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A Victory for Families, But Hardly a Panacea: The Supreme Court Holds That the Family and Medical Leave Act Applies to States

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Last week, in [Hibbs v. Department of Human Resources](#), the Supreme Court handed down a decision upholding the Family and Medical Leave Act (FMLA) as constitutional when applied to states. Among other things, that means that sufficiently large employers must grant twelve weeks of unpaid maternity and paternity leave.

The decision is important, and ironic, for several reasons. For one thing, surprisingly, it was a pro-federal power decision authored by Chief Justice Rehnquist - who is much better known for upholding states' rights against the exercise of federal power. For another thing, from a civil rights perspective, the decision may offer little tangible benefit, and even take away more than it gives.

First, the practical import of the victory is likely to be small, for reasons I will explain below. Second, at the same time that Rehnquist's majority opinion validates the FMLA's exercise of federal power, the decision cements the Court's recent efforts to hamstring Congress in other ways.

For instance, the decision reiterates that Congress cannot define the substantive equality guarantees of the Fourteenth Amendment. In addition, it operates under the assumption that Congress cannot enact substantive entitlements pursuant to its powers under Section 5 of the Fourteenth Amendment.

The Court's conservative block had laid the groundwork for this in recent cases involving Eleventh Amendment challenges to other federal civil rights statutes intended to apply to the states (which the Court did not ultimately allow). *Hibbs* gave Justice Rehnquist the opportunity to reinforce and apply that precedent while, at the same time, appearing to promote civil rights.

Thus, while approving this relatively narrow civil rights law, the Court preserved its ability to strike down other, broader acts, at least to the extent they are applied to the states.

The FMLA, the Eleventh Amendment, and the Supreme Court's Bottom Line

The FMLA - a federal statute enacted in 1993 - requires employers with more than 50 employees to give employees twelve weeks of unpaid leave when that leave is necessitated by an employee's serious illness, by birth or adoption of a child, or by the serious illness of a close family member.

At the end of the leave period, the employee must be reinstated. If the employer does not comply, the employee may be able to sue for damages. Thus, in the *Hibbs* case itself, William Hibbs invoked the FMLA to sue his employer - the State of Nevada - for allegedly refusing to reinstate him after he took time off to care for his sick wife.

The State of Nevada argued that the Eleventh Amendment meant Hibbs's suit had to be dismissed. That Amendment prohibits Congress from making states amenable to suits for money damages, unless it both has the power to abrogate their sovereign immunity, and clearly does so.

"Sovereign immunity" is a concept imported to America from English law, in which the King could not be sued. In the U.S., however, the "sovereigns" are the People, and the question is whether the governments that represent them can be sued. The Court has held that sovereign immunity is the default rule - meaning that states have it until Congress can and does take it away.

In *Hibbs*, the Court said that Congress could, and did. That is, it held that, when it came to the FMLA, Congress both had the power to abrogate states' sovereign immunity and unmistakably did so. Now that these issues have been resolved in Hibbs's favor, the case can proceed forward in the court below.

The Basis Congress Claimed For Abrogating Sovereign Immunity

It was quite obvious, in the *Hibbs* case, that Congress was unmistakably trying to take away states' sovereign immunity with respect to FMLA claims and to allow them to be sued. After all, a provision of the FMLA states specifically that states and their subdivisions are bound by it.

That left only one question: Did Congress have the power to do what it was trying to do? To determine that answer to this question, in accord with its prior precedents, the Court looked to the Constitutional provision that was the source for Congress's power to enact the FMLA.

In this case, it didn't have to look far. The legislative history of the FMLA contains plain statements that Congress was drawing on its power under [Section 5 of the Fourteenth Amendment](#), as well as its power under the Commerce Clause.

Section 5 authorizes Congress to "enforce" the Constitution's guarantee of equal protection with "appropriate legislation." This provision, the Court has held in the past, gives Congress the authority to abrogate Eleventh Amendment immunity, provided it exercises that power in an appropriate way. (In contrast, the Court has refused to allow Congress to abrogate immunity when it acts pursuant to the Commerce Clause or the Spending Clause.)

The Court's Holding that Congress Was, Indeed, Exercising Section 5 Power

That leads to another question: Congress said it was acting under Section 5, but was its action valid?

The Court has said that Section 5 allows Congress to enact statutes prohibiting unconstitutional behavior by the states. But in this case, the Constitution did not guarantee twelve weeks' leave in particular, as the FMLA does, so simply denying that period of leave was not inherently unconstitutional. In addition, it might not be unconstitutional for a workplace to give greater maternity leave than paternity leave, since mothers are still recovering from pregnancy, and fathers, obviously, are not. But the FMLA gives both sexes twelve weeks equally.

Fortunately for Hibbs, however, the Court had also said that Section 5 empowers Congress to enact statutes that prohibit constitutional behavior - such as, here, denying twelve weeks of leave - to the extent necessary to prevent and deter unconstitutional conduct.

To do so, however, Congress must both act based on a history of constitutional violations, and design a remedy that is both proportional and congruent to the identified injury. Put simply, Congress must be acting to remedy actual, past constitutional violations by the states.

In *Hibbs*, the Court both found the required constitutional violations, and approved Congress's remedy for them.

Specifically, the *Hibbs* opinion found that states had long committed acts of sex discrimination against female employees, often based on the "pervasive sex-role stereotype that caring for family members is women's work." In addition, it found that the FMLA was enacted to promote sex equality by responding to that discrimination.

A History of Sex Discrimination When It Comes to Working Women

The Supreme Court's solicitude, in *Hibbs*, for Congress' findings regarding the history of state-sponsored sex discrimination is heartening. As the Court recognized, there was copious evidence to support these findings.

For the better part of the Twentieth Century, states enacted and maintained laws designed to limit the rights of working women. Illinois refused to permit women to act as lawyers. Michigan refused to allow women to tend bar. Oregon limited the number of hours women could do wage-earning work. Florida encouraged women to avoid jury service on the theory that it would interfere with their duties as mothers.

Repeatedly, when women tried to seek relief from the U.S. Supreme Court, it turned them away - making the Court's own recognition of this discrimination all the more significant as an implicit repudiation of past Court mistakes.

Even today, Congress found evidence that states continue to rely on outmoded gender stereotypes in the workplace. And these stereotypes were particularly strong with respect to the administration of caregiving and parental leave.

States, the record showed, like private sector employers, tend to offer maternity leave but not paternity leave. Or even worse, they offered no leave at all.

Either way, they furthered the stereotype of women as primary responsible for family caregiving needs, parental or otherwise. Denying paternity leave but allowing maternity leave (beyond any actual period of disability associated with childbirth) assumes that men are not interested in child care, and places the whole burden on women. Meanwhile, offering no leave at all tends to force women to quit in order to become full- or part-time caretakers. In either case, women become less attractive to employers because they are likely to cost more, and stay for less time.

Currently, the Supreme Court applies a "heightened scrutiny" standard for gender-based classifications. Under that standard, these state-enacted laws and state-administered policies, like their predecessors from earlier in the century, would be struck down as violations of the Equal Protection Clause.

Accordingly, this evidence solidly established a history (past and present) of unconstitutional, discriminatory policies. This was the history that Congress relied on in enacting the FMLA. Given this history, and the limited scope of Congress' response to it, the Court concluded that the FMLA--as a remedy for constitutional injury--was both congruent and proportional.

The FMLA entitles both mothers and fathers to leave for caregiving, on the same terms. In so doing, it should eliminate any disincentive for employers to hire women. In addition, it should encourage fathers to become more involved in caregiving. More broadly, through these measures, the FMLA seeks to promote equality between women and men as workers, and between women and men as parents.

By equalizing leave for both sexes, the Court said, it "attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving." In addition, it targets the "fault line between work and family," where "sex-based generalization has been and remains strongest."

The FMLA's Reality: Men Don't Take Leave

While it is a victory for sex equality that the FMLA was upheld, it is a relatively small victory, in practical terms, for the FMLA is limited in several ways.

First, the FMLA's 50-employee threshold excludes almost half of the American workforce. Second, the FMLA guarantees only unpaid leave, which most workers cannot afford to take. The same workers who cannot afford to hire a caregiver, also cannot afford to take unpaid leave: For them, quitting may still seem like the only option.

But what about those employees who do work for big companies, and can afford to take leave - such as women executives striving both to break "glass ceilings" and to have children too? Isn't the FMLA great for them?

No. Unfortunately, the FMLA also often leaves such women out in the cold, for it expressly excludes high-ranking employees and officers. So it won't be breaking any glass ceilings any time soon.

Meanwhile, in reality, men, by and large, don't take FMLA leave - or any other type of leave - for purposes of caring for a child or sick family member. And that means the FMLA can't really accomplish its honorable goals. The idea of the FMLA is that when men and women both are allowed to take equal caretaking leaves, they will remain equally (un)attractive as employees, and equally likely to be caregivers.

Why don't men take leave? The answer is cultural and financial. Men often make more than their female partners - a reality that itself is largely the product of sex discrimination. As a result, taking unpaid leave costs them more.

Meanwhile, traditionally, men have not been involved in caregiving. They feel pressure, reinforced by widely held sex stereotypes, both to maximize their career opportunities and dissociate themselves from family-centered work.

In addition, they fear retaliation from employers for availing themselves of leave offered. Women often have little choice but to take at least some maternity leave and their doing so fits sex stereotypes. In contrast, men can opt not to take paternity leave, and they defy sex stereotypes by taking it. Men thus reasonably may have a greater fear than women that their employer may hold their taking leave against them, or simply be less accustomed to experiencing consequences at work flowing from parenthood.

These disincentives appear powerful. The numbers are so stark--almost no men take leave, even if it is available, and those that do average a leave of 5 days--that Professor Mike Selmi has even suggested that the FMLA ought to be amended to make leave mandatory for both men and women.

Alternatively, other reforms - such as subsidizing FMLA leave through unemployment insurance - might induce higher-earning men to take leave. In addition, such reforms may also enable more women to take advantage of the leave period despite financial constraints.

The FMLA's goals are laudable. But for real advances in sex equality, we need to look beyond the FMLA. Despite the FMLA, caregiving responsibilities still rest predominantly with women, largely as a result of past and current sex discrimination and stereotypes.

Truly effective legislation will actually redistribute those responsibilities more equally, as the FMLA, in the overwhelming majority of cases, has not. (At most, it has made it easier for women to bear the same burdens.) Only when such legislation is enacted, will women stand a chance at achieving equal status as wage-earners.

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