *parenting* leave, too, would be something only women would or should take, even for leaves to care for non-infant children. Thus Representative Emerson, speaking “as the father of four daughters,” cautioned against “legislat[ing] women into unemployment,” since “the primary responsibility for child care still falls mainly to women; [and] women will be the predominate ones using mandated leave.”¹⁸³

Proponents of the bill made similar assumptions about caretaking, like Representative Nadler, speaking strongly in favor of the bill, decried discrimination against “working parents, and especially against working women who are still the primary care givers for most American families.”¹⁸⁴ There was even speculation among court-watchers that Justice Rehnquist’s somewhat surprising majority opinion in *Hibbs* may have been inspired by watching his own daughter struggle to balance a high-powered career with her responsibilities as a single mother.¹⁸⁵

Other arguments in the House assumed women to be the sole leave-takers as well. Representative Boehlert, for example, reacted to an argument being made on the floor:

And then we are told . . . “You know what? They’ll take advantage of this family leave legislation.” The “they” are the women of America who have a child . . . I say to those who make that point that they do not understand America’s women and why America’s women work. . . . Those who suggest that they will take advantage of this bill and stay home and treat it as if it is vacation time just do not get it.¹⁸⁶

The record reveals occasional references to men taking leave, or at least references to gender-neutral categories like “workers” or “parents” who need leave. Representative Gilman noted that H.R. 1

to accommodate breastfeeding and the resulting consequences, see generally Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER & SOC. POL’Y & L. 471 (2001); Lara Gardner, *A Step Toward True Equality in the Workplace: Requiring Employer Accommodation for Breastfeeding Women*, 17 WIS. WOMEN’S L.J. 259 (Fall 2002).

183. 139 CONG. REC. 2020 (1993).

184. *Id.* at 2021.

185. See Linda Greenhouse, *Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, at D3.

186. *Id.* at 1981.

“not only favors working mothers who must take time off from work for child bearing purposes, but all workers who must take leave in cases involving a birth, adoption, or a serious health condition of a close family member.”¹⁸⁷

Similar themes run through the floor debate during the Senate’s consideration of S. 5, a bill introduced a few weeks after H.R. 1 was introduced in the House,¹⁸⁸ as Senator Hatch warned of the “insidious discriminatory impact of this legislation.”¹⁸⁹ The bill, he predicted, “may lead to discrimination against younger women of childbearing age. They are the employees most likely to take advantage of this mandate and, as a result, some employers who have to watch costs will want to avoid hiring them, if possible.”¹⁹⁰

In both House and Senate debates, polls of employers about their likely response to leave legislation were frequently invoked.¹⁹¹ Opponents used a Gallup poll, showing that forty percent of employers would be less likely to hire women of childbearing age if a law mandating leave for them was enacted, to argue that the law would negatively impact women.¹⁹² Proponents relied on information provided by the Bureau of Labor Statistics showing that only thirty-seven percent of employers provided maternity leave (before enactment of the FMLA) and a mere eighteen percent provided paternity leave, to argue that women needed the law’s protection.¹⁹³

187. *Id.* at 1987; *see also id.* at 1995 (Rep. Waters) (“It will allow women and men to be able to give their full attention to a family crisis, or changes in their family such as the birth or adoption of a child, without having to worry about their job or their insurance.”).

188. Ultimately, it was the substance of S. 5 that became law. The Senate first passed S. 5, then took up consideration of H.R. 1, but voted to delete the text and replace it with the text from S. 5. The House then voted to approve the revised H.R. 1 and, with passage in both houses, it was then sent to the newly inaugurated President Clinton for signature. *See* ELVING, *supra* note 1, at 282–85.

189. *Id.* at 1713.

190. *See id.*

191. *Id.* at 2024 (statement of Representative Franks). Representative Franks states:

Not to mention the fact that employers have stated that, if this bill should pass, they may be less likely to hire young women in their childbearing years. It is impossible to measure the costs to our economy of the lost talent and productivity of these women who will not be given a chance, merely because they may choose at some point in the future, to start a family.

Id.

192. *Id.* at 1713 (statement of Sen. Hatch).

193. *See, e.g., id.* at 1691 (statement of Sen. Dodd).

Members also relied on the report of the U.S. General Accounting Office (GAO), which prepared a cost estimate of one of the early versions of the FMLA. That report noted, with respect to the provision permitting leave to care for newborn or newly adopted children, that “[u]npaid leave to care for new children is used almost exclusively by women.”¹⁹⁴ The GAO based this conclusion on studies of U.S. firms and companies in countries that mandate or provide parental leave for men and women.¹⁹⁵

The Congressional Record is replete with statements about paternity leave that show its misunderstood purpose. While no federal legislator raised the prospect of elk hunting during paternity leave—or other misuse of the leave time—there was an oft expressed concern about the utility of such leave. The report of the Committee on Education and Labor, Minority Views, for example, expressed disdain for a law that would allow an employee to be on leave for twelve weeks following a birth or adoption “even though an *able-bodied spouse* is at home to care for the child—whether the spouse was home on leave under this legislation from his or her place of employment or was simply unemployed.”¹⁹⁶ The phrase “able-bodied spouse” obviously refers to the mother, despite the Committee’s weak attempt to express a gender-neutral concern.

The media took their cues from Congress and the bill’s advocates. By the time the FMLA became law, equality was not part of its symbolic message. It became a victory for workers’ rights over the powerful business lobbies.¹⁹⁷ It was a victory for women only to the extent it permitted them time off to give birth to or adopt children without being fired. Personal testimonials by Senators Boxer and Feinstein about their experiences of being forced out of jobs after giving birth to their children were used to “personalize the plight of

194. 139 CONG. REC. 1730 (1993) (GAO Report).

195. See *id.*

196. H.R. REP. NO. 103-8, pt. 1, at 69–70 (1993) (emphasis added).

197. See, e.g., Susan Feeney, *Family Leave Approved, Ending 7-Year Stalemate*, DALLAS MORNING NEWS, Feb. 5, 1993, at 1A (noting that opponents gripe about the “undue burdens on small businesses”); Ellen Goodman, *Family Leave Victory: It’s Only the First Step*, BOSTON GLOBE, Feb. 7, 1993, at 73 (editorial) (describing the FMLA as “a landmark in changing attitudes about family and work”); Rebecca H. Patterson, *Family Leave: What’s It All About?*, ST. PETERSBURG TIMES, Feb. 5, 1993, at 1A (describing the FMLA as “a milestone for family and worker rights”).

working mothers,” and thus the importance of the FMLA to women.¹⁹⁸ But no one ever called the law a victory for equality.

IV. THE EFFECT OF THE FMLA ON LEAVE POLICIES AND LEAVE-TAKING: A MIRROR OF THE PAST

The FMLA established the Commission on Family and Medical Leave and gave it the responsibility for studying the impact of the legislation on both employers and employees.¹⁹⁹ The Commission has conducted two major sets of surveys, the first in 1995²⁰⁰ and the second in 2000,²⁰¹ to study the impact of the FMLA on both the rate and type of employee leave-taking and on employers.

According to these surveys, the FMLA had a significant effect on leave policies, but relatively little effect on leave-taking behavior. According to the 1995 survey, two-thirds of covered employers made some change to their leave policies because of the FMLA.²⁰² Most of the changes involved adding or enlarging the leave available for fathers, something required by the FMLA that only a minority of companies had voluntarily provided prior to its enactment.²⁰³ By 1995, nearly seventy percent of employers had made some change relating to paternal leave.²⁰⁴ Five years later, when the second surveys were conducted, the number of non-covered establishments offering unpaid leave for either parent to care for a newborn, for example, increased even further, from 83.8% to 93.8%.²⁰⁵ The FMLA induced

198. Glenn F. Bunting, *Leave Measure Hits Home for Feinstein, Boxer Politics*, L.A. TIMES, Feb. 5, 1993, at 3. The depiction of the bill in feminist terms came mostly in trite recaps, noting failures and successes in the “Year of the Woman,” which 1992 had been designated. See Mary Voboril, *1992: Year of Small Steps for Womankind*, OREGONIAN, Jan. 2, 1993, at A4 (noting Congress’s failure to reintroduce leave legislation in 1992 as reflective of Congress’s “little enthusiasm for most feminist issues”).

199. See 29 U.S.C. §§ 2631, 2632(1) (2000).

200. In 1995, the Commission on Leave commissioned two surveys: an employee survey and an establishment survey. See FAMILY AND MEDICAL LEAVE SURVEYS 2000, *supra* note 6, at 1-7. The results of both were presented, with other Commission findings, in COMM’N ON FAMILY & MED. LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES (1996) [hereinafter A WORKABLE BALANCE].

201. See FAMILY AND MEDICAL LEAVE SURVEYS 2000, *supra* note 6, at 1-4.

202. See A WORKABLE BALANCE, *supra* note 200, at 66-67.

203. See Waldfogel, *supra* note 123, at 14.

204. See FAMILY AND MEDICAL LEAVE SURVEYS 2000, *supra* note 6, at 1-9.

205. See *id.* at 5-9.

other common changes as employers adapted to the new mandates.²⁰⁶ Employers, for the most part, have reported that they were able to implement the leave policies required by the Act with minimal cost or administrative difficulty,²⁰⁷ and with “no noticeable effect” on productivity or profitability.²⁰⁸

The Department of Labor surveys may misrepresent the state of gender-neutrality in the provision of leave policies, however. Other surveys suggest some important differences in the length and type of leave provided that are not captured by the official surveys. For example, a 1998 survey by the Families and Work Institute Business Work-Life Study (BWLS) of over a thousand large employers²⁰⁹ shows that only sixteen percent of those surveyed provided more than twelve weeks paternity leave while thirty-three percent provided more than twelve weeks maternity leave.²¹⁰ In addition to length-of-leave variations, large employers in this survey were likely to differentiate between mothers and fathers in the provision of paid leave. At least some replacement pay was made available by fifty-three percent of respondents for maternity leave, but only thirteen percent made replacement pay available for paternity leave.²¹¹

The impact on leave-taking has also been studied. According to the Commission’s 2000 survey, 16.5% of all workers took leave for an FMLA reason,²¹² a leave-taking rate very similar to 1995.²¹³ An additional 3.5 million employees needed leave, but were unable to take it.²¹⁴ The most common reason for not taking leave despite

206. For example, sixty-six percent of employers extended the period of leave available to employees, and fifty-three percent began offering continued health insurance through the leave period. See A WORKABLE BALANCE, *supra* note 200, at 66–67.

207. See *id.* at 119.

208. See FAMILY AND MEDICAL LEAVE SURVEYS 2000, *supra* note 6, at 6–10.

209. See Families and Work Institute, 1998 Business Work-Life Study: Executive Summary I (1998), available at <http://www.familiesandwork.org/summary/worklife.pdf>. The survey examined employers with 100 or more employees, almost all of whom were covered by the FMLA. *Id.*

210. See *id.* at IV tbl.B.

211. See *id.* at IV tbl.C.

212. The 2000 survey defined “leave-taker” to include anyone who took leave for a reason covered by the FMLA, whether or not they were eligible or worked for a covered employer. See FAMILY AND MEDICAL LEAVE SURVEYS 2000, *supra* note 6, at 2-1 to 2-2.

213. See *id.* at ix.

214. See *id.* at 2-13 to 2-14. If you count only employees in covered worksites, the number of leave-needers drops to 2.9 million, and counting only eligible employees in those worksites,

needing it is the inability to afford it,²¹⁵ and 87.8% of employees with unmet leave needs responded that they would have taken leave if at least some of it had been paid.²¹⁶

Leave-taking patterns reflect that most leave-takers use it only once during an eighteen-month period (75.2%),²¹⁷ and very few take leave more than twice (10.2%).²¹⁸ Most leaves are short—more than half were for ten days or fewer, and fewer than ten percent lasted more than eight weeks.²¹⁹

Parenting obligations triggered a relatively small percentage of total leave taken. Only 7.9% of leave-takers used the time for a pregnancy-related disability, 18.5% used it to care for a newborn, newly adopted, or newly placed foster child, and 11.5% used it to care for an ill child.²²⁰ In contrast, more than fifty percent of leaves were taken because of an employee's own health.²²¹ Maternity-disability situations tended to produce the longest leaves, and one-fourth of such leaves last longer than the twelve weeks allotted by the FMLA.²²²

A majority of leave-takers are female, and employees between ages twenty-five and thirty-four use more than both younger and older employees.²²³ Leave-takers are also more likely to be married and have children in the household relative to both the general employee population and non-leave takers.²²⁴

The statistics about leave-taking by gender show a predictable pattern. Of female employees with young children, 75.8% took at

the number drops further to 2.4 million.

215. *See id.* at 2-16 (finding 77.6% of leave-needers listed "ability to afford" as one of the reasons for not taking leave).

216. *See id.* at 2-17.

217. *See id.* at 2-3.

218. *See id.*

219. *See id.* (reporting 9.2% of leave-takers used between forty-one and sixty days of leave, and 9.9% took a leave lasting sixty-one days or more). For employees who took more than one leave during the survey period, the shorter of the two was typically very short, between one and three days long in nearly forty-three percent of the cases. Fewer than ten percent of second leaves lasted more than twenty days. *See id.* at 2-4.

220. *See id.* at 2-5.

221. *Id.*

222. *See id.* at 2-7.

223. *See id.* at 2-8.

224. *See id.*

least one leave, and a negligible number said they needed but did not take leave.²²⁵ This is consistent with pre-FMLA data showing that women take leave to have children even if they do not have a guaranteed job to return to. Leave for women was split relatively evenly between "maternity-disability" and "new child care."²²⁶ Of all female leave-takers, 13.6% took a maternity-disability leave and 15.3% took a newborn care leave.²²⁷ Of all female employees, 5.7% took a leave for either maternity or newborn care.²²⁸

In contrast, fewer than half of similarly situated male employees (45.1%) took any leave, and 3.8% reported needing leave but not taking it.²²⁹ As a percentage of all employees with young children, 34.1% of men took leave to care for a newborn or newly adopted child, while 68.2% of women took leave either classified as maternity-disability or newborn care during the same period.²³⁰ Twenty-two percent of male leave-takers took leave to care for a newborn or newly adopted child.²³¹ Of all male employees, 3.1% took a leave for that purpose, slightly more than half of the percentage of female employees taking such leave.

These numbers, which appear to reflect relatively small gender differences, likely mask a greater disparity. The 1995 and 2000 surveys have two significant gaps that make it difficult to assess the FMLA's impact on paternal leave-taking. First, they fail to break down data on length of leave by gender.²³² For example, the 2000 survey reports that of FMLA leaves taken for newborn care, more than half lasted fewer than ten days.²³³ But the survey does not differentiate by length between the newborn caretaking leaves taken by men and women. Pre-FMLA data suggests that women tend to

225. *See id.* at 4-15 to 4-16.

226. *Id.* at 4-17. It is likely that the line between these two categories is imprecise because a woman taking leave for childbirth is likely to characterize her entire leave as maternity-disability, though technically it should be reclassified as caretaking leave after six to eight weeks.

227. *See id.* at A-2-5.

228. *See id.* at A-2-14.

229. *See id.* at 4-15.

230. *See id.* at 4-17.

231. *See id.* at A-2-5.

232. The survey does break down the length of leave by the type of leave permitted by the FMLA. *See id.* at A-2-2.

233. *See id.*

take relatively long leaves²³⁴ while men take negligible ones.²³⁵ The FMLA Commission surveys do not show whether the FMLA has changed that pattern. What little data there is on post-FMLA paternal leaves suggests that they remain extremely short, a few days rather than a few weeks or months.²³⁶

Second, the 2000 survey does not make clear how many women's leaves begin with childbirth. It may be that the length of childbirth leaves (all longer than ten days, many longer than sixty days) indicates that some female-only parenting leave is being subsumed into that category, and thus the relatively equal number of male and female employees taking newborn care leave may be misleading.²³⁷

While better data would certainly be helpful, there is nothing in the official reports or elsewhere to suggest that the FMLA has been transformative for paternal leave-taking,²³⁸ although it has caused a significant number of employers to formally allow men to take paternity leave.

V. SOME LESSONS FROM ANTI-SUBORDINATION THEORY: A REFOCUSED VISION OF THE FMLA

The FMLA was pushed as a complement to the protections already available to pregnant women and working parents. By the time the FMLA was enacted, more than thirty states had mandatory leave laws,²³⁹ and employees working for employers with at least

234. See *supra* text accompanying note 97.

235. See *supra* text accompanying note 100. See also Joseph H. Pleck, *Are "Family-Supportive" Employer Policies Relevant to Men*, in *MEN, WORK, AND FAMILY* 226 (Jane C. Hood ed., 1993) (describing a 1984 study that included 119 companies offering paternity leave and found that of the nine companies reporting actual employee use of the policy, most show only one father taking leave). A 1990 recruiting firm study reported a one percent use of paternity leave. Pleck, *supra*.

236. See, e.g., Children's Defense Fund—Minnesota, *supra* note 103, at 3 (reporting data on length of paternity leaves).

237. FAMILY AND MEDICAL LEAVE SURVEYS 2000, *supra* note 6, at A-2-2.

238. See Rhode, *supra* note 81, at 841-42 (estimating fifteen percent of men to be paternity leave-takers); Selmi, *supra* note 102, at 756 (stating that "few men avail themselves of family leave"); see also Keith Cunningham, Note, *Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family*, 967, 976 (2001) (blaming the lack of fathers taking paternity leave on the loss of income they suffer during leave).

239. These laws took a variety of forms. Some mandated leave only for pregnancy; others were more similar to the FMLA. For a discussion of the laws in existence immediately prior to

fifteen employees also had the protection of the Pregnancy Discrimination Act.²⁴⁰

After the Supreme Court's 1987 decision in *California Federal Savings & Loan Association v. Guerra*, women had been granted formal equality for pregnancy-related disabilities. That is, employers could not treat them any worse than comparably disabled employees.²⁴¹ The Court also held that employers could treat them better than comparably disabled employees.²⁴² *Guerra* endorsed incremental progress: permitting employers (or states mandating leave) to accommodate motherhood even if they could not, or were not inclined to, accommodate other disabilities.²⁴³ It thus opened the door for a substantive equality approach to pregnancy by encouraging, though not requiring, employers to provide special accommodations for pregnancy. But even if all employers took up the Court's offer, the PDA could offer nothing beyond the accommodation of "childbirth, or related medical conditions."²⁴⁴ *Guerra* made clear that accommodations must correspond to the actual period of disability.²⁴⁵

Under the PDA, as interpreted by both the EEOC²⁴⁶ and the Supreme Court,²⁴⁷ employers are not allowed to provide parenting or caretaking leave unless they do so on gender-neutral terms.²⁴⁸ The disincentives for employers to voluntarily provide such broad-based leave are obvious.

The gender-neutral FMLA should have improved upon the PDA's groundwork with its mandate that at least minimal leave be offered. Immediately, it cures two limitations of the PDA for covered

passage of the FMLA, see Ross, *supra* note 82, at 98–106.

240. See Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2000)).

241. Katharine T. Bartlett, *Gender Law*, 1 DUKE J. GENDER L. & POL'Y 1, 2–3 (1994) (describing tenets of formal equality).

242. *Guerra*, 479 U.S. at 290–91.

243. See *id.*

244. 42 U.S.C. § 2000e(k) (2000).

245. See 479 U.S. at 290.

246. See 29 C.F.R. § 1604.10 (2003).

247. See *Guerra*, 479 U.S. at 290.

248. Providing different length parenting leave to men and women, unrelated to childbirth, would clearly violate Title VII's ban on sex-based employment practices.

employees.²⁴⁹ First, it deprives covered employers of the right to provide *no leave* for disability related to pregnancy or childbirth. This forced accommodation of motherhood provides job security to women who may have lacked it under their employers' policies. Second, it mandates that employers provide *parenting* leave regardless of whether the employee suffers a related disability. For biological mothers, the FMLA guarantees four to six weeks of leave in addition to the usual period of childbirth-related disability.²⁵⁰ For adoptive mothers and both biological and adoptive fathers, the Act mandates the availability of the same total amount of leave, even without the underlying disability—twelve weeks for a newly born or newly adopted child.²⁵¹ The Act thus forces some accommodation of parenthood, too, and provides job security for those who elect to take advantage of it.

However, these cures are not enough, and a brief discussion of theories of equality reveals why. The FMLA combines principles of formal and substantive equality. It serves principles of formal equality, which mandates equal treatment for equals,²⁵² by providing men and women the opportunity to take caregiving leave on equal terms. There is no biological reason why parenting—a distinct function from giving birth—ought to be predominantly performed by mothers,²⁵³ and thus no justifiable basis exists for employers to provide parenting leave to mothers and fathers on unequal terms. Insisting on formal equality with respect to caretaking leave is an extension of conventional liberal theory, which emphasizes “the similarities between men and women and the desirability of same-treatment solutions to legal problems.”²⁵⁴ This theory of equality reflects the desire to have “both women and men be free to make

249. The PDA was technically an amendment to Title VII and thus applies to any employer subject to Title VII—those with at least fifteen employees. See 42 U.S.C. § 2000e(b) (2000). The FMLA applies to much larger employers. See *supra* note 8.

250. See *supra* notes 6, 88.

251. This holds true except when married couples work for the same employer. In those cases, the twelve weeks must be shared between the spouses. See 29 U.S.C. § 2612(f) (2000). Because the biological mother will need six to eight weeks of leave for maternity disability, she will use up most, if not all, of that allotment herself.

252. See, e.g., Bartlett, *supra* note 241, at 2–3.

253. See *supra* notes 78–81 and accompanying text.

254. Bartlett, *supra* note 241, at 2.

their own choices, unconstrained by artificial barriers and prohibitions.²⁵⁵

The FMLA also embraces a substantive theory of equality—one that focuses on equal opportunity or outcomes—by imposing a minimum standard of leave. This ensures that women covered by the Act are given the same opportunity to reproduce and return to the same job, a perk most men already enjoy.²⁵⁶

Despite this focus, governmentally-imposed obstacles comprise only part of the story, and being able to have a baby without being fired is only part of the bundle of rights men have always enjoyed. Leave-taking data both before and after the FMLA was enacted shows that even after removal of the state barriers to equality obstacles and even after imposition of statutory guarantees of job security, inequality persists. Women continue to assume disproportionate responsibilities with respect to family caregiving and employers continue to prefer men as employees.

Gender neutrality does not guarantee equality. Although the mandate of gender-neutral leave does not explicitly reinforce stereotypes that only women do or should take leave to fulfill caregiving obligations, the FMLA does nothing to change those beliefs or the caretaking and leave-taking patterns that flow from them. The gender neutrality of the FMLA becomes simply a constitutional shield, to ward off attacks like the one launched, ultimately unsuccessfully, in *Hibbs*.

Under modern equal protection principles, Congress could not constitutionally mandate *parenting* leave—as distinguished from *pregnancy* or *childbirth* leave—only for women.²⁵⁷ To the extent employers provide leave for a childbirth-related disability, men, as a class, have no claim to the same right under conventional principles

255. *Id.*

256. See Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 22–31 (1985) (arguing that pregnant women should be assured “equality of opportunity to the same extent as that available to males who have engaged in reproductive conduct”); see also Linda Krieger & Patricia Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE L. REV. 513, 542 (1983) (urging courts to focus on “the effect of the very *real* sex difference of pregnancy on the relative positions of men and women in society and on the goal of assuring equality of opportunity and effect within a heterogeneous ‘society of equals’”).

257. See *supra* text accompanying notes 43–48.

of formal equality.²⁵⁸ But to the extent available leave exceeds the usual or actual period of disability associated with pregnancy or childbirth, it constitutes parenting leave, to which men do have an equal right. The Court's opinion in *Guerra*, as well as other Title VII cases, make this abundantly clear. Thus, if an employer provides parenting leave to women, it must also provide it to men.

Likewise, if the government mandates the provision of parenting or caretaking leave to women, it must mandate identical leave for men. But the constitutionality of a mandated leave law turns on its actual provisions, not the leave-taking patterns of private parties it induces. Congress's statements of purpose are consistent with Equal Protection Principles,²⁵⁹ and certainly do not reflect the kind of invidious purpose necessary to invalidate a gender-neutral law.²⁶⁰

Gender neutrality was also important to the FMLA's survival of the Eleventh Amendment challenge in *Hibbs*.²⁶¹ In *Hibbs*, the Court embraced the Statute as an appropriate federally mandated remedy for a history of state-sponsored discrimination against women that both hindered their efforts to be workers and promoted their tendencies as primary caretakers.²⁶² And yet the law, as actually utilized, does nothing of the sort.

The Supreme Court's attribution of this vision to the FMLA is a prime example of why constitutional gender equality and true equality are not necessarily the same thing. In the Court's understanding, the long history of state-sponsored discrimination against women in employment was *the* obstacle to both workplace and parenting equality.²⁶³ It thus lauded Congress's attempt not only

258. See *Geduldig v. Aiello*, 417 U.S. 484 (1974).

259. See 29 U.S.C. § 2601(b)(5) (2000) (stating a purpose of the Act: "to promote the goal of equal employment opportunity for women and men, pursuant to [the Equal Protection Clause]"); § 2601(b)(4) (2000) (stating another purpose: "to accomplish [the Act's other purposes] in a manner that, consistent with the Equal Protection Clause . . . , minimizes the potential for employment discrimination on the basis of sex").

260. A gender-neutral law can be challenged using equal protection principles if it has the purpose and effect of discriminating on the basis of sex. See *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 276–78 (1979). One would be hard pressed to prove that the FMLA was enacted *in order to* ensure that men do not take leave, even though it failed to take account of the data showing most of them would not.

261. See *supra* text accompanying notes 72–75.

262. See *Hibbs*, 123 S. Ct. at 1979.

263. See *id.* at 1979 n.5.

to remove those obstacles, but also to compensate for the damages they had caused. Applying a classic liberal approach to equality, the Court envisioned a world in which equal leave availability would translate to equal leave taking, equal parenting, and equal valuation of male and female workers.²⁶⁴ Yet all available data before Congress suggested this would not happen. Men, then and now, rarely take leave from work in order to care for children or other family members.²⁶⁵

Consider a less conventional approach to equality: anti-subordination theory. This theory of equality advocated most strongly by Catharine MacKinnon,²⁶⁶ may be useful in understanding the limitations of the FMLA from the perspective of inequality. She criticizes more conventional approaches to equality for leaving out “the social institutionalization of practices through which women are violated, abused, exploited, and patronized by men *socially*—in collaboration with the state, but not only or even primarily by the state as such.”²⁶⁷ It is these practices—overlooked by “main line” theories of equality that foster inequality and perpetuate the subordination of women. Unshared parenting—and the laws that allow or even encourage it to persist—must be put to the anti-subordination test.

Reevaluated with anti-subordination principles in mind, the FMLA’s limitations become obvious. As argued by Susan Deller Ross before its enactment, the FMLA does:

[S]et the stage for a more complete integration of fathers at home by allowing them substantial time off to care for [ill family members] as well as for newborns. And by giving fathers the right to do so, it takes pressure off mothers to be

264. See *id.* at 1982–83.

265. They do, it turns out, take a lot of sick leave: Of men who took FMLA leave for some purpose, 57.6% of them took it because of their own serious illness rather than for caregiving purposes. See FAMILY AND MEDICAL LEAVE SURVEYS 2000, *supra* note 6, at A-2-5. The comparable statistic for women is 48.6%, which does not include leave classified as maternity-disability. See *id.*

266. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987) (articulating anti-subordination theory); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); see also Catherine A. MacKinnon, *Unthinking ERA Thinking*, 54 U. CHI. L. REV. 759 (1987) (reviewing JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* (1986)).

267. MacKinnon, *Unthinking ERA Thinking*, *supra* note 266, at 765.

Super Mom and do all these tasks, thus setting the stage for women to be more completely integrated into the workforce.²⁶⁸

The FMLA sets the stage but does not induce the actors to actually perform. To the contrary, the Act was passed despite a virtual certainty that it would *not* have any significant effect on paternal leave-taking.

The subordinating practice is the intersection of unshared parenting and employment discrimination that occurs because of it. The FMLA fails to combat this subordination, and indeed masks its existence with the veil of neutrality. A better FMLA would want more than to provide job security for women as they continued not only to give birth to children (a biological imperative) but also to provide primary care. It would have as a goal the forced accommodation of motherhood *and* the simultaneous elimination of the incentives employers have to discriminate against female employees. Providing fathers with the formal opportunity to take parenting leave—in a society in which social, cultural, and economic forces make it unlikely he will do so—is not enough.

A law consistent with the anti-subordination approach to equality would understand that it is not enough to mandate equal provision of leave: Men must be affirmatively pressed into service. At a minimum, the law should make paternity leave more enticing. There has been some effort by employers to provide paid leaves to both mothers and fathers. A FWI study reports that thirteen percent of companies with at least 100 employees provide some paid leave for new fathers.²⁶⁹ Paid leave programs seem to be used at a much greater rate than unpaid ones. One large firm reports that as many as fifty percent of new fathers employed there take advantage of paid paternity leave.²⁷⁰ Other researchers have noted a “long-term trend . . . toward more firms offering paid paternity leave—and more workers taking advantage of it.”²⁷¹

268. Ross, *supra* note 82, at 104.

269. See Lewis, *supra* note 107, at 1 (describing the study and noting a “general societal shift” toward men wanting involvement with their newborn children).

270. See *id.* (describing the paternity leave policy and leave-taking patterns at KPMG, LLP).

271. Kane, *supra* note 105 (quoting James Levine, director of New York’s Fatherhood

But, as with all problems of culturally entrenched difference, individual incentives cannot solve the problem. Institutional culture is central to the reluctance of male employees to avail themselves of offered leave, and culture in a broader sense is central to their lack of desire to participate in childrearing. The FMLA might attack the problem of institutional culture first by giving organizations incentives, as Professor Michael Selmi has suggested, for successfully encouraging men to take parental leaves.²⁷² Without any inducement for equal parenthood, the FMLA's contribution to sex equality is necessarily constrained.

CONCLUSION

That the FMLA does not seem to have the effect of inducing paternal leave-taking does not, of course, mean that *Hibbs* was wrongly decided or that the Act is an unconstitutional attempt to abrogate state sovereign immunity. It simply means Congress did not go far enough. Within constitutional limits, it could have acted—or could now act—to remedy the same problem, the documentation of which now has the Supreme Court's stamp of approval as a bona fide history of unconstitutional sex discrimination. Congress now has license to redouble its efforts to fulfill the Court's vision of equality.

The lesson from *Hibbs* is that Congress can prohibit constitutional conduct to prevent and deter unconstitutional conduct. Requiring employers to offer unpaid leave responded to a state-sponsored history of discrimination—maybe too congruently and too proportionally. Congress could have cut a broader swath around the unconstitutional core in order to make a meaningful dent in the ongoing patterns of discrimination against mothers who work.

Requiring paid leave is one obvious solution that would undoubtedly have a non-negligible impact on paternal leave-taking. If leave is paid, many of the disincentives for men disappear. Other, more creative solutions may have to be considered as well. But

Project at the Families and Work Institute).

272. See Selmi, *supra* note 102, at 775–76. He has also suggested forcing new fathers to take leave—involuntarily if necessary, though he recognizes the political obstacles to such a proposal. *Id.* at 773–75.

Congress's concern with motherhood—despite the veil of neutrality—inhibited meaningful attention to the issue of equality for working mothers. So for now, women protected by the FMLA have gained job security without equality.

