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Geduldig Reborn: *Hibbs* as a Success (?) of Justice Ruth Bader Ginsburg's Sex-Discrimination Strategy

Jennifer Yatskis Dukart†

**FOREWORD**

A few years ago, while I was working as a registered nurse and before thoughts of attending law school had entered my consciousness, I encountered a magazine poll that asked, “What legislation has had the most impact on your life?” At first, I was unable to name any legislation, much less define its impact on me. Then the memory of one of the most personal and fulfilling experiences of my life flooded my mind: my twelve-week maternity leave with my first son and the story behind it. I knew that I had received twelve weeks of unpaid leave from my job as a registered nurse only because I was federally protected by the Family and Medical Leave Act (FMLA). When I took my maternity leave, I knew that despite the demanding hospital environment, where life and death emergencies sometimes required workers to stay late, come in early, or forego vacation days, I was entitled to twelve weeks of uninterrupted time to care for my newborn son.

I also knew that parents did not always have this right. I vividly remember the baby shower my co-workers held for me where my mentor, the mother of five children, looked at me with wonder and said, “Twelve weeks. I can’t even imagine it. One time I managed to have four weeks, and I felt so lucky. My supervisor couldn’t believe that I had managed to arrange it.”
Three years later—having taken another federally provided maternity leave—I was shocked to hear that the FMLA faced a challenge in the Supreme Court. In my first year of law school I learned that while the FMLA could require a private employer like my former hospital to provide leave, its power over state employers was unclear. I researched other maternity-leave cases litigated prior to FMLA’s enactment involving state employees who would lose their right to leave if the FMLA were struck down by the Court. I even read *Crowson v. Jamestown Public School District*, a suit raised by some of my former high school teachers who failed in their attempt to earn a six-week maternity leave. I thought of the countless workers who would be harmed if the Court curtailed the FMLA’s reach.

In June 2003, when the opinion in *Nevada Department of Human Resources v. Hibbs* came down in a stream of important decisions like *Grutter v. Bollinger* and *Lawrence v. Texas*, I was elated and amazed. As I entered my second year of law school, with my third child on the way, I felt compelled to pursue the next question in my mind: beyond the legal arguments and explanations, why was the Supreme Court willing to find a constitutional need for the FMLA? While many important legal scholars have probed the legal consequences of the decision, only a few have touched on the normative and psychological factors involved in the *Hibbs* decision. The following is my contribution to uncovering the complex set of factors that led the Court to uphold the FMLA.

**INTRODUCTION**

The Family and Medical Leave Act of 1993 allows eligible employees up to twelve weeks of unpaid leave a year to attend to a number of family-related matters, including the birth of a child or the onset of a “serious health condition” in an employee’s spouse, child, or parent. The State of Nevada challenged the Act as unconstitutionally beyond the scope of congressional power authorized under section five of the Fourteenth Amendment in *Nevada Department of Human Resources v. Hibbs*. Nevada claimed that Congress did not have the power to mandate the state as an employer to provide family leave. The resulting Supreme Court

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1. 335 N.W.2d 775, 779 (N.D. 1983). The teachers refused to accept the conceded three-week leave. Their suit failed despite evidence in the record that returning to work “wouldn’t be the best thing for [them] physically. [They] would still be tired and at times not feeling well.” *Id.*
decision in 2003, upholding the FMLA, surprised the legal and legislative community.\(^7\) Despite the strong federalist leanings of the Rehnquist Court, and its reluctance to defer to Congress, the Court held that the FMLA was an appropriate use of congressional power.\(^8\) Since the Court's recent cases indicated a strong likelihood of striking down the FMLA, why would the Court find congressional action appropriate in this case?\(^9\)

Part of the answer to the Court's support of the FMLA may lie in a more normative explanation—namely that the Hibbs case, whether intentionally or not, mirrors the strategy established by (now Justice) Ruth Bader Ginsburg to gain greater constitutional protection against sex discrimination.\(^10\) This strategy included litigation involving a male plaintiff and a sympathy-inducing set of facts, as well as the use of history and statistics to undermine stereotypes based on sex.\(^11\) Cognitive psychology illuminates the power of this strategy by demonstrating that cognitive ingroup biases may make the Court more likely to respond favorably to cases that employ the Ginsburg strategy.\(^12\)

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9. *See Hibbs*, 538 U.S. at 730-31, 736, 738 (arguing that the heightened scrutiny required for classifications based on sex, the goal of diminishing gender stereotypes, and concern with access and equality in the workplace support upholding the FMLA). However, in *United States v. Morrison*, the Court struck down the Violence Against Women Act, which involved sex classifications. 529 U.S. 611 (1999). Also, in cases such as *Geduldig v. Aiello*, the Court has held that access and equality were not sufficient justifications for legislation. 417 U.S. 484 (1974).

10. Judith Baer, *Advocate on the Court: Ruth Bader Ginsburg and the Limits of Formal Equality, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC* 216, 218-19. (Earl M. Maltz ed., 2003). Throughout this piece, 1 will use the more appropriate term “sex” to refer to distinctions made on the basis of being male or female. However, I will use the word “gender,” despite its technical definition of referring to traits associated with being male or female, when the referencing source uses the term.


While *Hibbs* shares the strengths of the Ginsburg strategy, the protection afforded by *Hibbs* may share also the weaknesses of the earlier Ginsburg cases. Namely, *Hibbs* does not fully address or recognize the disparate impact issues that prompted the FMLA, nor does it lend itself to advances in recognizing “difference theory” in pregnancy discrimination or other areas affecting women in the workforce. Furthermore, the male bias exhibited by formal equality theory is also present in *Hibbs*.\(^{13}\) 

Part I of this Comment describes why the *Hibbs* decision was unanticipated. In Part II, I argue that part of the reason the Court upheld the FMLA is based on the case’s similarity to the Ginsburg line of cases involving sex discrimination. That is, the cases are similar in their use of a sympathetic male plaintiff, their phrasing of the issue as differential treatment based on sex, and the arguments against generalizations and stereotypes based on sex. Part III addresses the reasons that the Ginsburg strategy is successful, focusing on the implications of precedent, as well as ingroup cognitive biases. Finally, in Part IV, I explore the limitation of *Hibbs* and the Ginsburg formal equality strategy to address future issues involving women, pregnancy, and families in the workplace.

\section{Why *Hibbs* Was Vulnerable to Invalidation by the Supreme Court}

\subsection{Strict Requirements for Enacting Section Five Legislation}

Supreme Court precedent has established that Congress may abrogate states’ sovereign immunity in providing a cause of action under the Equal Protection Clause of section one of the Fourteenth Amendment.\(^{14}\) To be valid, however, the exercise of Fourteenth Amendment section five power requires evidence of constitutional violations.\(^ {15}\) As articulated in *City of Boerne v. Flores* and repeated in *Hibbs*, it is the role of the Court, not Congress, to define what constitutes a constitutional violation.\(^ {16}\) Once the Court accepts that the Equal Protection Clause has indeed been violated,

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\(^{13}\) As described in Part IV, the difference theory advanced by some feminists to achieve women’s rights is rooted in a belief of the biological differences between men and women, with the most common example being that only women bear children. In contrast, formal equality theory stresses a need to treat men and women the same.

\(^{14}\) Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Section one of the Fourteenth Amendment provides, “...nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

\(^{15}\) City of Boerne v. Flores, 521 U.S. 507, 519 (1997); Katzenbach v. Morgan, 384 U.S. 641, 658 (1966); Section five of the Fourteenth Amendment states, “The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.

\(^{16}\) Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003); *Boerne*, 521 U.S. at 519. For a more nuanced perspective, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003), discussing the section five issues in *Hibbs*, as well as the history of the legislation.
Congress has leeway not only to proscribe the constitutionally prohibited conduct, but also to prevent a "broader swath of conduct," known as prophylactic legislation.\textsuperscript{17} Still, the remedy provided for by Congress must be congruent and proportional to the identified injury.\textsuperscript{18}

Beginning with \textit{Boerne} in 1997, the Court has struck down every piece of section five legislation before it.\textsuperscript{19} Often the invalidation was based on the Court's conclusion that the congressional record did not evidence sufficient constitutional violations. Admittedly, the congressional record reviewed in \textit{Boerne} was weak; it did not provide documentation of routine state violations against the Free Exercise Clause, which would have been necessary to support the Religious Freedom Restoration Act (RFRA).\textsuperscript{20} Later, however, the Court also invalidated legislation with a stronger legislative record.

Perhaps most astonishing was \textit{Board of Trustees v. Garrett}, in which the Court invalidated the monetary damages award of the Americans with Disabilities Act (ADA) as applied to states. Chief Justice Rehnquist wrote the majority opinion, which held that the legislative record was insufficient to establish an unconstitutional pattern of states acting to discriminate against the disabled: only a "half a dozen examples from the record . . . involve[d] states."\textsuperscript{21} However, as Justice Breyer demonstrated for the four dissenting justices, "[i]n fact, Congress compiled a vast legislative record documenting massive, society-wide discrimination against persons with disabilities."\textsuperscript{22} Justice Breyer's dissent even included an appendix that contained hundreds of examples involving state actors discriminating against people with disabilities who, among other injuries, were denied jobs, were unable to utilize public transportation or access public buildings, had difficulty exercising their right to vote, or were denied access to governmental services.\textsuperscript{23} Despite this extensive legislative history, the Court determined that abrogating state immunity was unwarranted due to a lack of judicially defined constitutional violations by states against persons with disabilities.

In other section five cases, the Court has invalidated congressional legislation when the remedy was not "congruent and proportional" to the

\textsuperscript{17} See Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2001); Katzenbach, 384 U.S. at 651.

\textsuperscript{18} \textit{Boerne}, 521 U.S. at 520.


\textsuperscript{20} See Daniel A. Farber et al., \textit{Constitutional Law, Themes for the Constitution's Third Century} 921 (3d ed. 2003) (stating that the RFRA legislative history did not support that the states had committed constitutional violations as defined by the judiciary).


\textsuperscript{22} \textit{Id.} at 377. (Breyer, J., dissenting) (internal quotations omitted).

\textsuperscript{23} \textit{Id.} at 379, app. C.
identified constitutional violations. For example, in *Kimel v. Florida Board of Regents*, the majority held that the Age Discrimination in Employment Act (ADEA) was inappropriate section five legislation because it "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional."²⁴ The Court found that protecting workers from age discrimination went beyond the provisions of the Fourteenth Amendment, based on the reasoning that age classifications did not warrant any scrutiny beyond rational basis.²⁵

However, even in *United States v. Morrison*, the Court took a similar stance, holding the Violence Against Women Act (VAWA) as beyond Congress's section five power.²⁶ The Court found that granting the victim of a gender-motivated violent crime a federal cause of action was not congruent and proportional to the injury sought to be remedied, which in *Morrison* was a failure by states to sufficiently investigate and prosecute such crimes.²⁷

In addition to the weighty evidence of judicially defined constitutional violations that the Court required from the legislative history, the section five cases after *Boerne* also indicated a strict standard for meeting the congruence and proportionality test. Legal scholars began to document the Court's new federalist position and posited that the stream of section five invalidation would decrease Congress's ability to redress discrimination through section five legislation.²⁸ Given this precedent, the *Hibbs* decision, which upheld the FMLA legislation as appropriate section five legislation, shocked many in the legal community.²⁹

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²⁵ Id. at 83, 91.
²⁷ The Court reasoned that a cause of action against private actors is not an appropriate remedy for unconstitutional state action. Id. at 621.
²⁹ *Fashioning the Legal Constitution*, supra note 19, at 4 (describing the 2002 Supreme Court term, including *Hibbs*, as "[c]onfirming the endless capacity of the Court to astonish and surprise"); David L. Hudson, Jr., *Court Surprises With Family Leave Act Ruling*, 2 ABA J. E-REPORT 21, 21(May 30, 2003) (quoting Nina Pillard, the arguing attorney in *Hibbs*, as stating that "it certainly was the case that the smart money was on my opponents" and citing speculation that Hibbs had a "95% chance" of losing (internal quotation marks omitted)), available at LEXIS, ABA Library, ERPORT File. But see Ellen D. Katz, *Reinforcing Representation: Congressional Power to Enforce the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2365 (2003) (arguing that *Hibbs*, while different from post-*Boerne* cases because it was upheld, does not reflect a change in jurisprudence); Michael E. Solimine, *Formalism, Pragmatism, and the Conservative Critique of the Eleventh Amendment*, 101 MICH. L. REV. 1463, 1468 n.29 (2003) (reviewing John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides With the States* (2002)) (claiming that *Hibbs* "scrupulously adheres to the analytical framework of the post-*Boerne* cases," but is an incremental change in Eleventh Amendment doctrine).
B. Supreme Court Review of Sex- and Pregnancy-Discrimination Legislation

Although the *Hibbs* opinion relies heavily on the heightened scrutiny now afforded classifications based on sex, from a judicial perspective the FMLA is actually a more complex piece of legislation than the opinion describes. Supreme Court precedent, which did not provide protection for any classifications based on sex for the first hundred years of the Fourteenth Amendment, was later interpreted to require an "important" governmental interest and a "substantial relation" to the objectives for facially sex-based classifications. However, the Court does not consider pregnancy discrimination to be based on a sex classification. In addition, as *Morrison* illustrates, not all legislative action to redress distinctions based on sex warrant abrogating state immunity. Therefore, it is questionable whether the FMLA's congressional history sufficiently documents judicially defined constitutional violations or establishes that the FMLA's remedy is congruent and proportional to the harm done to constitutional rights.

Before parsing out the pregnancy, sex discrimination, and legislative history components of the FMLA, it is first beneficial to review the Supreme Court precedent involved in classifications based on sex and pregnancy.

1. From Promoting to Invalidating Stereotypes: Classifications Based on Sex

Early Supreme Court cases addressing sex classifications not only refused to interpret the Constitution as protecting women's rights, but also advanced the prevailing gender stereotypes of the time. For example, in the 1872 case *Bradwell v. Illinois*, Justice Joseph Bradley's concurring opinion stated, "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life." After refusing to limit bakers' workweeks to sixty hours in 1905, in 1908 the Court upheld an Oregon statute limiting women laundry workers to ten-hour workdays as necessary protection based on the disadvantage posed by "woman's physical structure and the performance of maternal functions."

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30. Notably, declining to apply the Equal Protection Clause of the Fourteenth Amendment to women was consistent with the congressional understanding at the time the amendment was passed. See SUSAN GLUCK MEZEY, ELUSIVE EQUALITY 7 (2003) (describing the efforts of the women's movement to extend women's rights through the passage of the Fourteenth and Fifteenth Amendments, a proposal that Congress considered and rejected).

31. 83 U.S. (16 Wall) 130, 141 (1872) (Bradley, J., concurring) (affirming the denial of Myra Bradwell's admission to the Illinois bar because she was married).


Later, the Court upheld legislation "protecting" women from the occupation of bartending\textsuperscript{34} and from mandatory jury registration.\textsuperscript{35}

The Court did not apply the Fourteenth Amendment, which prohibits "denying to any person . . . the equal protection of the laws,"\textsuperscript{36} to cases advancing women's equality until the 1970s.\textsuperscript{37} The first change in the Court's approach occurred in \textit{Reed v. Reed}, in which Ginsburg filed a brief for the American Civil Liberties Union (ACLU) Women's Rights Project.\textsuperscript{38} Prior to \textit{Reed}, a unanimous Court claimed to apply rational-basis review to an Idaho law that chose men over women to administer estates, which in some cases had required only "any state of facts [that] reasonably can be conceived that would sustain it."\textsuperscript{39} However, in \textit{Reed}, the Court stated that the classification must bear a "fair and substantial relation to the object of the legislation."\textsuperscript{40} Finding the preference for males over females "arbitrary," the Court struck down for the first time a law based on sex classifications for the first time.\textsuperscript{41}

Two years later, in \textit{Frontiero v. Richardson}, another case litigated by Ginsburg for the ACLU, a plurality of judges announced that classifications based on sex should receive strict scrutiny, the highest level of review, which had been previously reserved for race, alienage, and national origin cases.\textsuperscript{42} While the judgment of the Court invalidated the statute requiring female, but not male, service members to prove spousal dependence to obtain benefits, Justice Brennan was unable to garner the fifth vote for strict scrutiny, which would have required classifications based on sex to serve a "compelling" governmental interest and to be "narrowly tailored" to accomplish that interest.

Although Ginsburg and the ACLU were unable to secure the strict scrutiny they sought in \textit{Frontiero}, in \textit{Craig v. Boren} the Supreme Court announced the next best alternative: intermediate scrutiny for sex-based classifications.\textsuperscript{43} Despite early sex-discrimination precedent, Justice Brennan reasoned that heightened scrutiny was appropriate to ensure that laws not be grounded in "archaic and overbroad generalizations," "old notions of role typing," or " outdated misconceptions concerning the role of females in the home."\textsuperscript{44} After \textit{Craig}, classifications based on sex had

\textsuperscript{34} Goesaert v. Cleary, 335 U.S. 464 (1948).
\textsuperscript{35} Hoyt v. Florida, 368 U.S. 57 (1961).
\textsuperscript{36} U.S. CONST. amend. XIV § 1.
\textsuperscript{38} 404 U.S. 71; see \textit{Mezey}, supra note 30, at 13.
\textsuperscript{39} See Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).
\textsuperscript{40} Reed, 404 U.S. at 76.
\textsuperscript{41} Id. at 76-77.
\textsuperscript{42} 411 U.S. 677, 682 (1973).
\textsuperscript{43} 429 U.S. 190, 200, 204 (1976); see also Campbell, \textit{supra} note 11, at 178.
\textsuperscript{44} Craig, 429 U.S. at 198-99 (internal citations omitted).
to serve an "important governmental objective" and bear a "fair and substantial relation" to that interest in order to survive a constitutional challenge.45

More recently the Court, in an opinion by Justice Ginsburg, held that the exclusively male admission policy of the Virginia Military Institute (VMI) violated the Equal Protection Clause.46 In strong language, Justice Ginsburg wrote that the justification for a sex-based classification must be "exceedingly persuasive" and that the state must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives."47 Some have characterized VMI as increasing the scrutiny placed on sex classifications.48 However, the opinion justified using heightened scrutiny for sex classifications by the need to root out sex stereotypes and "overbroad generalizations about the different talents, capacities, or preferences of males and females."49 The Court stressed a concern with denying women opportunity, in this case a chance to attend VMI, based on their sex.50 In summary, VMI demonstrates an adherence, and possibly even strengthening, of the Supreme Court’s intermediate scrutiny of classifications based on sex.

2. Pregnancy Discrimination is Not Sex Discrimination

Perhaps counterintuitively, the Court does not consider classifications based on pregnancy to be based on sex. The Court first announced the distinction between pregnancy and sex discrimination in Geduldig v. Aiello.51 Rejecting an equal protection challenge by pregnant women not covered under their employer’s disability plan, the opinion denied that a state disability plan which refused to cover pregnancy-related leave excluded women based on sex. Instead, argued the majority, the exclusion distinguished between pregnant people (who were women) and nonpregnant people (who were women and men).52 Therefore, pregnancy classifications

45. Id. at 197; id. at 211 (Stevens, J., concurring).
47. Id. at 533 (internal quotations and citations omitted).
48. See id. at 559-60 (Rehnquist, J., concurring) (expressing concern that the language "exceedingly persuasive justification" rather than "important governmental objective" introduces uncertainty as to the appropriate level of scrutiny); id. at 566 (Scalia, J., dissenting) (claiming the majority opinion "drastically revises our established standards for reviewing sex-based classifications"); see also Baer, supra note 10, at 229 (stating that VMI "nudges the law closer" to Justice Ginsburg’s goal of strict scrutiny for sex classifications).
49. VMI, 518 U.S. at 533 (internal citations omitted).
50. Id. at 542 (describing the issue as whether Virginia could constitutionally deny all women the opportunity to attend VMI, not as whether all women are suited for the adversarial method of instruction).
52. Id. at 497 n.20.
do not violate the Equal Protection Clause if they can be justified by any rational basis, the lowest tier of scrutiny. 53

After Geduldig, the Court held to its distinction between pregnancy and sex. Some plaintiffs began using Title VII, which prohibits sex-based classifications, to challenge pregnancy-benefit exclusions from disability plans. 54 However, in General Electric Co. v. Gilbert, the Court held that pregnancy exclusions did not violate Title VII because both men and women belonged to the class of nonpregnant persons. 55 Congress immediately responded by passing the Pregnancy Discrimination Act, which declared that pregnancy-related classifications are based on sex and violate Title VII. 56 However, the distinction between pregnancy and sex remains in the Supreme Court interpretation of the Equal Protection Clause. Thus, governmental actors who classify based on pregnancy do not violate the Fourteenth Amendment, as long as a rational basis for the classification exists.

C. Hibbs Remains a Mystery

As articulated above, the Boerne line of cases set the congressional evidentiary and remedial standards for evaluating section five legislation high. Indeed, many scholars predicted that only an “extraordinary” legislative record and narrow tailoring of the means could survive the Court’s new approach. 57 The FMLA in particular seemed vulnerable. First, the FMLA did not appear to have the requisite extensive legislative history of constitutional violations. 58 Also, the existing legislative history arguably did not demonstrate as many state actors causing the violations as in Garrett. 59 Next, much of the impetus for the FMLA focused on the inadequacy of leave opportunities for women in the workforce, which the Supreme Court had already determined did not violate Equal Protection standards. 60 Last, the remedy of federally mandated family leave arguably

53. Id. at 495, 498.
54. Mezey, supra note 30, at 190.
58. Id. at 9; see also Fashioning the Legal Constitution, supra note 19, at 16 (describing the FMLA legislative history as “virtually barren of specific allegations or examples of relevant unconstitutional state discrimination”). But see Oluwaseun O. Ajayi, J’Accuse: The Court Competes With the Constitution, Congress, and Citizens?, 21 Yale L. & Pol’y Rev. 527, 535 (2003) (claiming that the FMLA is “replete with findings of why the legislation is necessary”).
59. Doran & Mason, supra note 57.
does not pass the previous congruence and proportionality test. Given these deficiencies, it is not surprising that many constitutional scholars questioned the future of the FMLA.

The reasoning employed in Hibbs remains vulnerable to criticism. Specifically, Rehnquist's reliance on intermediate scrutiny involving sex classifications is not applicable to the evidence involving pregnancy. In addition, the argument that VMI heightened the scrutiny for sex classifications cannot support the result in Hibbs because Rehnquist's concurrence in VMI denounced this position. Furthermore, Hibbs considers the remedy of leave appropriate because it improves access and equal opportunity in employment for women. Employment access and opportunity concerns, however, were not enough to support pregnancy legislation as an equal-protection remedy in the past. The Hibbs opinion leaves room for a normative explanation for the outcome beyond the doctrine.

1. How Hibbs Fails the Section Five Standards

Arguably, the FMLA does not meet the Court's requirements for section five legislation. In Hibbs, Justice Kennedy dissented on the grounds that the legislative history of the FMLA does not demonstrate a sufficient pattern of constitutional violations by the states to justify abrogating state immunity. Comparing the legislative record to the section five requirements defined by Garret, the FMLA appears to fall short. It lacks a sufficient documented history of constitutional violations, an adequate record of individual state violations, and evidence of discrimination by state actors. Furthermore, it arguably offers a remedy that is too broad and which is enforceable against states with no history of wrongdoing.

The FMLA's documentation is weaker than the documentation supporting the ADA. Before the Ninth Circuit decision in Hibbs, every court to rule on the constitutionality of the FMLA found its legislative history insufficient to support section five legislation. Garrett clearly required
evidence of state actors committing constitutional violations. But much of the FMLA evidence that was introduced involved private employers. The state history that did exist consisted of two pieces of evidence noting similarities between private and public employers and one study by the Bureau of Labor Statistics conducted seven years before enactment of the FMLA. In comparison, Garrett was backed by thirteen congressional hearings, a special congressional task force that held hearings in every state, and documentation of hundreds of infractions by state actors. In addition, as Professor Vikram Amar pointed out, the Garrett opinion detailed six specific infractions by individual states; the Court held that these infractions did not justify abrogating state immunity. At best, Hibbs is supported by eleven individual state violations. The Garrett Court offers no explanation of why violations by an additional five states crosses the threshold and justifies abrogation.

The next inquiry into the appropriateness of the FMLA under section five analysis involves whether the remedy, federally guaranteeing twelve weeks of unpaid leave, is congruent and proportional to the documented constitutional violations. Precedent suggested that the Court could have found the FMLA leave provision too broad because it prohibited more than would be held constitutional by the legislative record and because the number and level of state involvement did not support a remedy against all states. The FMLA’s legislative history provided a basis for the Court to strike down its remedy as overly broad. In Kimel, the Court struck down the Age Discrimination in Employment Act (ADEA) because it “prohibit[ed] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection ... standard.” As demonstrated below, many of the pregnancy

68. See Nevada Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 747-48 (2003) (Kennedy, J., dissenting) (arguing that most of the evidence presented involved private sector employers); see also Amar, supra note 7, at 351 (describing the scant evidence linking the private sector violations to the states and further difficulties due to Garrett’s exclusion of local and county actors from the definition of state actors).
69. Hibbs, 538 U.S. at 747 (Kennedy, J., dissenting).
70. Garrett, 531 U.S. at 357.
71. Amar, supra note 7, at 351-52.
72. Id.; see Hibbs, 538 U.S. at 741 (Scalia, J., dissenting) (dissenting largely on the grounds that the record did not establish violations “by the State against which the enforcement action is taken”).
75. Doran & Mason, supra note 57, at 9 (predicting the FMLA would be unable to satisfy the congruence and proportionality test).
76. Kimel, 528 U.S. at 86.
and family-care provisions required by the FMLA are not required to meet Fourteenth Amendment requirements. That is, even though using sex-based distinctions to allocate benefits is unconstitutional, failure to provide benefits is not. Using the Kimel approach, in Kazmier v. Widman, the Fifth Circuit concluded that the FMLA’s congressional record did not justify its prophylactic remedy.\(^7\)

In addition to the lack of constitutional violations, the FMLA’s legislative history also failed to establish that its remedy was necessary for all states.\(^8\) In Morrison, the Court distinguished the Violence Against Women Act (VAWA) from other, constitutionally valid, section five legislation by finding the uniform application of VAWA to all states, rather than a restricted remedy for the states that had violated equal protection, overbroad.\(^9\) As Justice Scalia pointed out in his dissent in Hibbs, the majority in Hibbs did not allow this concern for “innocent” states to prevent them from upholding the FMLA.\(^10\)

2. **How Hibbs Fails the Equal Protection Standards**

The final inadequacy of the FMLA legislative record involves its relationship with Fourteenth Amendment precedent. The legislative history of the FMLA indicates that Congress’s primary concern was that, as women join the workforce, they experience conflict between caregiving duties and work.\(^11\) This is a problem because protecting women’s ability to maintain employment and still care for their children, spouses, or family members, while laudable, is not justified by equal protection precedent.\(^12\) As described in Boerne, the Court holds that Fourteenth Amendment is remedial

\(^{77}\) 225 F.3d 519, 525-27 (5th Cir. 2000) (finding that “Congress identified no pattern of discrimination by the States with respect to the granting of employment leave for the purpose of providing family care,” and thus, the FMLA was an inappropriate exercise of section five power).

\(^{78}\) See Amar, supra note 7, at 354.

\(^{79}\) 529 U.S. at 626-27.

\(^{80}\) Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 741 (2003) (Scalia, J., dissenting) (arguing the means test requires violations “by the State against which the enforcement action is taken”).


\(^{82}\) Suzanna Sherry, *The Unmaking of a Precedent*, 2003 SUP. CT. REV. 231, 246 (2003) (pointing out that disparate impact policies do not violate the constitution either and should not be considered as evidence of unconstitutional state action).
(redressing or preventing unconstitutional actions), rather than substantive (obligating states to provide certain benefits). Furthermore, Geduldig precluded any possibility that the failure to provide pregnancy leave could constitute a Fourteenth Amendment violation. Thus, much of the FMLA’s legislative history, including the primary stated purpose of the legislation, does not document judicially defined constitutional violations of the Equal Protection clause and therefore provides no justification for the legislation.

3. The Remaining Questions After Chief Justice Rehnquist’s Majority Opinion

Hibbs does not fully address the criticism that upholding the FMLA is inconsistent with precedent. Heightened scrutiny cannot fully distinguish Hibbs, nor can the inappropriateness of reliance on sex stereotypes. Concern for women’s access and equality in the workplace cannot justify the Court’s action. Therefore Hibbs leaves room for a normative explanation of the Court’s willingness to uphold the FMLA.

Chief Justice Rehnquist’s opinion distinguishes Hibbs from previous section five legislation held as invalid on the basis of the heightened scrutiny for sex classifications. However, the chief argument against this explanation is Rehnquist’s own words in Morrison. Despite the heightened scrutiny required by classifications based on gender, the Court invalidated the section five legislation in Morrison as overbroad. At least one scholar, Professor Amar, argues that had intermediate scrutiny been applied in Hibbs the same way it was in Morrison, the Court would have struck down the FMLA. Thus, although the Court attempts to distinguish Hibbs, there is no clear reason why it did not meet the fate of other federal legislation that attempted to address the failure of states to adequately protect women.

Remedying gender stereotypes also cannot fully explain Hibbs. In his opinion, Chief Justice Rehnquist described the FMLA as legislation

85. Hibbs, 538 U.S. at 736.
86. See 529 U.S. at 625-26.
87. See Amar, supra note 7, at 353 (questioning why the results in Morrison and Boerne differ from Hibbs when all of the classifications at issue warrant heightened scrutiny); Kenneth L. Karst, Justice O’Connor and the Substance of Equal Citizenship, 2003 Sup. Ct. Rev. 357, 453-54 (highlighting that Morrison also involved gender and the failure of the Court to cite it).
88. Additional doctrinal arguments to support the heightened-scrutiny rationale are also flawed. First, Morrison succeeded VMI by four years, so the level of scrutiny for sex-based classifications was firmly established. Indeed, Justice Rehnquist’s own concurrence in VMI foreclosed the explanation that sex-based classifications could receive any higher level scrutiny after VMI. Second, the state’s failure to provide pregnancy leave cannot justify the FMLA because pregnancy discrimination does not receive heightened scrutiny.
addressing gender stereotypes and unequal leave for men. This makes sense, insofar as equal protection jurisprudence supports upholding legislation designed to remedy sex stereotypes and inequality. By providing a leave benefit that applies equally to men and women the FMLA addresses the generalization that women are caregivers and the concern that men were being denied paternity and family leave at a higher rate than women. However, the congressional record and the scholarship analyzing the FMLA describe the function of diminishing stereotypes and gender norms as a secondary goal of the FMLA. Therefore, the equal protection justification that the Court used to uphold the FMLA was, at best, a secondary concern for Congress and cannot fully explain the Court’s action.

In Hibbs, the Court deemed the states’ failure to provide access and equality in the workplace a sufficient justification for the FMLA’s remedy, despite holding that this concern was an inadequate justification in previous equal protection cases. Chief Justice Rehnquist upheld the FMLA remedy of mandated leave as congruent and proportional means, even after dismissing the alternative remedy of providing no leave. Since two-thirds of the caregivers of older, chronically ill, or disabled persons are women, the Court reasoned that the no-leave remedy would be inappropriate because it “would exclude far more women than men from the workplace.” However, Geduldig and its subsequent line of cases held that employers may refuse to provide pregnancy leave benefits. Thus, the concern with access and equality for women in the workplace, which was not sufficient to uphold pregnancy leave protection in Geduldig, is held as a sufficient justification in Hibbs for a congressionally-mandated family-leave remedy.

In conclusion, the Hibbs decision was a surprising one. Given the Court’s section five sex-discrimination and pregnancy-classification jurisprudence, the FMLA seemed vulnerable to invalidation. The opinion’s reasoning leaves room for questioning the Court’s decision. Therefore, an additional explanation must underlie the Hibbs result.

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89. See, e.g., Hibbs, 538 U.S. at 730-31.
90. See 29 U.S.C. § 2601(a)(1) (2003) (listing the increasing number of single-parent households and two-parent households in which both parents work as the first reason for the FMLA); Donna Lenhoff & Claudia Withers, Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace, 3 AM. U. J. GENDER & L. 39, 49 (1994) (describing the changing American workforce and a need to balance home and work as the first reason for the FMLA and addressing gender stereotypes and norms as the second major concept).
91. Nev. Dep’t of Human Res. v. Hibbs, 273 F.3d 844, 854-56, 858-60 (9th Cir. 2001), aff’d, 538 U.S. 721 (2003). However, a vast array of scholarship and legal arguments characterize the primary purpose of the FMLA as redressing gender stereotypes. See, e.g., Mezey, supra note 30, at 209-11.
92. Hibbs, 538 U.S. at 738.
93. Id. Of course, three-thirds (all) of those affected by the refusal to grant pregnancy-related leave are women; so this refusal policy, upheld by the Court in Geduldig, excludes only women from the workplace.
II

HIBBS IS AN EXTENSION OF THE GINSBURG STRATEGY

One could imagine the FMLA appearing before the Supreme Court on much different grounds. For example, the issue presented could have been the personal disability provisions in the FMLA, in which case the ADA case of Garrett would seem to suggest that the FMLA, perhaps in its entirety, would be struck down as beyond Congress’s section five power.95 Even the family-leave provisions could have been challenged under a very different set of circumstances. Since most people who use the FMLA leave are women, it is not farfetched to imagine the case being presented by a pregnant female plaintiff.96 Perhaps part of the reason the Court was willing to uphold the FMLA hinges on the facts of Hibbs itself—a male plaintiff seeking time off work to care for his family member—and the similarities between this fact pattern and existing sex-discrimination precedent.97

Hibbs follows Ginsburg’s strategy in sex-discrimination cases in many respects. Hibbs’s presentation of a novel issue before the Court using a fact pattern involving a sympathetic, male plaintiff is similar to Ginsburg’s cases, such as Weinberger v. Wiesenfeld and Craig. The briefs in Hibbs crafted arguments attacking sex stereotypes such as the breadwinning males and nurturing females, arguments contained in opinions such as Frontiero and Wiesenfeld. Furthermore, supporting the arguments against stereotypes with history and statistics is a classic Ginsburg approach that is also evident in Hibbs.98 Last, the Hibbs appellees framed the issue as one abrogating formal equality—the theory advanced by Ginsburg and adopted by the Court—by stating that the FMLA was designed to reduce gender stereotypes and to allow men and women to be treated the same.99

These similarities of Hibbs to the Ginsburg strategy, as well as the invocation of precedent established by the Ginsburg sex discrimination

96. See Mezey, supra note 30, at 210-11 (reporting that women use FMLA leave more than men).
97. Beyond this normative explanation, many scholars have, and continue to proffer, insightful theories to explain the Hibbs result. See, e.g., Fashioning the Legal Constitution, supra note 19, at 18, 19 n.85 (suggesting that the constitutionality of Title VII, which could be called into question if the FMLA were struck down, may have influenced the Court’s opinion; this article also acknowledges that Chief Justice Rehnquist’s daughter is a single mother who Rehnquist himself has had to aid in childcare and work conflicts).
98. See Campbell, supra note 11, at 197.
99. See Kathryn Abrams, The Constitution of Women, 48 ALA. L. REV. 861, 867-68 (1997) (providing a general description of formal equality theory); see also Brief of the National Women’s Law Center et al., at 12, Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003) (No. 01-1368) (stating that “[t]he FMLA is a remedy for and prophylactic against States’ different treatment of men and women due to sex-based stereotypes about men’s role as breadwinner, and women’s role in tending to the family”).
cases, may explain the surprising decision of the Court to uphold the FMLA.

A. Hibbs as a Successor to the Line of Cases Established Through the Ginsburg Strategy

As detailed in Part I, classifications based on sex evolved from the Court's rational-basis review, which often upheld laws distinguishing between males and females, to intermediate scrutiny, which resulted in striking down sex classifications such as the male-only military college in VMI. Much of the credit for this innovation in the law is given to Ruth Bader Ginsburg, who, within her role as head of the ACLU Women's Rights Project (WRP), developed and implemented a strategy that led to the Court's adoption of heightened review.100

In order to move the court to adopt a heightened review for sex classifications, Ginsburg developed a line of cases that held sex-based classifications violated the Equal Protection Clause.101 Ginsburg began with "easy" cases, whose facts made victory clear, so that sex-discrimination precedent could eventually be applied to harder cases.102 Case-selection criteria included sympathetic male plaintiffs.103 Ginsburg also presented the cases from the theoretical framework of attacking gender stereotypes, especially that of the breadwinner/homemaker, through the use of history and statistics.104 The resulting sex-discrimination opinions adopt formal equality theory. Hibbs employs a sympathetic male plaintiff, presents arguments designed to address gender stereotypes, and adopts formal equality.


102. Deborah L. Markowitz, In Pursuit of Equality: One Woman’s Work to Change the Law, 14 WOMEN’S RTS. L. REP. 335, 337 (1992). It bears noting that Hibbs does not reflect all of the criteria of the Ginsburg strategy. Unlike the early test cases, Hibbs was not "cost-free"; striking down the FMLA would have a huge impact on society. Furthermore, the FMLA is not an example of an "archaic" law. Rather, Hibbs resembles the "harder" cases, which were designed to be presented later in the sex-discrimination litigation.

103. See Baer, supra note 10, at 219 (describing Ginsburg’s litigation strategy).

104. See Campbell, supra note 11, at 197 (describing Ginsburg’s use of history and statistics as a hallmark of her strategy and detailing their use in Kahn v. Shevin, 416 U.S. 351 (1974)).
Hibbs's similarity to the Ginsburg line of sex-discrimination cases possibly explains its surprising outcome.\textsuperscript{105} Furthermore, although the FMLA remedy is gender-neutral, much of the impetus for the litigation involved pregnancy and maternity leave. Thus Hibbs, by following the Ginsburg strategy, became the pregnancy-discrimination success that Ginsburg was unable to achieve as a litigator.\textsuperscript{106}

1. Hibbs\textit{ Follows the Ginsburg Strategy by Employing a Sympathetic Male Plaintiff}

Although the cases in the Ginsburg line are not identical, the strategy did involve deliberate selection of cases, arguments, and plaintiffs. One important selection factor was the sex of the plaintiff.\textsuperscript{107} Although the WRP strategy in no way limited its litigation to male plaintiffs, all of Ginsburg's Social Security cases involved male plaintiffs.\textsuperscript{108} For example, \textit{Wiesenfeld} involved a husband being denied Social Security survivor benefits after the death of his wife.\textsuperscript{109} Also, somewhat ironically, the case that announced heightened scrutiny for classifications based on sex, \textit{Craig}, was brought on behalf of eighteen-year-old Oklahoman males who could not purchase 3.2% beer.\textsuperscript{110} Hibbs, brought by a male seeking to obtain family leave, follows the Ginsburg strategy of using male plaintiffs to redress sex discrimination.\textsuperscript{111}

Another hallmark of the Ginsburg strategy was to select cases with emotionally compelling fact patterns.\textsuperscript{112} For example, Ginsburg's first Supreme Court case involving sex discrimination was \textit{Reed}. In \textit{Reed}, per Idaho custom, custody of Sally and Cecil Reed's son was transferred from Sally to Cecil when the son reached adolescence. After custody had been transferred to Cecil Reed, the son spent time in a corrections facility,
became depressed, and committed suicide. The boy's mother sought to administer the estate but an Idaho law granted a preference for males over females with the same relationship to the deceased. One reason Ginsburg chose to join the Reed litigation was the sympathetic fact pattern. The same was true in Frontiero, which involved a servicewoman whose family was unable to qualify for the same benefits that would automatically be granted to the families of servicemen, and in Wiesenfeld, where the male plaintiff whose wife had died in childbirth sought Social Security benefits—which would automatically be granted to females—in order to stay home and care for his newborn son.

Similarly, the fact pattern in Hibbs is compelling because it involves an employee seeking family leave to care for his wife while she recovered from a car accident and surgery. In fact, the appellee's brief capitalizes on the sympathy-inducing situation by describing in detail the injury his wife sustained and the medical procedures performed to assist her. Highlighting emotionally compelling facts is a standard legal technique, but using the fact pattern to dramatize how sex-based discrimination leads to unjust results is a core component of the Ginsburg strategy that Hibbs employs.

2. Hibbs Follows the Ginsburg Strategy by Attacking Stereotypes Through History and Statistics

The presentation of legal arguments in the Ginsburg line of cases followed a predictable pattern. First, Ginsburg consciously attacked existing gender stereotypes in the law and society through her briefs and choices for litigation. A second component of the case presentation was the use of history and statistics as a basis for striking down sex-based classifications.

From the outset, Ginsburg sought to challenge and upset existing gender stereotypes. One of her most frequently utilized and successful arguments involved attacking the stereotypes of males as breadwinners

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118. Brief for Respondent William Hibbs at 6-7, Hibbs (No. 01-1368).
119. See Ellington et al., supra note 114, at 721.
120. Campbell, supra note 11, at 197.
121. See Ginsburg, supra note 11, at 269-70 (describing the harms of gender stereotypes).
devoted to work and of females as homemakers and nurturers. By presenting cases in which the fact pattern demonstrated a harm based on notions of traditional roles, Ginsburg was able to achieve the litigation result and precedent language she sought. Cases such as *Wiesenfeld* and *Frontiero* involved litigants who usurped the traditional work and nurturing sex roles of men and women. In *Wiesenfeld*, a man was harmed by the denial of Social Security benefits from his working wife’s account; he sought to recover the money so that he could remain at home to care for his newborn son after his wife’s death. Similarly, *Frontiero* involved a female servicemember providing for her family. Choosing cases that demonstrated the fallacies of sex stereotypes, namely men as breadwinners and women as nurturers, allowed Ginsburg to advance the rights of women.

Adhering to the Ginsburg strategy, the facts in *Hibbs* challenge the breadwinning and nurturing stereotypes by positing a male seeking leave to care for a family member. The brief filed by respondent Hibbs first frames the issue as involving a stereotype: “The [FMLA] is directed at a leading source of unconstitutional sex discrimination today: the pervasive sex-role stereotype that caring for children and ill family members is women’s work . . . .” The amicus curiae briefs for *Hibbs* also explicitly characterize the FMLA as a response to the inappropriate stereotypes that men focus on work and not caregiving, and that women prioritize family care over work.

To demonstrate the naiveté of relying on inappropriate sex stereotypes, Ginsburg employed a second strategy: supporting her legal arguments with statistics and history. For example, Ginsburg’s brief in *Reed* included statistical evidence regarding the increasing numbers of women in higher education and the workplace. Similarly, in *Wiesenfeld*, Ginsburg provided national labor statistics to challenge the stereotype that women stayed at home. Ginsburg also deftly used historical information. *Reed* employed historical information relating to society’s view of women, as did *Frontiero*, where Ginsburg’s brief demonstrated how Blackstone’s

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122. See Ellington et al., supra note 114, at 721.
123. See Markowitz, supra note 102, at 345, 350.
126. Brief for Respondent William Hibbs at 1, *Hibbs* (No. 01-1368).
127. Id. at 12 (stating that “[t]he FMLA is a remedy for and prophylactic against States’ different treatment of men and women due to sex-based stereotypes about men’s role as breadwinner, and women’s role in tending to the family”).
128. Campbell, supra note 11, at 197.
129. Id. at 171.
130. Ellington et al., supra note 114, at 732.
131. Id. at 723.
common law had perpetuated the breadwinner/homemaker stereotype.\textsuperscript{132} By invoking statistics and history behind the laws at issue, Ginsburg brought into focus larger societal concerns at stake in the litigation.

The \textit{Hibbs} briefs also emphasized history. The appellees invoked the broad history of discrimination against women and women’s roles in the workplace as relevant to the Court’s analysis.\textsuperscript{133} For example, the appellees highlighted the history of decreased earnings and reduced opportunities for women in the workforce.\textsuperscript{134} The appellees also argued that specific congressional findings in the record were unnecessary when “volumes of history” evidenced discrimination based on sex.\textsuperscript{135} While the history of state violations is necessary to document constitutional violations (as described in Part I), incorporating evidence of historical attitudes and harms is not required, but does harken back to the strategy Ginsburg developed.


Ruth Bader Ginsburg’s strategy reflects her support of formal equality theory, which asserts that women are functionally indistinguishable from men and that treating people differently based on their sex is prejudicial.\textsuperscript{136} Resulting in part from Ginsburg’s success as a litigator, the Supreme Court has adopted the approach of treating men and women the same.\textsuperscript{137} Whether the strategy shaped the jurisprudence or whether Ginsburg shaped the strategy to fit the direction the Court was already moving is beyond the scope of this article. But the precedent resulting from the Ginsburg line of sex-discrimination cases clearly articulates a formal equality theory. The effects of the jurisprudence have included advances for women, such as admission into the formerly all-male VMI,\textsuperscript{138} but have also failed to address critical disadvantages suffered by women, such as inadequate time for family leave.\textsuperscript{139} \textit{Hibbs}, as an extension of the Ginsburg sex-discrimination precedent, reflects the Court’s adoption of formal equality theory and repairs some of its limitations in addressing pregnancy.

\begin{itemize}
\item \textsuperscript{132} Campbell, \textit{supra} note 11, at 187.
\item \textsuperscript{133} Brief for Respondent William Hibbs at 15-16, \textit{Hibbs} (No. 01-1368).
\item \textsuperscript{134} Id. at 12.
\item \textsuperscript{135} See \textit{id.} at 17; see also Brief of Amici Curiae Senators Christopher Dodd and Edward M. Kennedy, and Representatives Patricia Schroeder, Marge Roukema, and George Miller at 7-8, \textit{Hibbs} (No. 01-1368) (arguing that the nation’s long history of sex discrimination is relevant to the Court’s determination of whether the FMLA was a congruent and proportional remedy).
\item \textsuperscript{136} Abrams, \textit{supra} note 99, at 867-68.
\item \textsuperscript{137} See \textit{id.} at 868 (describing formal equality theory as the perspective most frequently invoked by the Supreme Court in sex discrimination cases).
\item \textsuperscript{138} United States v. Virginia, 518 U.S. 515, 547 (1996).
\item \textsuperscript{139} See Abrams, \textit{supra} note 99, at 868.
\end{itemize}
As described in Part I, the Supreme Court has adopted an intermediate level of scrutiny for classifications based on sex. In most cases, therefore, the Court will not tolerate governmental decisions based on sex. As Justice Ginsburg herself stated in the majority opinion in VMI, "differential treatment or denial of opportunity" must have "exceedingly persuasive" justifications.

I. Hibbs Employs Formal Equality Theory Promulgated by Ginsburg

While many theories support the Court's intolerance for sex discrimination, the Court has most often advanced formal equality theory within its reasoning. That is, the Court recognizes treating women and men differently as a redressable harm within the meaning of the Fourteenth Amendment. Furthermore, the Court often supports its decisions with rhetoric adopted from formal equality theory, finding reliance on sex stereotypes to be evidence of sex discrimination. However, the employment of formal equality theory left pregnancy and family leave time undressed under the Fourteenth Amendment, until Hibbs.

a. Ginsburg's Sex-Discrimination Litigation Stemmed from and Encouraged Formal Equality Theory

The language of Supreme Court opinions in sex-discrimination cases reflects the formal equality view that men and women are the same. For example, in Frontiero, the plurality opinion disapproved of the sex classification when determining benefit qualifications which the defendants justified by administrative convenience because it causes "dissimilar treatment for men and women who are...similarly situated." Another member of the Court has admitted the Court's preference for treating men and women the same. In her oft-cited article, Portia's Progress, Justice O'Connor acknowledged the Court's reluctance to treat men and women

140. See supra notes 43-45 and accompanying text.
141. Despite the tendency of the Court to employ equality theory, note that some decisions have allowed distinctions made on the basis of sex when based on "real differences." See, e.g., Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) (upholding a state law that allowed only men to be convicted for statutory rape, based on the different consequences of teen pregnancy for men and women).
142. VMI, 518 U.S. at 532-33.
143. Abrams, supra note 99, at 867-68.
144. While one could imagine other redressable injuries, such as disparate impact claims, the Court has required "intentional discrimination," or volition, to treat men and women differently in order to support Fourteenth Amendment violations. See Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).
145. See, e.g., VMI, 518 U.S. at 550 (finding that "generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average description").
146. Frontiero v. Richardson, 411 U.S. 677, 683-84 (1973) (citing Reed v. Reed, 404 U.S. 71, 77 (1971)).
differently, citing the paternalistic history of protectionist legislation that kept women out of the workforce as a justification for formal equality theory.\textsuperscript{147} O'Connor is hesitant to abandon the Court's formal equality approach, except perhaps in the realm of pregnancy.\textsuperscript{148}

Along with employing formal equality's view that men and women are inherently similarly situated, the Court has also adopted the theory's condemnation of reliance on sex stereotypes and roles. Justice O'Connor describes the Supreme Court as approaching sex classifications "with a somewhat jaundiced eye at the loose-fitting generalizations, myths, and archaic stereotypes that previously kept women at home."\textsuperscript{149} For example, \textit{Califano v. Goldfarb} condemned the breadwinner stereotype; the Court refused to allow distinctions made in Social Security payments because they relied on "archaic and overbroad generalizations" that wives are usually dependent on their husbands.\textsuperscript{150} Challenging the generalization that nursing is a woman's profession (and also perhaps the stereotype that men cannot nurture), in \textit{Mississippi University for Women v. Hogan}, the Court required a state school to allow men to enroll in the Nursing College.\textsuperscript{151} Again invoking formal equality language against stereotypes, the majority opinion held that the gender classification "must be applied free of fixed notions concerning the roles and abilities of males and females."\textsuperscript{152}

\textbf{b. Hibbs Reflects Formal Equality Theory}

The \textit{Hibbs} opinion is an extension of the sex-discrimination cases Ginsburg litigated in that it reflects formal equality theory. The opinion focuses on the impermissibility of treating or viewing men and women differently. For example, in the majority opinion, Chief Justice Rehnquist describes the disparity in maternity and paternity leave provisions as evidence supporting the need for the FMLA.\textsuperscript{153} The Court also noted that when state child-care policies do exist for men, they receive discriminatory treatment and are granted leave less often than women.\textsuperscript{154} Thus, the crux of the evidence finding the FMLA appropriate because of state constitutional violations rests on the disparity between leave provisions for men and women, which is classic formal equality reasoning.

In addition, much of the analysis in the \textit{Hibbs} opinion is based on formal equality theory's disapproval of sex stereotypes. Rehnquist describes the FMLA as addressing both the breadwinning and nurturing

\begin{itemize}
\item \textsuperscript{147} O'Connor, \textit{supra} note 37, at 1552.
\item \textsuperscript{148} \textit{Id.} at 1556-57.
\item \textsuperscript{149} \textit{Id.} at 1552.
\item \textsuperscript{150} 430 U.S. 199, 217 (1977).
\item \textsuperscript{151} 458 U.S. 718, 733 (1982).
\item \textsuperscript{152} \textit{Id.} at 724-25.
\item \textsuperscript{153} \textit{See} Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003).
\item \textsuperscript{154} \textit{See id.}
\end{itemize}
stereotypes. The opinion describes the FMLA as allowing women to participate more freely in the workplace and as attacking the male breadwinner stereotype by providing leave on a gender-neutral basis rather than relying on "discriminatory leave policies." According to the majority, the gender-neutral remedy also combats the nurturing stereotype, which suggests that only women are responsible for family caregiving. The remedy of federally provided leave is also found congruent and proportional because it addresses formal equality concerns with stereotypes and assumptions. In short, both the Hibbs litigation and precedent are extensions of the sex-discrimination line of cases brought forth by Ginsburg.

2. Fixing the "Pregnant Problem": The FMLA Repairs Ginsburg's Failure to Establish a Pregnancy Discrimination Remedy

Ginsburg had two major goals in her work through the WRP. First, she sought to challenge gender-based discrimination and achieved heightened scrutiny for sex classifications. The second goal was to challenge pregnancy discrimination, which, as described in Part I, was not achieved through litigation. In challenging what she referred to as the "pregnant problem," Ginsburg argued that pregnancy discrimination is sex discrimination even though "it can't happen to a man." She attempted to advance the notion that sex discrimination exists not only when distinctions are based on sex, but also when a defined class of people are denied an opportunity based on stereotypical assumptions. Adhering to the definition of discrimination as that which is suffered because of sex-based classification, Geduldig's stilted distinction between pregnant women, on the one hand, and nonpregnant women and men, on the other, abrogated any chance that pregnancy discrimination would be recognized as sex discrimination. Therefore, proponents of pregnancy and family leave provisions were left to pursue legislative remedies.

155. Id. at 730.
156. Id. at 736-37.
157. Id. at 738 (describing the FMLA as appropriate because it "is narrowly targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest").
158. Campbell, supra note 11, at 168.
159. Id. (describing Ginsburg's second priority as "eliminat[ing] discrimination based on pregnancy").
160. See id. at 210, 213 (citing the Brief of Amicus Curiae ACLU, Cohen v. Chesterfield County School Board, 414 U.S. 905 (1973) (No. 72-1129) (on file with the Library of Congress, United States Supreme Court Records and Briefs, Vol. 414 at 9), a case ultimately decided on due process grounds).
161. Id. at 210.
163. MEZEY, supra note 30, at 190.
The FMLA is one in a series of congressionally mandated leave provisions designed to provide pregnancy, maternity, and family leave. Although many of the briefs in *Hibbs* and the resulting Supreme Court opinion describe the FMLA as primarily designed to address gender stereotypes and provide both paternity and maternity leave, the evidence suggests that the bill was driven by concerns for the disadvantages suffered by working women as a result of their pregnancy and family-care obligations. The stated purpose for the bill; the legislative history of the FMLA, including its opposition; the subsequent descriptions of the bill; and the impact of its passage on society indicate that the FMLA was primarily designed to redress pregnancy, maternity, and family-care disadvantages suffered by women. Therefore, the Court’s upholding of the FMLA under the Fourteenth Amendment marks the first instance of the Supreme Court addressing the “pregnant problem” as an equal protection concern.

a. The Intended Purpose of the FMLA was to Provide Family Leave for Working Women

The stated congressional purposes show that the FMLA is a remedy designed for women. Congress’s first stated reason for the FMLA is the increased number of women in the workforce. If it were true that the primary justification for the bill was disparate leave for men and women—the justification asserted in the *Hibbs* opinion—then the increased number of working women would be irrelevant as long as the disparity exists, and one would question why that statistic is offered as the first justification for the FMLA. Rather, if the FMLA is viewed as designed to provide a remedy to women workers who bear greater family-leave obligations, then the evidence indicating an increased number of women in the workforce provides strength to the argument that the legislation is needed.

Congress also described the increased number of aging Americans requiring care as a reason for the FMLA. Coupled with the acknowledgement that women provide more care for family, including the eld-

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164. For an interpretation of the concepts underlying the FMLA, see Lenhoff & Withers, *supra* note 90, at 48-51.
165. The FMLA does provide gender-neutral family leave, and benefits would certainly result if men shared a greater proportion of family-care burdens. The point being advanced here is that the achievement of these societal benefits was not the driving purpose behind enacting the FMLA.
erly, the FMLA is properly seen as legislation primarily designed to relieve the unequal burden on working women.

b. Evidence in the Legislative History Reveals That Congress Designed the FMLA to Redress Harms Suffered by Working Women

Many of the documented harms in the FMLA's legislative history involve disadvantages suffered by women. Congress noted studies documenting that women are the primary family caregivers for both children and the elderly. Two-thirds of people providing care for the elderly, disabled, and chronically ill are working women. Congressional evidence established that the lack of family-leave provisions has a disparate impact on women because women are more likely to be the caregivers. For example, Congress heard evidence that family-care responsibilities cause women to suffer pay disparity, to fall behind in career advancement, and sometimes to leave the workforce. In fact, one study indicated that the economic disparity between men and women would not improve unless the disproportionate family-care burden faced by women was addressed. Congress's decision to include family leave in the FMLA indicates that it designed the legislation to address the disadvantages suffered by working women.

Additional evidence that the FMLA was targeted to address the needs of women comes from the most powerful opponent of the legislation: the business community. In arguing against the passage of the FMLA, the business community purported that the legislation would harm women by making it more expensive, and thus less desirable, to employ them. Implicit in this argument is the hypothesis, substantiated in later studies, that women are more likely to take family leave. Furthermore, the argument suggests that the business community did not view the FMLA as alleviating gender disparities; if men would also be taking advantage of the family leave, the cost of employing either sex would be equal. In addition,

170. See also Mezey, supra note 30, at 210 (reviewing the legislative history, which "indicates that Congress was concerned that women's familial responsibilities for children or parents affected their employment status").
172. Id. (citing The National Council on Aging).
175. Mezey, supra note 30, at 207.
176. Id. at 210-11 (claiming empirical evidence that women utilize family-leave provisions).
another opponent of the FMLA described the bill as "feminist legislation." Thus, even the opponents of the FMLA recognized it as alleviating the disproportionate family-leave burden suffered by working women.

c. Postenactment Evidence Indicates That Congress Designed the FMLA to Provide Benefits for Women

A telling signal that the FMLA was designed to redress the disparate family-care obligations of women, including the inadequacy of pregnancy and maternal leave, is found in litigation briefs for Hibbs. First, many of the briefs supporting the appellees characterized the FMLA as legislation that would benefit women. For example, in the opening line of the Summary of Argument filed by members of Congress supporting the FMLA, the legislators describe Congress's recognition that inadequate leave has a disparate impact on women. The brief goes on to acknowledge that working women would benefit most from the FMLA. Other amici invoked congressionally recognized disadvantages, such as lower wages and decreased promotions, that are suffered by working women as a result of inadequate family leave. Another argument frequently invoked in the Hibbs briefs is that providing no leave would have a disparate impact on women. Thus, the arguments advanced by the appellees in Hibbs strengthens the assertion that the FMLA was designed to aid women.

The briefs supporting Hibbs also explicitly reference inadequate pregnancy and maternity leave as reasons for the FMLA. For example, one amicus curiae brief, in an attempt to demonstrate that the FMLA was an appropriate remedy, describes the failure of nineteen states to provide any pregnancy leave and describes six states as providing only a minimum of pregnancy leave. Another brief characterizes the FMLA as attacking sex discrimination by providing job protection after women take maternity leave.


178. However, as described in the preceding section, the briefs also advance the argument that the FMLA was designed to alleviate gender stereotypes and disparities between the sexes.

179. Brief of Amici Curiae Senators Christopher Dodd and Edward M. Kennedy, and Representatives Patricia Schroeder, Marge Roukema and George Miller at 7-8, *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (No. 01-1368). Note that disparate impact is not a redressable injury under Fourteenth Amendment jurisprudence, so that evidence does not support the finding of constitutional violations. Instead, describing the disparate impact more likely points to the legislative purpose behind the act.

180. *Id.* at 6.

181. Brief of the National Women's Law Center et al. at 14-15, *Hibbs* (No. 01-1368).

182. *See, e.g.*, Brief of Women's History Scholars Alice Kessler-Harris et al. at 14 n.10, *Hibbs* (No. 01-1368).

183. Brief of Amici Curiae Senators Christopher Dodd and Edward M. Kennedy, and Representatives Patricia Schroeder, Marge Roukema and George Miller at 24-25, *Hibbs* (No. 01-1368).
leave. The appellee's own brief describes the failure to promote a woman because of pregnancy as an example of sex discrimination suffered by women in the workplace. Interestingly, the inadequacy of pregnancy and maternity provisions should be irrelevant in an equal protection analysis since Geduldig held pregnancy discrimination is not sex discrimination. Therefore, descriptions of inadequate pregnancy and maternity leave in the Hibbs briefs seems an especially good indicator that the purpose of the FMLA was to help working women, primarily by providing pregnancy and maternity leave provisions.

Perhaps the most convincing proof that the FMLA was designed to address harms suffered by working women, including inadequate pregnancy and maternity leave, is found in the statistics regarding who actually uses the leave. Many more women take leave under the FMLA than men. Furthermore, evidence suggests the disparity between male and female utilization will likely continue.

In short, the FMLA was designed, perceived, and implemented in response to the disadvantages suffered by working women. In particular, inadequate pregnancy and maternity leave provisions were a primary motivation for congressional action. Thus, despite Ginsburg's lack of success with the "pregnant problem" as a litigator, Hibbs, in following the Ginsburg strategy, represents the achievement of one of her primary strategic goals: addressing pregnancy discrimination through the Fourteenth Amendment.

III

COGNITIVE BIASES HELP EXPLAIN WHY HIBBS WAS SUCCESSFUL IN EMPLOYING THE GINSBURG STRATEGY

There are many similarities between Hibbs and Ginsburg's sex-discrimination precedent. Thus, it is my contention that the parallels between Hibbs and the Ginsburg strategy are a partial explanation for the surprising willingness of the Court to uphold the FMLA. Namely, framing the FMLA as fitting within the Court's existing sex-discrimination precedent resulted in the Hibbs decision. However, psychological factors may have had almost as much influence than precedent. The similarities be-
tween the Ginsburg strategy and the arguments employed in *Hibbs* are supported by cognitive psychology, which recognizes that ingroup biases aid the Ginsburg strategy's success.

Cognitive ingroup biases may help to explain both the *Hibbs* result and the success of the Ginsburg strategy for sex-discrimination cases.\textsuperscript{189} Psychological research shows that people respond more favorably to members of their own group (ingroup) than others (outgroup).\textsuperscript{190} This favoritism occurs whether groups are formed based on arbitrary criteria developed by researchers,\textsuperscript{191} or more recognized traits such as race or sex.\textsuperscript{192} Both *Hibbs* and the Ginsburg line of sex-discrimination cases may have capitalized on sex-based ingroup biases by selecting sympathetic male plaintiffs. That is, by presenting the aggrieved party as a member of the adjudicator's group—in this case a white middle-aged male since most federal judges are white middle-aged men—the judge is more likely to respond favorably.\textsuperscript{193} Ingroup bias is even more likely to operate because sex, a clear dividing line between groups, is the focus in sex-discrimination cases. Taking advantage of a sympathetic fact pattern and formal equality theory in *Hibbs* and the Ginsburg cases also may have exacerbated ingroup biases.\textsuperscript{194}

### A. Cognitive Ingroup Biases Result in Favoritism Among Ingroup Members

Substantial psychological research has demonstrated that people exhibit group biases in decision making.\textsuperscript{195} Favoritism within ingroups has startling implications when considering jurisprudence in general and *Hibbs* and the Ginsburg sex-discrimination cases in particular.

\textsuperscript{189} This section is designed to provide an overview into the theory that the Ginsburg strategy and *Hibbs* capitalize on ingroup biases. An additional detailed and more technical exploration into the subject by a more qualified individual would be of substantial importance in both cognitive psychology and legal scholarship.

\textsuperscript{190} See Brewer, supra note 12, at 160.

\textsuperscript{191} See, Schneider, supra note 12, at 238, 243 (describing the "minimal-group" paradigm studied by Tajfel where groups arbitrarily divided by the researcher on psychologically insignificant measures, such as artistic preferences, displayed ingroup bias and describing results of ingroup biases based on race and sex).

\textsuperscript{192} Id. (describing ingroup biases in the "minimal-group" paradigm where researchers grouped subjects on arbitrary criteria without psychological significance such as personality patterns or artistic preferences and also acknowledging research finding ingroup biases for race and sex).


1. **The Focus on Sex and Gender Likely Exacerbated Ingroup Biases in Hibbs and the Ginsburg Sex-Discrimination Cases**

In order for ingroup biases to operate, the perceiver must recognize the aggrieved party as part of the ingroup. That is, on some level the adjudicator must make a connection that the injured party is a fellow ingroup member. Psychologists note that recognizing another person as an ingroup member is the result of a process called categorization. Grouping people is a necessary component to processing the large amount of information that individuals receive on a daily basis. Furthermore, by forming in- and outgroups, people balance their needs to feel part of a group and to feel unique as a person. Categorization can occur by sight, sound, or merely by description. Research has demonstrated that individuals make unconscious associations, including an association regarding sex. In fact, research shows that people are more likely to categorize on the basis of sex than race, age, or role.

Admittedly, the research setting—which can carefully control for variables such as race, ethnicity, sex, and age—does not reflect a real-world experience. Nor can ingroup biases solely account for effects in the real world. In fact, research shows that multiple-group status can alter ingroup biases. However, as the salience or importance of one characteristic rises, research suggests that the observer will categorize based on that component. Also, the tendency to categorize oneself into an ingroup increases when group identity is threatened on important issues. Therefore, psychological research supports the notion that ingroup biases based on sex

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197. Id.
199. Gaertner & Dovidio, supra note 196, at 24 (reviewing research of students observing a victim of another race).
200. Id. at 23-24 (describing race categorization based on hearing a person's voice).
201. Id. at 29 (referencing an ingroup study where subjects were told to read a trial transcript that revealed the defendant's race).
204. See Schneider, supra note 12, at 240 (admitting that the ethnic conflicts in the Middle East cannot "be entirely reduced to preferences for ingroup members based on minimal information").
205. See id. at 243 (describing how ingroup biases fade as more ingroups are introduced and classification of groups becomes more complex).
206. See Gaertner & Dovidio, supra note 196, at 35-36.
207. See Schneider, supra note 12, at 242.
and gender are likely to operate in cases where sex discrimination is the central issue.

Further cognitive research suggests that it is likely that ingroup biases would have arisen in the litigation settings of Hibbs and the Ginsburg cases. First, substantial research shows that the preferences displayed to ingroup members are automatic, rather than requiring conscious engagement. In fact, research suggests that counteracting the tendency to favor ingroups can be achieved only through conscious effort. Thus, the judges in sex-discrimination cases such as Hibbs need not exhibit an awareness of a tendency to favor males in order for the bias to increase the likelihood of the male plaintiffs’ success.

When groups are based on criteria such as sex, ingroup bias is almost guaranteed to occur. Sex is a readily identifiable characteristic; thus, the grouping occurs based on extremely limited information, such as name or appearance. In addition, sex is considered a “salient” characteristic, one that people notice and use to classify. Research has shown that not only do people classify based on sex, but also that they are likely to make “status” judgments, with the tendency to respond by favoring males. Thus, research suggests that the Hibbs and Ginsburg strategy employment of male plaintiffs is likely to invoke ingroup bias based on sex.

As the salience of the group’s distinctions increases, the perceiver’s tendency to favor the ingroup member increases. Thus, raising the perceiver’s awareness of the distinction defining the group exacerbates the


209. See Krieger, supra note 195, at 1285.

210. See Judith A. Howard & Kenneth C. Pike, Ideological Investment in Cognitive Processing: The Influence of Social Statuses on Attribution, 49 SOC. PSYCHOL. Q. 154, 155 (1986). Measurable ingroup biases have even been observed when groups were randomly formed but members were told they were based on arbitrary criteria, such as similarities in estimating the number of dots viewed. Brewer, supra note 12, at 163.


212. Id. at 368. See also Will Kaikhoff & Christopher Barnum, The Effects of Status-Organizing and Social Identity Process on Patterns of Social Influence, 63 SOC. PSYCHOL. Q. 95, 96-97 (2000).

213. To measure ingroup biases, studies often employ the Implicit Association Test, in which study participants match items, like male and female names, with another variable, such as pleasant or unpleasant words (e.g., good/bad and competent/incompetent). By measuring response times, researchers have measured that individuals are more likely to associate flower names with pleasant concepts than insect names. Research has been able to demonstrate the unconscious associations that individuals make, including an association between their own sex group and positive characterizations. Richeson & Ambady, supra note 202, at 495.

214. See, e.g., Wilder, supra note 211, at 217.
ingroup bias. The focus on sex and gender in sex-discrimination cases like Hibbs further increases existing ingroup biases based on sex. The cases must highlight classifications based on sex to show that the Equal Protection Clause has been violated. The precedent, briefs, and oral arguments concentrate on sex, gender stereotypes, and the distinctions between male and female. The focus on gender classifications in Hibbs and the Ginsburg cases likely raised the salience of the litigants’ sex and increased ingroup biases in favor of the male plaintiffs.

2. Specific Cognitive Ingroup Biases Result in Better Outcomes for Ingroup Members

The general tendency of favoring ingroup members on the basis of sex may explain the results of Hibbs and the Ginsburg cases. Further evidence from psychological studies shows the specific effect that ingroup biases may have had in these cases. Namely, members of the ingroup are favored in reward allocation; the amount and extent of help offered; increased empathy and validation of perceptions; and attribution of external, rather than internal, causal forces—all of which have implications in the litigation setting.

a. Using Male Litigants Capitalizes on Ingroup Favoritism in Reward Allocation

Research indicates that people are likely to favor ingroup members when allocating rewards. In one research study, subjects were assigned to groups, then given the task of distributing points to other subjects. The subjects consistently assigned more points to those in the ingroup, even though the distribution did not affect their own rewards. The reward-allocation bias is one of the most commonly noted manifestations of ingroup biases; in fact, research acknowledges that ingroup bias is more likely to involve ingroup favoritism than hostility towards an outgroup.

The ingroup bias in reward allocation is likely to be relevant in the litigation setting. A favorable judgment can readily be characterized as a “reward.” Employing a male plaintiff increases the chances of a case suc-

217. See generally Brewer, supra note 12.
218. Wilder, supra note 211, at 230.
219. Id. (describing the research of Henri Tajfel et al., Social Categorization and Intergroup Behavior, 1 EUR. J. OF SOC. PSYCHOL. 149-78 (1971)).
220. Id.
221. GAERTNER & DOVIDIO, supra note 196, at 40; see also Erina L. MacGeorge, Gender Differences in Attributions and Emotions in Helping Contexts, 48 SEX ROLES, 175, 175 (2003) (studying the amount of help offered by each sex but noting an overall surprising lack of research on attributional rewarding in the context of gender).
ceeding because an overwhelming majority of judges are male—including seven out of nine justices on the Supreme Court. Since more rewards are distributed to ingroup members, even when the adjudicator does not personally benefit, using a male litigant is an effective means of appealing to the ingroup bias of the federal judiciary.

b. Male Litigants Are More Likely to Benefit from an Ingroup Helping Bias

Other cognitive research shows that a “helping bias” occurs with ingroup members. People are more likely to help when the perceived victim is a member of the ingroup. In one study, when the research subjects were aware of group status in a staged “emergency” situation, people responded to in- and outgroup members at an equal rate when they thought they were the only available assistance. However, when the situation was ambiguous as to whether another helper was available, or whether help was warranted at all, subjects overwhelmingly responded to aid an ingroup, but not an outgroup, member. In another study, grocery shoppers stopped as frequently to assist white and black shoppers who had dropped grocery bags, but spent less time and provided less assistance to the outgroup. Thus, the amount and likelihood of help increases when the injured party is a member of the perceiver’s ingroup.

Again, when applying the helping bias to the courtroom setting, selection of a male litigant, as in the Ginsburg cases and Hibbs, increases the likelihood of success. Most litigation examines whether harm occurred and the degree of egregiousness. Ambiguity in equal protection cases is particularly ripe for argument; litigants contest whether constitutional violations occurred, how egregious they were, and how often they occurred. For example, in Hibbs the issue was whether the states had committed sufficient constitutional violations to justify the FMLA as a remedy. In the Ginsburg cases, the broad questions were whether, and to what extent, sex

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222. See Black & Rothman, supra note 193, at 839, 842 n.14 (reporting that 89% of judges in 1995 were male).
225. Id. at 1322-23 (describing research performed by Lauren G. Wispe & Harold G. Freshley, Race, Sex and Sympathetic Helping Behavior: The Broken Bag Caper, 17 J. PERSONALITY & SOC. PSYCHOL. 59 (1971)).
226. See Laurie A. Rudman & Stephanie A. Goodwin, Gender Differences in Automatic In-Group Bias: Why Do Women Like Women More Than Men Like Men?, 87(4) J. OF PERSONALITY AND SOC. PSYCHOL. 494 (2004) (acknowledging the primary motive in ingroup bias to favor one’s own group); see also Gaertner & Dovidio, supra note 196, at 7 (reviewing the evidence that people are more helpful to ingroup members).
227. See supra Part I (discussing the section five precedent).
228. Hibbs, 538 U.S. at 726.
discrimination existed, and what level of judicial scrutiny was sufficient to proscribe it.\textsuperscript{229} Thus, both situations can be characterized as ambiguous as to whether and to what extent help is warranted.

Given the cognitive bias in favor of helping, and the greater degree of help provided when the injured party is from the perceiver's ingroup, the use of a male plaintiff should increase the likelihood that the mostly male judiciary will find intervention warranted. Since in the litigation setting the need for help will appear ambiguous, because both sides will argue whether help is warranted at all, the helping bias is likely to operate. Furthermore, the use of a male plaintiff increases the amount of help provided, making the FMLA (in Hibbs) or heightened scrutiny (for the Ginsburg cases) appear to male judges as reasonable measures.

c. The Greater Empathy Afforded to Ingroup Members Helps Male Litigants

Further studies show that people are more likely to take the perspective of and empathize with an ingroup victim.\textsuperscript{230} Cognitive research has shown that more concern will be shown to victims of the ingroup, noting that, in general, the perceiver's ability to identify with a victim increases the chances of perceiving a harm and the degree of emotional response to the harm.\textsuperscript{231} Similar research has also shown that the judgments of ingroup members are more likely to be perceived as accurate and appropriate.\textsuperscript{232} That is, if ingroup members claim to be harmed, their perception of injustice is more likely to be accepted and validated than that of outgroup members. Psychologists have found that subjects exhibit heightened levels of response and concern and are more likely to adopt perceptions of harm if the injured party is of the same ingroup.

Empathy toward the plaintiffs in Hibbs and the Ginsburg cases likely increased the chances for a favorable judgment. Not only are male judges more likely to help, and to help to a greater degree, when presented with an ingroup member, they are also likely to show more concern and empathy for that person. Arguably, the Court's employment of references to formal equality theory is evidence of greater empathy for ingroup members. The Court's clear concern for men and the fact that they do not receive an equal share of child-care leave in Hibbs, when compared to the Court's insensi-

\textsuperscript{229} See supra Part I (describing the Ginsburg sex-discrimination cases).
\textsuperscript{230} See Martin Davidson & Raymond A. Friedman, \textit{When Excuses Don't Work: The Persistent Injustice Effect Among Black Managers}, 43 ADMIN. SCI. Q. 154, 158-59 (March 1998) (describing and applying the research of Daniel C. Batson, \textit{The Altruism Question: Toward a Social-Psychological Answer} (Eribaum, ed. 1991)).
\textsuperscript{231} See id. at 159 (comparing the increased empathy caused by attachment to the victim to a mother's response to the experiences of her child).
tivity to the complete lack of pregnancy leave for women in *Geduldig*, may reflect the operation of ingroup bias in favor of the male plaintiff in *Hibbs*.

Furthermore, the expressed formal equality concern with inappropriate nurturing stereotypes may have been based on increased empathy for the situation of Hibbs, a male seeking to be a caregiver, being denied leave. Hibbs's own position, that the leave was required and that he was being discriminated against, could also have received added support due to ingroup bias, which causes people to accept and validate perceptions of ingroup members at a greater rate. In *Hibbs* and in the Ginsburg sex-discrimination cases, cognitive psychology supports the notion that the litigants benefited from the increased concern for male ingroup members.

**d. Ingroup Bias Causes Attribution of Harm to Outside Factors, Rather Than Internal Causes**

When ingroup members experience a negative event, research shows that a perceiver is more likely to attribute the situation to external, rather than internal, causes. In addition, males show a propensity to view a negative event as being caused by external factors, while women and blacks are more likely to attribute a harm to their own performance. This is also true from an observer's point of view. For example, when observing the same performance, boys' bad performance will be judged as caused by external forces like luck or bad teachers, while girls' failures are attributed to lack of ability. Thus, females are more likely to be viewed as responsible for their predicaments, while the existing structure or environment is seen as the cause of injury for males.

An ingroup attribution bias favors male plaintiffs, especially in an equal protection argument, because a key issue is whether the negative situation was caused by outside actors and to what extent that result was intended. Therefore, the judiciary's increased likelihood to view the situation as a result of external causes when a male is harmed may have helped Hibbs and the male plaintiffs in the Ginsburg cases. Rather than viewing the negative consequences as transient and attributable to the person, the Court found external social forces, including the states, to blame. In *Hibbs*, the Court found the FMLA remedy was appropriate because of the history of intentional sex-based discrimination by the states.

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234. Brewer, supra note 12, at 166.
236. Howard & Pike, supra note 210, at 155.
237. *Cf.* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 281 (1979) (holding that a preference for veterans, which prevented a woman from being promoted, did not violate the Equal Protection Clause because the Court did not attribute the harm to an intent to discriminate).
238. 538 U.S. at 735.
B. Cognitive Biases Favor Litigants Who Rely on Formal Equality Theory and Sympathetic Scenarios

Cognitive psychology has shown that the desire to help increases when the perceiver views the harm as one that could happen to him or her. Therefore the invocation of formal equality theory in Hibbs and the Ginsburg cases likely increased the likelihood of success since the issue, classifications based on sex, was framed as one that the adjudicators could experience.\(^{239}\) Second, emotional arousal may be triggered by the Hibbs and Ginsburg strategy of a sympathetic fact pattern, increasing the salience of the group distinction as well as the ingroup helping bias.

Empathy and the desire to help the injured party increase when the perceiver has experienced a similar injury or when the perceiver anticipates that he or she could be the victim of such an injury.\(^{240}\) For example, in one research study, subjects were less likely to devalue the electrical shock experienced by another if they thought they might also receive one.\(^{241}\) Thus, the helping bias increases when the person perceiving the harm could also experience it.

Through its use of formal equality theory, Hibbs frames the issue at stake as a harm that both the male and female members of the Court could imagine experiencing: denial of family leave based on sex classifications. Hibbs also illustrates another harm that males and females are vulnerable to: denial of the ability to nurture a loved one. In the Ginsburg line of sex discrimination cases, focusing the formal equality’s concern with sex-based stereotypes and distinctions allowed all adjudicators to identify with the harm, as opposed to harms suffered only by one sex, like pregnancy discrimination. In summary, the formal equality arguments in Hibbs and the Ginsburg cases describe the relevant question in such a way that judges are more likely to see the harm as one that could happen to them. Thus, this approach takes advantage of cognitive biases that favor the cases’ success.

Fact patterns that cast the litigant in a sympathetic light also tend to provoke cognitive biases. Sympathy increases the saliency of the situation to the perceiver, and it also increases the chance that bias will be involved.\(^{242}\) One scholar has argued that sympathetic fact patterns increase the likelihood for a favorable judgment, regardless of the legal merits of

\(^{239}\) The helping bias explains why the predominantly male judiciary may be sympathetic to the Ginsburg argument that distinctions based on sex are a redressable harm because such classifications are an injury they could sustain.

\(^{240}\) Davidson & Freidman, supra note 230, at 158.

\(^{241}\) Id. (noting the research of Richard M. Sorrentino and Robert G. Boutilier, Evaluation of a Victim as a Function of Face Similarity/Dissimilarity, 10 J. OF EXPERIMENTAL SOC. PSYCHOL. 84 (1974)).

\(^{242}\) Feigenson, supra note 194, at 49-57 (1997) (describing psychological research on sympathy bias in the courts).
the case.243 Thus, the Ginsburg strategy of selecting plaintiffs with sympathetic fact patterns when presenting the Court with a novel issue, and the sympathetic fact pattern in *Hibbs*, may have encouraged biases in favor of those plaintiffs.

In summary, the parallels between *Hibbs* and the Ginsburg cases may help explain why the Court was willing to uphold the FMLA. First, invoking precedent and its language through demonstrated similarities is a powerful legal tool. Second, the similarities between *Hibbs* and the Ginsburg sex-discrimination cases exhibit many of the characteristics that have been shown to trigger favorable cognitive biases, including ingroup biases. Cognitive research supports the proposition that the use of male plaintiffs, formal equality theory, and sympathetic fact patterns prompted cognitive biases that increased the chance of success for the litigants involved in *Hibbs* and the Ginsburg cases.

IV
LIMITATIONS OF THE GINSBURG STRATEGY AND ITS LEGACY, INCLUDING *HIBBS*

Given the success of the Ginsburg strategy, the family-leave protections its extension helped secure in *Hibbs*, and support for the approach from cognitive psychology, one could argue that future use of the strategy and heightened recognition of Ginsburg's accomplishments are warranted. While the importance of Ginsburg's contributions can hardly be questioned, some limitations to the strategy and its underlying theory should be acknowledged. Furthermore, the limitations of *Hibbs* and what it accomplishes also require attention.

A. Theoretical Response to Formal Equality Theory

Employing the formal equality theory advanced by Ginsburg and adopted by the Supreme Court has produced mixed results. The push toward treating men and women exactly the same has resulted in women being admitted into the previously all-male, state-sponsored Virginia Military Institute244 and the removal of automatic exemptions for women from jury duty.245 However, formal equality theory has also been invoked to uphold a preference for veterans, which disproportionately held back women from promotion,246 and to allow disability provisions that did not include pregnancy.247 In *Personnel Administrator of Massachusetts v. Feeney*, despite the fact that 98% of Massachusetts veterans were male, the Court upheld

243. *Id.* at 50.
the absolute preference for veterans because "any person who was a veteran" could obtain the benefit. Feeney signaled the Court’s unwillingness to recognize a disparate impact remedy for women under the Fourteenth Amendment. Thus, formal equality theory, firmly adopted by the Supreme Court in sex-discrimination cases, has led to results that have both helped, and failed to help, women.

I. Support for Formal Equality Theory

Scholars have developed several responses to the mixed results of the Court’s adoption of formal equality. First, many have applauded this move by the Court, arguing that anything other than viewing men and women as the same would harken back to the protectionist legislation that prevented women from working and attaining legal rights. Wendy Webster Williams argues that any needed changes in the workforce can best be achieved through labor reforms that remove toxins, create sick leave, and provide disability plans for all workers, rather than offering these benefits only to women because of biological differences such as pregnancy. In fact, Williams argues that legislation designed to benefit women would only cause resentment, resulting in worse outcomes for women. According to its proponents, formal equality theory has furthered women’s opportunities, and it is still advanced as the most appropriate feminist theory by some leading scholars, as well as the Supreme Court.

To proponents of formal equality, Hibbs embodies the strengths of the theory. That is, the FMLA, which provides benefits such as pregnancy and maternity leave, was upheld, but on gender-neutral terms. The legislation benefits both men and women in providing twelve weeks of unpaid leave for a variety of family-care needs, exactly the “benefits everyone” remedy that Williams proposes. Furthermore, the Court’s explicit renunciation of stereotypes based on sex supports formal equality’s position that women and men are similar.

248. Feeney, 442 U.S. at 279 (internal quotations omitted). See Farber et al., supra note 20, at 362.

249. See Abrams, supra note 99, at 869-74 (highlighting the alternatives to formal equality theory such as difference theory, represented by scholars such as Carrie Menkel-Meadow, Leslie Bender, and Chris Littleton, and dominance theory, developed by Catherine MacKinnon).

250. See O’Connor, supra note 37, at 1552-53 (lamenting the gender differences approach which, according to O’Connor, “recalls the old myths we have struggled to put behind us”); see also Wendy W. Williams, Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate, 13 N.Y.U. Rev. L. & Soc. Chang. 325 (1984-85) (arguing, as one of the preeminent supporters of formal equality theory, that equal treatment of men and women in the workplace is the most effective legal concept to break down barriers and gender roles).

251. Mezev, supra note 30, at 200-01 (describing Williams’s argument).

252. Id.

253. See Abrams, supra note 99, at 867-68.
2. Criticism of Formal Equality
   a. Formal Equality Theory Cannot Remedy Disparate Impact

Despite its endorsement by the Court, some scholars reject the notion that formal equality is the ideal mechanism through which women can achieve parity in the workforce. First of all, a recognized limitation of formal equality theory is that it cannot address disparate impact harms. Therefore, if a law does not facially distinguish between men and women, even if its application overwhelmingly disadvantages women, the Court will not find a violation of the Equal Protection Clause. Scholars have noted that the failure to address disparate impact prevents women from attaining equality in the workforce. The continued gap between men's and women's salaries, the lower status women generally occupy in the workforce, and the unequal opportunities for promotions for women still exist. However, none of these are bases for challenging current practices under the Constitution because the existing policies apply to both men and women. Formal equality cannot address disparate-impact claims because its goal is to treat men and women the same, rather than to eliminate the barriers and disadvantages women continue to encounter.

The case presented and the resulting opinion in Hibbs demonstrate how formal equality can benefit women, but neither acknowledges the disparate impact that prompted the legislation. Hibbs upheld the FMLA, thereby preserving a family-leave benefit that Congress acknowledged was driven by the increased number of working women and that was utilized primarily by women. The opinion did not rely on the facts demonstrating the disparate impact that prompted the FMLA. Rather, it utilized formal equality theories that criticized reliance on gender stereotypes and which described the constitutional violation from the standpoint of men who were treated differently from women with regard to family-leave allowances. Thus, some formal equality supporters would point to Hibbs as a victory because it addressed a concern of working women in a gender-neutral fashion that ended up benefiting men and women. Others might criticize the decision because the actual societal forces that created the need for the legislation were not recognized; this reasoning forces harms to women to be

254. See discussion about Feeney, supra Part IV.A.
256. See Abrams, supra note 99, at 868-69 (pointing out that formal equality did not provide a remedy for the male-designed working environment, which ignored the demands of pregnancy, reinforced disproportionate child-care obligations, and established "merit-based" systems that privileged male norms).
257. See Torrey, supra note 107, at 154-56.
258. See 29 U.S.C. § 2601(a)(5)(2000) (identifying the fact that primary responsibility for family caretaking often falls on women as a justification for the FMLA).
depicted either as harms suffered by males or as the result of stereotypes, depictions that might not always be possible.

b. Formal Equality Fails to Account for Workplace Norms Favoring Men

A second criticism of formal equality theory is that the goal of treating men and women exactly the same fails to recognize that existing workplace structures favor men. As one scholar eloquently observed, "[H]idden within the concept of people being 'similarly situated' is an unstated norm. To be similarly situated, there must be a reference point from which it can be determined if you are the 'same' or 'different.'" 260 The reference point in sex-discrimination cases, the author goes on to argue, has been the position of males. 261 Job descriptions, career paths, evaluations of merit, and family-leave options were designed primarily when men dominated the workforce. 262 Thus, although formal equality theory is imposed in a working environment that has been primarily structured and run by men, it does not acknowledge any disparate impact as a harm.

Again, while Hibbs upholds the FMLA, resulting in a beneficial outcome for women, the reasoning employed in the case demonstrates a bias toward the male perspective. First, Rehnquist primarily relies on the discrepancy between paternity and maternity leaves as evidence of a constitutional violation that makes congressional action appropriate. 263 Thus, the workplace itself, which has been designed primarily by and for men, results in less pay, fewer promotions, and more conflicts with family obligations for women, is not seen as the problem. 264 Rather, the Court focuses on the differences between the sexes in the existing work environment, a classic formal equality approach. While some would argue that the result in Hibbs, upholding the FMLA, displays the strengths of formal equality theory, the demonstrated male bias should flag concern for the level of "equality" achieved since women are benefiting only because harm to men has been demonstrated.

c. Formal Equality Theory Primarily Benefits Men

Yet another criticism of formal equality theory has been that men are the primary beneficiaries of the sex discrimination jurisprudence. Craig won the right for eighteen-year-old males to drink 3.2% beer. 265 Wiesenfeld secured Social Security benefits for widowers. 266 Some scholars suggest that men, on a societal level, have benefited the most from the sex-

260. Torrey, supra note 107, at 148.
261. Id.
263. See Hibbs, 538 U.S. at 730.
264. See Abrams, supra note 99, at 868-69; Torrey, supra note 107, at 154-56.
discrimination jurisprudence employing formal equality.\textsuperscript{267} For example, men experienced an increase in the number of custody awards in the wake of Craig.\textsuperscript{268}

In one sense, Hibbs could be seen to refute the argument that formal equality theory primarily benefits men. Since the needs of working women the legislation was driven by and has been utilized by more women than men, one could argue that Hibbs is an example of women benefiting from formal equality theory in sex-discrimination jurisprudence.\textsuperscript{269} However, the true test of the ultimate beneficiaries of Hibbs may lie in future litigation regarding sex discrimination and family leave, the implications of which are explored in the following section.

d. Formal Equality Theory Fails to Address Real Biological Differences

Many women’s advocates challenge formal equality theory for its inability to recognize the biological differences, often relating to childbearing, that distinguish women from men. Proponents characterize the “difference” perspective as the belief that men and women have fundamental differences and that these differences should be recognized and appreciated in society.\textsuperscript{270} Rather than solely focusing on treating men and women exactly the same, the supporters of approaches other than formal equality theory concentrate on removing obstacles that prevent women from achieving the same status in the workforce as men.\textsuperscript{271} Recognizing that only women must balance pregnancy and work, many scholars and theorists criticize formal equality theory for failing to address pregnancy discrimination.\textsuperscript{272} Others argue that burdens imposed by differences between men’s and women’s child- and family-care obligations should be redressable


\textsuperscript{269} See discussion supra Part II.

\textsuperscript{270} See, e.g., Leslie Bender, From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law, 15 VT. L. REV. 1 (1990).


\textsuperscript{272} See, e.g., Herma Hill Kay, Equality and Difference: The Case of Pregnancy, 1 Berkeley Women’s L.J. 1, 26 (1985); Christine A. Littleton, Equality and Feminist Legal Theory, 48 U. Pitt. L. REV. 1043 (1987); O’Connor, supra note 37, at 1557 (acknowledging that pregnancy may require treating men and women differently).
through the Fourteenth Amendment. Proponents of the "difference theory" criticize the formal equality goal of producing a gender-neutral result, because this goal fails to consider the (purportedly different) needs of men and women.

B. Future Implications and Limitations of the Hibbs Decision

By upholding the FMLA, Hibbs provides immediate, recognizable benefits to both sexes. However, formal equality theory espoused by Hibbs may create obstacles for forthcoming sex-discrimination litigation and future legislation designed to aid working women. First, the language in the opinion does not acknowledge or recognize the disparate impact concerns, which prompted the legislation. Second, the opinion reveals a continued bias that reinforces male privilege. Third, the opinion moves no closer toward recognizing any differences, not even pregnancy, that might warrant an exception to formal equality theory. Last, women may not be the primary beneficiaries of Hibbs, as some have argued is true for the rest of the Court's sex-discrimination jurisprudence.

1. Disparate Impact Evidence, Even for Pregnancy, Will Continue to Be Irrelevant

As described above, Hibbs strongly adheres to the Court's precedent of refusing to consider evidence of disparate impact when determining whether the Equal Protection Clause of the Fourteenth Amendment has been violated. Chief Justice Rehnquist's opinion highlights inappropriate stereotypes and disparities between maternity and paternity leave as evidence of constitutional violations sufficient to uphold the FMLA. Rather than considering the disparities between men and women in wages and promotions, or the impact on women of balancing career and family obligations as justifications for the FMLA, the Court adheres to its view of the Equal Protection Clause based on formal equality theory. Thus, one could infer that if no evidence showing that the sexes had been treated differently existed, the Court would be less willing to find congressional action appropriate.

The failure of the Court in Hibbs to consider disparate impact under the Fourteenth Amendment is consistent with its precedent and comes as no surprise. However, the opinion could have included more evidence

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274. Hibbs, 538 U.S. at 730.
275. See, e.g., Washington v. Davis, 426 U.S. 229, 239 (1976) (stating that Supreme Court precedent does not find discriminatory purpose, which is necessary for a constitutional violation of the Fourteenth Amendment, "solely because [a law] has a racially disproportionate impact"). For a breathtaking, detailed analysis of the history and future of feminism and equal protection litigation, read Serena Mayeri, Constitutional Choices: Legal Feminism and the Historical Dynamics of Change, 92 CALIF. L. REV. 755 (2004).
detailing the harms to women that Congress actually considered when enacting the FMLA. In this way, the Court would have opened the door to claims, such as pregnancy discrimination, in which equality requires accommodating gender differences. In fact, even Justice O’Connor has suggested that such claims could be cognizable under the Fourteenth Amendment.  

The problem with the rigid adherence to formal equality theory is that it requires establishing proof that the sexes are being treated differently. Thus, certain situations, such as pregnancy, will continue to be beyond the reach of the Fourteenth Amendment, because no comparison between pregnant males and females can be established. Furthermore, any harm to women (or men) that society or Congress may wish to address must have the ability to be characterized as involving inappropriate stereotypes or different treatment of the sexes, not “only” an injustice or injury to one sex. Arguably, the equality sought by the FMLA would be enhanced if it were recognized for the concerns that prompted it, rather than for its ability to benefit both sexes and to be characterized as gender neutral.

2. Hibbs Signals a Continued Bias in Favor of Males

Hibbs also signals that future litigation will continue to require identifying the harm from the male perspective. The Court does not rely on evidence regarding pay and promotion disparities or the career disadvantages posed by family obligations that were suffered by women and acknowledged by Congress. The Court does not consider whether the existing work environment, which has been structured and continues to be run primarily by males, may be part of the problem. Instead, the Court implicitly accepts the status quo as appropriate, regarding disparities in maternity- and paternity-leave as the problem. By perceiving the existing, male-constructed environment as essentially “gender neutral,” the Court perpetuates the formal equality bias toward males. The success of future claims may depend on their ability to be characterized as a harm recognizable from the male perspective, which may limit the types of cases and legislation that will succeed. In particular, pregnancy discrimination, which is not a harm that males could experience, is no closer to being a recognizable claim under the Fourteenth Amendment.

276. See O’Connor, supra note 37, at 1557 (stating that “sometimes to treat men and women exactly the same is to treat them differently, at least with respect to pregnancy”).

277. Brief of the National Women’s Law Center et al., at 14-15, Hibbs (No. 01-1368).

278. See Hibbs, 538 U.S. at 731.
3. **Hibbs Fails to Advance Difference Theory, Even for Pregnancy Discrimination**

The Court's failure to acknowledge the needs of working women as justification for the FMLA stunts any future attempts to push the jurisprudence toward recognizing additional differences between men and women. *Hibbs* presented an opportunity for the Court to evolve toward recognizing sex-based differences, especially in the area of pregnancy. The FMLA seeks to remedy stereotypes and different treatment of the sexes, which the *Hibbs* opinion did rely on, in addition to addressing the adverse effects suffered by women due to inadequate maternity and family leave, which Rehnquist did not highlight. References to the evidence of such effects in the opinion could have opened the way for the Court to eventually recognize pregnancy discrimination. In addition, the impact of inadequate leave on women's careers could even be used to support a difference theory requiring a restructuring of the working environment to accommodate family-care concerns. Thus, *Hibbs*, which could have represented a shift in judicial thinking just as *Reed* opened the door for heightened scrutiny, may further entrench formal equality theory of sex and pregnancy discrimination.

4. **The Court's Sex-Discrimination Precedent May Limit Future Equal Protection Remedies for Women**

Women retained the right to necessary family leave through the Court's upholding of the FMLA in *Hibbs*. In that sense, women have benefited from the use of formal equality theory in sex-discrimination precedent. However, if the limitations of *Hibbs* described above hold true, the Court will not be likely to uphold any future legislation designed to help only women achieve equality in wages, promotions, and influence on society.

The above discussion highlights how *Hibbs* adheres to formal equality theory and therefore perpetuates some of its limitations. If disparate impact continues to be a noncognizable harm under the Fourteenth Amendment and therefore insufficient to justify congressional action, women may have difficulty achieving full equality in the workforce. In addition, the opinion's reflection of male bias—in that the existing environment is assumed to be gender neutral and the harm identified is one that men can experience—may limit the remedies women can achieve through the Equal Protection Clause.

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Furthermore, the inability of the Court to recognize that differences that may exist between the sexes could limit the advancement of women. Recognition of these differences would not only help remedy pregnancy discrimination, but could also justify restructuring work and education environments.\(^{281}\) If the Court continues not to recognize sex-based differences, even related to pregnancy, men may be the ultimate beneficiaries of the Court's sex-discrimination precedent. Others, however, would argue that all of society loses when women continue to suffer systematic disadvantages that are not redressable through equal protection litigation. In short, while only time will tell what influence *Hibbs* will have on future sex-discrimination cases and women's equality in general, the adherence to formal equality theory may perpetuate the limitations of the Ginsburg strategy.

**CONCLUSION**

In summary, the Supreme Court's upholding of the Family and Medical Leave Act of 1993 was a surprise given recent section five cases and previous sex-discrimination precedent. The legislative history of the FMLA appeared vulnerable to judicial scrutiny because of the high standard set in *Boerne*\(^{282}\) and employed in *Garrett*.\(^{283}\) Second, while the congressional history described the disparate impact that inadequate leave policies have on women, the Court has held that these harms do not support congressional action against states.\(^{284}\) Last, as the dissenting justices argued, the FMLA appeared to violate the Court's congruence and proportionality test since it imposed a mandatory twelve-week-leave policy on all states.\(^{285}\)

The surprising result in *Hibbs* may be explained in part by its similarity to and employment of the sex-discrimination strategy developed by Ruth Bader Ginsburg. The facts, approach, arguments, and resulting opinion in *Hibbs* reflect Ginsburg's sex-discrimination strategy in many ways. Both involved the use of sympathetic male plaintiffs.\(^{286}\) Both targeted sex-based breadwinner and nurturer stereotypes, using history and statistics to buttress the arguments presented to the Court.\(^{287}\) Finally, both *Hibbs* and

\(^{281}\) See Abrams, supra note 99, at 868-69.

\(^{282}\) See generally City of Boerne v. Flores, 521 U.S. 507 (1997).

\(^{283}\) *Hibbs*, 538 U.S. at 746-47 (Kennedy, J., dissenting) (arguing that the congressional record of the FMLA did not evidence sufficient constitutional violations for section five legislation). See also Alabama v. Garrett, 531 U.S. 356, 368-69 (2001).


\(^{285}\) *Hibbs*, 538 U.S. at 758 (Kennedy, J., dissenting).

\(^{286}\) Baer, supra note 10, at 219.

\(^{287}\) See Ellington et al., supra note 114, at 721, 723, 732.
the Ginsburg strategy resulted in Court opinions that adopt formal equality theory.\textsuperscript{288}

Two factors from the Ginsburg cases and \textit{Hibbs} may help explain the Court’s upholding of the FMLA. First, the similarities in facts and arguments allowed the appellees to analogize \textit{Hibbs} to sex-discrimination precedent. Second, cognitive biases that support the Ginsburg approach may help explain the Court’s conclusion in \textit{Hibbs}. Namely, selecting male plaintiffs prompts ingroup cognitive biases.\textsuperscript{289} Also, the use of sympathetic fact patterns invokes biases that may favor the Ginsburg and \textit{Hibbs} plaintiffs.\textsuperscript{290}

\textit{Hibbs} represents a victory for women in achieving a remedy for what Ginsburg labeled the “pregnant problem”; it provides leave for pregnant women.\textsuperscript{291} However, given the adherence to formal equality theory expressed in the opinion, \textit{Hibbs} may impose limitations to addressing further equality concerns. That is, the Court continues to ignore sex-based disparate impact. In addition, \textit{Hibbs} perpetuates the male bias of formal equality theory. Finally, difference theory, which is necessary to recognize pregnancy discrimination as sex discrimination and is essential to expanding the Court’s recognition of differences into other areas, is not advanced, or even supported, by \textit{Hibbs}.

Some of the credit for the result in \textit{Hibbs} should be given to Justice Ginsburg for her development of the Ginsburg strategy and the resulting sex-discrimination precedent. However, the limitations present in sex-discrimination jurisprudence, including \textit{Hibbs}, leave the future of increasing women’s equality in the workplace uncertain.

\textsuperscript{288} \textit{See} Abrams, \textit{supra} note 99, at 867-68 (describing the Court’s tendency to employ formal equality theory).

\textsuperscript{289} \textit{See generally} Brewer, \textit{supra} note 12, at 160-70 (describing the operation of ingroup biases).

\textsuperscript{290} \textit{See} Feigenson, \textit{supra} note 194, at 50 (describing how sympathetic plaintiffs can increase the chances of a favorable outcome regardless of the case’s legal merits).

\textsuperscript{291} \textit{See} Campbell, \textit{supra} note 11, at 213.