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Supplementary Material

Chapter 11: The Contemporary Era—Equality/Gender

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003)

William Hibbs was an employee of the Nevada Department of Human Services who took a leave of absence to care for his sick spouse. The Family and Medical Leave Act (FMLA) permitted Hibbs to take a leave of absence to care for ill relatives, but Hibbs and his state employer disagreed about the leave time employees were entitled to under the FMLA. When the Department notified Hibbs that he had used all his approved FMLA time, Hibbs did not return to work and was fired. Hibbs filed suit in federal district court seeking reinstatement to his position in the Department of Human Services and monetary damages. The district court dismissed the suit, finding that Congress could not constitutionally authorize suits against the states for monetary damages. On appeal, the Ninth Circuit reversed, in an opinion written by Judge Stephen Reinhardt, a liberal Carter appointee, joined by two Clinton appointees. The Nevada Department of Human Resources appealed to the Supreme Court of the United States.

The Family and Medical Leave Act (FMLA) of 1993 passed during the brief period of unified Democratic government during the first two years of the Clinton administration. The statute provided a significant and a much desired entitlement to a prized constituency assiduously courted by Clinton and Democrats in the 1990s, middle-class women. The bill authorized eligible employees to take twelve weeks of unpaid leave in a twelve month period to attend to family health issues or twenty-six weeks during one year for particularly pressing family health issues. FMLA put no pressure on the federal budget because the cost of this entitlement was borne by employers. Nevertheless, the statute ran against the deregulatory grain of the Republican Party and amounted to another "unfunded federal mandate" that became a target of the 1994 Republican Contract with America. Even had the Republicans been so inclined, however, the FMLA was far too popular to repeal.

The FMLA made no exception for employees of state and local governments, and the legislation allowed employees to sue their employers for monetary damages if they failed to comply with the terms of the act. Under the Court's existing doctrine, Congress had no difficulty reaching the states as employers under the interstate commerce clause. The Rehnquist's Court's recent rulings, however, had established that Congress could not authorize lawsuits against the states for monetary awards under the commerce clause To authorize such suits, Congress had to rely on Section Five of the Fourteenth Amendment. Doing so required demonstrating that the FMLA either remedied or prevented constitutional violations in the states.

The Supreme Court upheld the FMLA on a 6–3 vote. Chief Justice Rehnquist's majority opinion held that the congressional finding that states often relied on gender stereotypes in employment contexts justified a federal law ensuring that both men and women were eligible for family leave. Why did the Chief Justice believe his opinion was consistent with such cases as United States v. Morrison*, where a judicial majority rejected the use of Section Five powers? Why did the dissent disagree? Who had the better of the argument?*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The Family and Medical Leave Act of 1993 (FMLA or Act) entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a "serious health condition" in an employee's spouse, child, or parent. . . . We hold that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act.

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For over a century now, we have made clear that the Constitution does not provide for federal

jurisdiction over suits against nonconsenting States. . . .

Congress may, however, abrogate such immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment. . . . The clarity of Congress' intent here is not fairly debatable. . . .

In enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under § 5 of the Fourteenth Amendment to enforce that Amendment's guarantees. Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce. . . . Congress may, however, abrogate States' sovereign immunity through a valid exercise of its § 5 power, for "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment."

. . . Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. "'Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'" . . . In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.

City of Boerne v. Flores (1997) also confirmed, however, that it falls to this Court, not Congress, to define the substance of constitutional guarantees. . . . Valid § 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." . . .

The FMLA aims to protect the right to be free from gender-based discrimination in the workplace. We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny. . . . For a gender-based classification to withstand such scrutiny, it must "serve important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives."

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. . . According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States' gender discrimination in this area. . . . The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; . . . the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation.

As the FMLA's legislative record reflects, a 1990 Bureau of Labor Statistics (BLS) survey stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies. . . .

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Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. It was aware of the "serious problems with the discretionary nature of family leave," because when "the authority to grant leave and to arrange the length of that leave rests with individual supervisors," it leaves "employees open to discretionary and possibly unequal treatment." . . . Testimony supported that conclusion, explaining that "the lack of uniform parental and medical leave policies in the work place has created an environment where [sex] discrimination is rampant." . . .

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We reached the opposite conclusion in *Board of Trustees v. Garrett* (2001) and *Kimel v. Florida Board of Regents* (2000). In those cases, the § 5 legislation under review responded to a purported tendency of state officials to make age- or disability-based distinctions. Under our equal protection case law, discrimination on the basis of such characteristics is not judged under a heightened review standard, and passes muster if there is "a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." . . .

By creating an across-the-board, routine employment benefit for all eligible employees, Congress

sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.

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. . . [A]statute mirroring Title VII, that simply mandated gender equality in the administration of leave benefits, would not have achieved Congress' remedial object. Such a law would allow States to provide for no family leave at all. Where "two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women," . . . and state practices continue to reinforce the stereotype of women as caregivers, such a policy would exclude far more women than men from the workplace.

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JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

. . . I join the Court's opinion here without conceding the dissenting positions just cited or the dissenting views expressed in *Seminole Tribe of Fla. v. Florida* (1996). . . .

JUSTICE STEVENS, concurring.

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As long as it clearly expresses its intent, Congress may abrogate that common-law defense pursuant to its power to regulate commerce "among the several States." . . .

JUSTICE SCALIA, dissenting.

The constitutional violation that is a prerequisite to "prophylactic" congressional action to "enforce" the Fourteenth Amendment is a violation *by the State against which the enforcement action is taken.* There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States. . . .

Today's opinion for the Court does not even attempt to demonstrate that each one of the 50 States . . . was in violation of the Fourteenth Amendment. . . .

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JUSTICE KENNEDY, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

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The Court is unable to show that States have engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits. The inability to adduce evidence of alleged discrimination, coupled with the inescapable fact that the federal scheme is not a remedy but a benefit program, demonstrate the lack of the requisite link between any problem Congress has identified and the program it mandated.

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The relevant question, as the Court seems to acknowledge, is whether, notwithstanding the passage of Title VII and similar state legislation, the States continued to engage in widespread discrimination on the basis of gender in the provision of family leave benefits. . . . If such a pattern were

shown, the Eleventh Amendment would not bar Congress from devising a congruent and proportional remedy. The evidence to substantiate this charge must be far more specific, however, than a simple recitation of a general history of employment discrimination against women. When the federal statute seeks to abrogate state sovereign immunity, the Court should be more careful to insist on adherence to the analytic requirements set forth in its own precedents. Persisting overall effects of gender-based discrimination at the workplace must not be ignored; but simply noting the problem is not a substitute for evidence which identifies some real discrimination the family leave rules are designed to prevent.

As the Court seems to recognize, the evidence considered by Congress concerned discriminatory practices of the private sector, not those of state employers. . . .

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The Court's reliance on evidence suggesting States provided men and women with the parenting leave of different length . . . [is flawed]. This evidence concerns the Act's grant of parenting leave . . . and is too attenuated to justify the family leave provision. The Court of Appeals' conclusion to the contrary was based on an assertion that "if states discriminate along gender lines regarding the one kind of leave, then they are likely to do so regarding the other." . . . The charge that a State has engaged in a pattern of unconstitutional discrimination against its citizens is a most serious one. It must be supported by more than conjecture.

The Court maintains the evidence pertaining to the parenting leave is relevant because both parenting and family leave provisions respond to "the same gender stereotype: that women's family duties trump those of the workplace.". . . This sets the contours of the inquiry at too high a level of abstraction. The question is not whether the family leave provision is a congruent and proportional response to general gender-based stereotypes in employment which "have historically produced discrimination in the hiring and promotion of women," . . . [T]he question is whether it is a proper remedy to an alleged pattern of unconstitutional discrimination by States in the grant of family leave. The evidence of gender-based stereotypes is too remote to support the required showing.

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The paucity of evidence to support the case the Court tries to make demonstrates that Congress was not responding with a congruent and proportional remedy to a perceived course of unconstitutional conduct. Instead, it enacted a substantive entitlement program of its own. If Congress had been concerned about different treatment of men and women with respect to family leave, a congruent remedy would have sought to ensure the benefits of any leave program enacted by a State are available to men and women on an equal basis. Instead, the Act imposes, across the board, a requirement that States grant a minimum of 12 weeks of leave per year. . . . This requirement may represent Congress' considered judgment as to the optimal balance between the family obligations of workers and the interests of employers, and the States may decide to follow these guidelines in designing their own family leave benefits. It does not follow, however, that if the States choose to enact a different benefit scheme, they should be deemed to engage in unconstitutional conduct and forced to open their treasuries to private suits for damages.

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It bears emphasis that, even were the Court to bar unconsented federal suits by private individuals for money damages from a State, individuals whose rights under the Act were violated would not be without recourse. The Act is likely a valid exercise of Congress' power under the Commerce Clause . . . and so the standards it prescribes will be binding upon the States. The United States may enforce these standards in actions for money damages; and private individuals may bring actions against state officials for injunctive relief under *Ex parte Young*. . . . What is at issue is only whether the States can be subjected, without consent, to suits brought by private persons seeking to collect moneys from the state treasury. Their immunity cannot be abrogated without documentation of a pattern of unconstitutional acts by the States, and only then by a congruent and proportional remedy. There has been a complete failure by respondents to carry their burden to establish each of these necessary propositions. I would hold that the Act is not a valid abrogation of state sovereign immunity and dissent with respect from the Court's conclusion to the contrary.