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Free to Discriminate: Coleman v. Court of Appeals of Maryland Leaves States with an Incentive to Hire Men over Women

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I. INTRODUCTION

Gender discrimination in the workplace comes in two forms: unequal treatment and unequal opportunity.[1] All too often, a remedy to combat one perpetuates the other. For example, a law that combats unequal opportunity by addressing the special needs of pregnant women also perpetuates the view that women should be treated differently than men—discriminatory treatment.[2] Congress took eight years to carefully construct the Family and Medical Leave Act of 1993[3] (FMLA or "Act"), which it believed struck the perfect balance between providing women with equal treatment and equal opportunity in the workplace by including a self-care provision with the family-care provisions.[4] The Supreme Court, however, did not agree.

The FMLA, when adopted, included four provisions.[5] The first three provisions are collectively referred to as the family-care

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1. Unequal treatment concerns the way in which women are treated as employees, such as whether women are treated differently than men. Unequal opportunity concerns the ability of women to participate in the workforce, including whether men are favored over women in hiring decisions. *See* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1340 (2012) (Ginsburg, J., dissenting) (presenting the viewpoints of equal-treatment feminists and equal-opportunity feminists).

2. H.R. REP. NO. 101-28, pt. 1, at 14 (1989).

3. 29 U.S.C. § 2612(a)(1)(D) (1993), *declared unconstitutional by* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012).

4. *Id.* § 2601; *Coleman*, 132 S. Ct. at 1350 (Ginsburg, J., dissenting).

5. 29 U.S.C. § 2612. In 2008, Congress added a fifth provision to the FMLA, which requires employers to grant eligible employees up to twelve workweeks of leave if the employee

provisions and require employers to provide eligible employees with up to twelve workweeks of leave per year to care for a new child or an ill family member.[6] The fourth provision, referred to as the self-care provision, requires employers to provide eligible employees with up to twelve workweeks of leave per year when a serious health condition makes the employee unable to perform the functions of his or her position.[7]

In a 5–4 decision with no majority opinion, the Supreme Court held in *Coleman v. Court of Appeals of Maryland*[8] that Congress did not have the power to abrogate a state's sovereign immunity by passing the self-care provision of the FMLA.[9] In other words, Congress could not grant an employee the right to sue his or her employer for violations of the self-care provision if the employer was a state or state entity.[10] As a practical matter, Congress has the power to abrogate a state's sovereign immunity only when the legislation attempts to remedy or prevent due process or equal protection violations.[11] The Court did not believe that Congress had made sufficient findings to justify a belief that the FMLA would serve to perpetuate unequal opportunity for women if the Act only sought to combat unequal treatment of women in the workplace —that is, if it contained only the family-care provisions.[12] The Court's decision stands in stark disagreement with its earlier opinion in *Nevada Department of Human Resources v. Hibbs*,[13] which held that Congress had the power to abrogate the states' immunity when it passed the family-care provisions of the FMLA.[14]

This Comment argues that the plurality opinion in *Coleman* ignored the express congressional findings used to justify the FMLA

has a qualifying exigency that arises because an immediate family member is on (or has been called to) active duty in the armed forces. *Id.* § 2612(a)(1)(D), *declared unconstitutional by* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012).

6. *Id.* § 2612(a)(1)(A)–(C).

7. *Id.* § 2612(a)(1)(D), *declared unconstitutional by* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012).

8. 132 S. Ct. 1327 (2012) (plurality opinion).

9. *Id.* at 1338.

10. *See id.*

11. *See* U.S. CONST. amend. XIV, § 5; Seminole Tribe of Fl. v. Florida, 517 U.S. 44, 59–72 (1996) (establishing that Fourteenth Amendment is the only source of Congress's power to abrogate).

12. 26 U.S.C. § 2601 (2006).

13. 538 U.S. 721 (2003).

14. *Id.* at 740.

that the Court had previously confirmed in *Hibbs*. Part II outlines the circumstances that brought *Coleman* to the Supreme Court. Part III details the historical framework of the FMLA by exploring some of the congressional findings that led to its passage and considering the Supreme Court's view of those findings in *Hibbs*. Part IV presents the rationales of the competing *Coleman* opinions. Part V analyzes the plurality opinion in *Coleman*, contrasting it against both the dissenting opinion and the *Hibbs* majority opinion. Part VI concludes that by taking away an employee's ability to seek a monetary remedy for a state's violation of the self-care provision of the FMLA, the Supreme Court has left the states with an incentive to hire men over women, leaving the states economically free to discriminate in the hiring process.

II. STATEMENT OF THE CASE

Daniel Coleman worked as executive director of procurement and contract administration at the Maryland Court of Appeals.[15] In his sixth year of employment, Coleman requested sick leave "based upon a documented medical condition."[16] The day after Coleman's request, one of his supervisors gave him the choice to either resign or be terminated.[17] Because the FMLA required the Maryland Court of Appeals to grant Coleman the leave, Coleman sued his employer in federal court for, inter alia, violating the Act.[18]

A U.S. district court in Maryland dismissed the suit after the state asserted sovereign immunity despite the FMLA's express provision that it applies to "any employer (including a public agency)."[19] The district court based this decision in part on Fourth Circuit precedent that held that the entire FMLA was an unconstitutional abrogation of state sovereign immunity.[20] But the Supreme Court had overruled that decision in *Hibbs*, at least insofar

15. Coleman v. Md. Court of Appeals, 626 F.3d 187, 189 (4th Cir. 2010).

16. *Id.*

17. *Id.*

18. Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1332–33 (2012) (plurality opinion).

19. Coleman v. Md. Court of Appeals, No. L-08-2464, 2009 WL 8400940, at *1 (D. Md. May 7, 2009); 29 U.S.C. § 2617(a)(2) (2006).

20. *Coleman*, 2009 WL 8400940, at *1.

as the family-care provisions were concerned.[21] Nevertheless, the district court found there was "universal agreement of the Federal Courts of Appeals" that Congress's abrogation of "state sovereign immunity with respect to the FMLA's self-care provision" was unconstitutional.[22]

The Fourth Circuit affirmed the district court's decision.[23] The court agreed with the four other circuits to address the issue, finding that Congress could not constitutionally abrogate states' sovereign immunity in the self-care provision of the FMLA.[24] The court provided two reasons for its decision. First, the legislative history of the FMLA showed that "gender discrimination was not a significant motivation of Congress's decision to include the self-care provision."[25] Instead, "Congress included that provision to attempt to alleviate the economic effect on employees and their families of job loss due to sickness and also to protect employees from being discriminated against because of their serious health problems."[26] Second, even if Congress had intended the self-care provision to protect against gender discrimination, "Congress did not adduce any evidence establishing a pattern of the states as employers discriminating on the basis of gender in granting leave for personal reasons."[27]

III. HISTORICAL FRAMEWORK

A. The FMLA

The FMLA requires an employer to hold an eligible employee's job open for up to twelve weeks a year in the event that the employee needs to take family or medical leave for one of the following:

> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

21. *Id.* at *2 (citing Lizzi v. Alexander, 255 F.3d 128 (4th Cir. 2001)). When analyzing the FMLA, courts have distinguished the first three provisions (family-care) from the fourth provision (self-care). *See id.* at *1.

22. *Id.* at *2. At that time, the Sixth, Seventh, and Tenth Circuits had addressed the issue. *Id.*

23. Coleman v. Md. Court of Appeals, 626 F.3d 187, 194 (4th Cir. 2010).

24. *Id.* at 193. At the time of the Fourth Circuit's decision, the Fifth Circuit had joined the Sixth, Seventh, and Tenth Circuits' reasoning on this issue. *Id.* at 194

25. *Id.*

26. *Id.*

27. *Id.*

> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
>
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
>
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.[28]

To enforce these provisions, "[t]he Act creates a private right of action to seek both equitable relief and money damages 'against any employer (including a public agency)' that 'interfere[s] with, restrain[s], or den[ies] the exercise of' FMLA rights."[29] By detailing that "any employer" includes a "public agency," Congress explicitly sought to make the Act enforceable against the states despite their sovereign immunity.[30]

Congress detailed its "[f]indings and purposes" in section 2601 of the Act, which helped justify its decision to abrogate state immunity and explain its reasoning behind passing the FMLA.[31] Specifically, Congress declared that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender."[32] To combat this and its other findings, Congress expressed that one of the Act's purposes was "to promote the goal of equal employment opportunity for women and men."[33]

B. Constitutionality

The Eleventh Amendment of the Constitution grants the states sovereign immunity from suits for damages brought under federal law.[34] However, Section 5 of the Fourteenth Amendment gives Congress the power to enforce the substantive guarantees of Section

28. 29 U.S.C. § 2612(a)(1) (2006), *declared unconstitutional in part by* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012).

29. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 724 (2003) (citations omitted) (quoting 29 U.S.C. § 2617(a)(2) and § 2615(a)(1)).

30. *Coleman*, 132 S. Ct. at 1333 (plurality opinion).

31. *See* 29 U.S.C. § 2601.

32. *Id.* § 2601(a)(6).

33. *Id.* § 2601(b)(5).

34. U.S. CONST. amend. XI.

1 of that Amendment—the Due Process and Equal Protection Clauses.[35] This enforcement power means Congress can pass legislation that either remedies or deters violations of rights guaranteed by Section 1.[36] Such legislation can be enforced against the states if Congress both (1) makes "its intention to abrogate [the states' sovereign immunity] unmistakably clear in the language of the statute"[37] and (2) tailors the legislation "to remedy or prevent conduct transgressing the Fourteenth Amendment's substantive provisions."[38]

In order to evaluate the second requirement, the Supreme Court developed a "congruence and proportionality" test in *City of Boerne v. Flores*.[39] The test requires (1) identifying the "evil or wrong that Congress intended to remedy" or prevent[40] and (2) assessing "the means Congress adopted to address that evil."[41] Legislation passes the test if there is "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[42]

In *Hibbs*, the Supreme Court applied the congruence and proportionality test to the FMLA's family-care provisions.[43] The Court looked at the evidence of gender discrimination in order to determine what harm Congress was attempting to remedy.[44] By framing the constitutional harm as the "pervasive sex-role stereotype that caring for family members is women's work," the Court found that the first *Boerne* step was met.[45] The Court noted that Congress had evidence that state employers were as guilty of succumbing to the sex-role stereotype as private employers.[46] This alone, it reasoned, was enough to justify "Congress' passage of prophylactic

35. U.S. CONST. amend. XIV, §§ 1, 5; *Coleman*, 132 S. Ct. at 1333.

36. *Coleman*, 132 S. Ct. at 1333.

37. *Id.* (quoting Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003)) (internal quotation marks omitted).

38. *Id.* (quoting Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999)) (internal quotation marks omitted).

39. 521 U.S. 507, 520 (1997).

40. *Coleman*, 132 S. Ct. at 1333 (quoting *Coll. Sav. Bank.*, 527 U.S. at 639) (internal quotation marks omitted).

41. *Id.* at 1334 (citing *City of Boerne*, 521 U.S. at 520).

42. *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

43. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003).

44. *See id.* at 729.

45. *Id.* at 731, 737 (citing Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001)).

46. *See id.* at 729.

§ 5 legislation."[47] But the Court then continued its analysis by looking specifically at the maternity-leave provision and found that the disparate treatment in leave policies further evidenced the widespread stereotype.[48] The Court held that the FMLA family-care provisions satisfied the last step in the *Boerne* test because the "across-the-board, routine employment benefit for all eligible employees . . . ensure[d] that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men."[49] Additional restrictions on the applicability of the Act caused the Court to find that the FMLA was sufficiently tailored to the "targeted violation."[50]

IV. RATIONALE OF THE COURT

The Supreme Court issued four opinions in *Coleman*. Justice Kennedy authored the plurality opinion, which only three Justices joined.[51] Justice Ginsburg authored the dissent, which also had three Justices join.[52] Justice Thomas, who joined the plurality opinion, authored a concurrence, while Justice Scalia authored an opinion concurring only in the judgment.[53]

A. The Plurality Opinion

The plurality began with a synopsis of *Hibbs*, explaining that the Supreme Court had "permitted employees to recover damages from states for violations of [the FMLA's family-care provisions]."[54] It thereby reaffirmed the early finding of the *Hibbs* Court that

47. *Id.* at 730.

48. *Id.* at 731.

49. *Id.* at 737.

50. *Id.* at 739–40. Additional restrictions include that the act "requires only unpaid leave"; is applicable "only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months"; excludes from coverage "employees in high-ranking or sensitive positions, . . . state elected officials, their staffs, and appointed policymakers"; and mandates that "[t]he damages recoverable are strictly defined and measured by actual monetary losses, and the accrual period for backpay is limited." *Id.* (citations omitted).

51. Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1332 (2012) (plurality opinion). The Chief Justice, Justice Thomas, and Justice Alito joined in the plurality opinion. *Id.*

52. *Id.* at 1339 (Ginsburg, J., dissenting). Justice Breyer joined with the dissent in full, and Justice Sotomayor and Justice Kagan joined Justice Ginsburg's dissent with the exception of footnote one. *Id.*

53. *Id.* at 1338 (Thomas, J., concurring); *id.* (Scalia, J., concurring in the judgment).

54. *Id.* at 1334 (plurality opinion).

"Congress [had] relied upon evidence of a well-documented pattern of sex-based discrimination in family-leave policies," which included facially discriminatory policies and facially neutral policies that were administered in a gender-biased way.[55] Both practices "reflected what Congress found to be a 'pervasive sex-role stereotype that caring for family members is women's work.'"[56] Justice Kennedy framed the *Hibbs* decision as "conclud[ing] that requiring state employers to give all employees the opportunity to take family-care leave was 'narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest.'"[57]

The plurality opinion then rejected three arguments that Coleman presented to justify why Congress had the power to abrogate states' sovereign immunity when it passed the self-care provision of the FMLA.[58]

First, the plurality rejected that "[t]he self-care provision standing alone addresses sex discrimination and sex stereotyping."[59] It could not find any basis for concluding that sick-leave policies were facially discriminatory or administered in a discriminatory way, nor did it believe there was any evidence of a stereotype that women take more sick leave than men.[60] The Court found that Congress's intent in passing the self-care provision did not relate to gender; rather, Congress was concerned about discrimination based on illness and the economic hardships families faced with illness-related job loss.[61]

Second, the plurality did not agree that "the [self-care] provision [was] a necessary adjunct to the family-care provisions" sustained in *Hibbs*.[62] Coleman had argued that without the self-care provision, employers would assume that women would take more family-care leave and would thereby have an incentive to hire men over women.[63] He urged that the self-care provision was an attempt to

55. *Id.*
56. *Id.* (quoting Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003)).
57. *Id.* (quoting *Hibbs*, 538 U.S. at 738).
58. *See id.* at 1334–37.
59. *Id.* at 1334.
60. *Id.*
61. *Id.* at 1335.
62. *Id.*
63. *Id.*

remedy the discrimination in hiring that would result from the enactment of the family-care provisions, rather than an attempt to remedy discrimination in the leave policies.[64] The plurality rejected this argument because "Congress [had] made no findings, and received no specific testimony, to suggest the availability of self-care leave equalizes the expected amount of FMLA leave men and women will take," and because the argument could not pass the *Boerne* test.[65]

Third, the plurality rejected Coleman's argument that the self-care provision served to help single parents keep their jobs when they became ill.[66] The plurality declared that the Fourteenth Amendment did not protect against this suggested evil.[67] This was true even if most single parents were women because the provision at most attempted to remedy "employers' neutral leave restrictions which have a disparate effect on women."[68] Disparate impact alone is insufficient to prove a constitutional violation.[69] The plurality, therefore, held that the self-care provision, under this rationale, was "out of proportion to its supposed remedial or preventative objectives."[70]

The plurality concluded that Congress had no authority to abrogate the states' sovereign immunity when it passed the self-care provision of the FMLA.[71] It noted, though, that the immunity only applied to suits for money damages.[72] Individuals can still sue state employers for violations of the FMLA. While individuals cannot recover money damages, they may get their jobs back.[73] Additionally, the plurality noted that a state "may waive its immunity or create a parallel state law cause of action."[74]

64. *See id.*
65. *Id.* at 1335–36.
66. *See id.* at 1337.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82 (2000)).
71. *Id.* at 1338.
72. *Id.*
73. *See id.* at 1337–38.
74. *Id.* at 1338.

B. The Dissenting Opinion

The dissent would have held that the self-care provision "validly enforce[d] the right to be free from gender discrimination in the workplace" and was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.[75] The dissenting Justices found that two distinct justifications supported this conclusion.[76]

Under the dissent's primary rationale, the self-care provision was directed at sex discrimination because it sought to protect pregnant women.[77] Justice Ginsburg cited the legislative history, including the competing political views, to show that there was conflict even among feminists in how to frame laws (such as the FMLA) to ensure that women's rights were protected without singling women out.[78] The dissent found that Congress attempted to resolve this conflict by creating the self-care provision, which protected pregnant women without treating them differently than anyone else with a disability.[79] Justice Ginsburg further argued that "pregnancy discrimination is inevitably sex discrimination," a conclusion that she argued the Court was wrong to deny roughly forty years earlier in *Gedulig v. Aiello*.[80] Finally, the dissent reasoned that the self-care provision was congruent and proportional to protecting women from pregnancy discrimination because it separated gender-neutral parental care from the female-only disability that follows childbirth.[81] Furthermore, the provision was necessary to protect women who needed more leave than sick-leave plans provided because their pregnancies were exceptionally taxing or they needed to recover from a miscarriage or a stillborn childbirth.[82] The inclusion of all disabilities, rather than only pregnancy did not "mean that the provision lack[ed] the requisite

75. *Id.* at 1339 (Ginsburg, J. dissenting).

76. *See id.* at 1339–47.

77. *Id.* at 1340.

78. *Id.* Women's rights advocates were split into two groups: "equal-treatment" feminists and "equal-opportunity" feminists. *Id.* Equal-treatment feminists wanted laws that did not distinguish between men and women. *Id.* Equal-opportunity feminists wanted laws that would overcome the burdens placed on women. *Id.*

79. *Id.* at 1340–41.

80. *Id.* at 1345. In *Gedulig v. Aiello*, 417 U.S. 484, 496 n.20 (1974), the Court concluded that discrimination on basis of pregnancy is not sex discrimination because an entire class of females would never become pregnant. Justice Ginsburg roundly criticized *Aiello*'s rationale and argued that the Court should have expressly repudiated it. *See Coleman*, 132 S. Ct. at 1345, 1347 & n.6.

81. *Id.*

82. *Id.*

congruence and proportionality to the identified constitutional violations" because Congress had ample evidence that singling out pregnancy would result in gender discrimination in hiring.[83]

Second, the dissent believed that the Court could have held that the self-care provision validly applied to states because it prevented the gender discrimination in hiring that would necessarily have followed had the self-care provision not been included in the FMLA.[84] Congress was attempting to alleviate the stereotype that "caring for family members is women's work."[85] Employers viewed the passage of the parental and family-care provisions as women's benefits.[86] Therefore, without the self-care provision, the FMLA would lead employers to view men as more favorable job candidates.[87] The dissent thus found the self-care provision necessary to "lessen the risk that the FMLA would give rise to the very sex discrimination it was enacted to thwart."[88]

Overall, Justice Ginsburg could not separate the self-care provision from the parental- and family-care provisions.[89] The FMLA, in her opinion, was a total package designed to provide women with both equal opportunity and equal treatment in the workplace.[90] The focus on gender discrimination in the Act made it a valid exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment.[91]

C. The Concurring Opinions

The concurring Justices were not concerned with the nuances of how the self-care provision related to gender discrimination.[92] In their views, it was irrelevant to analyzing Congress's power in this instance.[93] Justice Thomas believed that "*Hibbs* was wrongly decided" because Congress did not have sufficient evidence of a

83. *Id.* at 1346.
84. *Id.* at 1347–48 (quoting Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003)).
85. *Id.* at 1347 (quoting *Hibbs*, 538 U.S. at 731).
86. *Id.*
87. *Id.* 1347–48.
88. *Id.* at 1349.
89. *See id.* at 1350.
90. *See id.*
91. *Id.*
92. *See id.* at 1338 (Thomas, J., concurring); *id.* at 1338–39 (Scalia, J. concurring in the judgment).
93. *See id.* (Thomas, J., concurring); *id.* (Scalia, J., concurring in the judgment).

"demonstrated pattern of unconstitutional discrimination by the States" when it passed the family-care leave provisions, and there was even less evidence concerning the self-care leave provision.[94] Justice Scalia argued that the *Boerne* test is arbitrary and unhelpful.[95] He believed that the plurality and dissent each applied the test faithfully, yet their vastly different conclusions evinced the uselessness of the test.[96] Instead, Justice Scalia would limit Congress's Fourteenth Amendment, Section 5 enforcement power to legislation that enforces the provisions of the Fourteenth Amendment as those provisions were envisioned when the Fourteenth Amendment was passed—legislation concerning racial discrimination alone.[97]

V. ANALYSIS

The self-care provision of the FMLA must pass the *Boerne* test in order for the Court to consider it a valid abrogation of the states' sovereign immunity. The first step requires identifying the unconstitutional behavior that Congress was attempting to prevent.[98] The second step assesses the law to determine if it is "congruent and proportional" to achieving its goal.[99]

A. The Self-Care Provision Actually Attempts to Prevent Employment Discrimination

The plurality in *Coleman* ignored the predominant theme that permeates both the *Hibbs* analysis and the Act's congressional findings and purposes in concluding that there was no nexus between gender discrimination and the FMLA's self-care provision.[100] The

94. *Id.* at 1338 (Thomas, J., concurring).

95. *Id.* (Scalia, J., concurring in the judgment).

96. *Id.*

97. *See id.* at 1338–39; Tennessee v. Lane, 541 U.S. 509, 557–58 (2004) (Scalia, J., dissenting).

98. *See* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997).

99. *See id.* at 520.

100. *Compare Coleman*, 132 S. Ct. at 1337 (plurality opinion) (stating there is no nexus between gender discrimination and the self-care provision), *with* 29 U.S.C. § 2601 (2006) (stating that a purpose of the Act is to "minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for [an] eligible medical reason . . . on a gender-neutral basis"), Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 730 (2003) (stating that employers relied on stereotypes about the allocation of family duties because they were so deeply rooted), *Coleman*, 132 S. Ct. at 1347–48 (Ginsburg, J., dissenting) (identifying public employers that admitted they would discriminate in hiring if only required to grant parental

theme in both was that the Act was attempting to overturn the "pervasive sex-role stereotype that caring for families is women's work."[101] The plurality took from *Hibbs* only that Congress had found evidence that family-leave policies differentiated or were administered differently based on sex.[102] However, *Hibbs* had arrived at this conclusion by focusing on the overarching stereotype that Congress was trying to stifle.[103] By ignoring the end goal of the FMLA, the plurality could also ignore the strong evidence that the self-care provision was necessary for the family-care provisions to work.[104]

Justice Ginsburg, who was in the majority in *Hibbs*, did not miss this sleight of hand.[105] Her dissent began with the admonition that "the plurality undervalues the language, purpose, and history of the FMLA, and the self-care provision's important role in the statutory scheme."[106] She also declared that "the plurality underplays the main theme of our decision in *Hibbs*."[107] Then, she detailed the competing agendas of women's rights activists (equal-treatment feminists and equal-opportunity feminists) that influenced the final scope of the FMLA.[108]

However, in her primary rationale, Justice Ginsburg digressed from this foundation and instead focused on the self-care provision as a remedy for pregnancy discrimination.[109] Her attempt to hinge the self-care provision on pregnancy discrimination was simply too great a stretch. First, it required making the leap that disability meant pregnancy. Then, it required making the additional leap that pregnancy could be equated with the female gender to arrive at the conclusion that the self-care provision, which proscribed discrimination based on disability, actually proscribed discrimination based on sex.

leave), *and* S. REP. NO. 101-77, at 32 (1989) ("Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect.").

101. *Hibbs*, 538 U.S. at 731.
102. *See Coleman*, 132 S. Ct. at 1335–38 (plurality opinion).
103. *Hibbs*, 538 U.S. at 729.
104. *See Coleman*, 132 S. Ct. at 1336–38.
105. *See id.* at 1339–40 (Ginsburg, J., dissenting).
106. Id.
107. *Id.* at 1340.
108. *Id.*
109. *Id.*

Although the dissent presents a valid argument, it suffers from defective logic because it is based on false premises.[110] The first premise is clearly underinclusive because there are a number of disabilities other than pregnancy. The second premise is somewhat less obvious, but is nonetheless underinclusive. Although only females may get pregnant, not all females will or even can get pregnant. In other words, there is an entire class of females that will never be in the class defined by pregnancy—a fact the Supreme Court recognized thirty-eight years earlier in *Aiello*.[111] It is unfortunate that Justice Ginsburg went down this road because her alternative argument is far more persuasive; however, as it stands, that argument is underdeveloped and gets lost in the dissenting opinion.

Although the dissent attempted to take the congressional findings a bit further than they can logically go, the dissent caught what the plurality missed (or ignored).[112] Indeed, it would be hard to miss unless one purposely tried to ignore it.[113] Congress listed its findings and purposes in the text of the statute.[114] The list was neither long nor confusing, and it included six findings and five purposes for enacting the FMLA.[115] Express in those findings and statements of purpose was a clear congressional intent "to promote the goal of equal employment opportunity for women and men."[116]

It is clear from the congressional record that the self-care provision was an attempt to proscribe the employment discrimination that would result if the FMLA was enacted with only the family-care

110. NICHOLAS CAPALDI, THE ART OF DECEPTION 96–97 (1987).

111. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

112. *Compare Coleman*, 132 S. Ct. at 1337 (plurality opinion) ("There is nothing in particular about self-care leave . . . that connects it to gender discrimination."), *and id.* at 1347–48 (Ginsburg, J., dissenting) (explaining that Congress adduced evidence that employers would regard required parental and family-care leave as a woman's benefit), *with* 29 U.S.C. § 2601 (2006) (stating that a purpose of the FMLA was to "minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available . . . on a gender-neutral basis"), Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003) ("The FMLA aims to protect the right to be free from gender-based discrimination in the workplace."), *and* S. REP. NO. 101-77, at 32 (1989) ("Legislation solely protecting pregnant women gives employers an economic incentive to discriminate against women in hiring policies; legislation helping all workers equally does not have this effect.").

113. *See* 29 U.S.C. § 2601.

114. *Id.*

115. *See id.*

116. *Id.*

provisions.[117] As the Court recognized in *Hibbs*, Congress was well aware of the stereotype that family care was a woman's job.[118] If Congress knew that the stereotype was prevalent, then there was ample reason for Congress to believe that employers would determine that an Act with only a family-care provision was a benefit only for women.[119]

The plurality's error lies in its attempt to subject the self-care provision to the same analysis the Court used in *Hibbs* to analyze the family-care provisions, as though the provisions could be evaluated in the same way.[120] Of course the self-care provision would fail if evaluated under the same criteria as the family-care provisions. Congress passed the family-care provisions to *remedy* gender discrimination and the self-care provision was passed to *prevent* it.[121] Both entitle Congress to invoke its Section 5 power to abrogate the states' sovereign immunity, but they cannot be evaluated in the same way.[122] For example, the Court cannot require Congress to adduce evidence of an established pattern of gender discrimination by the FMLA when it comes to hiring post-FMLA.[123] There will not be a pattern of gender discrimination to adduce when Congress has not passed the law that will create it.

Instead, the Court should have used the *Hibbs* analysis as a starting point for what the Court had already determined regarding congressional findings and purposes. Then, the Court could have applied the congruence and proportionality test to determine if there was a sufficient nexus between the self-care provision and the potential for employment discrimination as a result of the family-care provisions. If *Hibbs* were used in this way, there would have been no denying that Congress had sufficient "reason to believe" that it was preventing unconstitutional behavior when it passed the self-

117. *Id.* § 2601(b)(4)–(5).

118. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729 (2003).

119. Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1347–48 (2012) (Ginsburg, J., dissenting).

120. The plurality at one point calls both the family-care and the self-care provisions preventive. *Id.* at 1336 (plurality opinion).

121. *See, e.g.*, 29 U.S.C. § 2601(a)(6).

122. City of Boerne v. Flores, 521 U.S. 507, 529–30 (1997).

123. *Coleman*, 132 S. Ct. at 1337 (plurality opinion) ("But States may not be subject to suits for damages based on violations of a comprehensive statute unless Congress has identified a specific pattern of constitutional violations by state employers." (citing *City of Boerne*, 521 U.S. at 532)).

care provision.[124] The Court could also have relied on the *Hibb* Court's reasoning that the limited applicability of the Act made it sufficiently tailored.[125] The dissent pointed out this approach, but unfortunately it lost credibility when it attempted to equate the self-care provision to a remedy for pregnancy discrimination.[126]

B. The Self-Care Provision Is Congruent and Proportional to Its Goal of Preventing Employment Discrimination

The plurality summarily concluded that the self-care provision—as a preventative measure for the inevitable employment discrimination that would result from a FMLA that only included a family-care provision—could not come close to passing the *Boerne* test.[127] The dissent, by reiterating Congress's findings regarding the probable discrimination and outlining the law's restrictions, declared that it passed the test.[128] Since neither the plurality nor the dissent compared this theory to other cases in which the Court had applied *Boerne's* congruent and proportionality test, an analysis is in order.[129] A quick look at four cases that applied the test to other laws in which Congress sought to abrogate states' sovereign immunity reveals that the self-care provision indeed should have passed the test.

First, in *Boerne*, the Court held that Congress exceeded its Section 5 power when it passed the Religious Freedom and Restoration Act of 1993 (RFRA).[130] The RFRA prohibited the "'[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden result[ed] from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest.'"[131] The expansive nature of the RFRA "ensure[d] intrusion at every level of government" and was "so out

124. *City of Boerne*, 521 U.S. at 532.
125. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 738–40 (2003).
126. *See Coleman*, 132 S. Ct. at 1340 (Ginsburg, J., dissenting).
127. *Id.* at 1336 (plurality opinion).
128. *Id.* at 1345–47 (Ginsburg, J., dissenting).
129. *See id.* at 1336 (plurality opinion); *id.* at 1345–47 (Ginsburg, J., dissenting).
130. City of Boerne v. Flores, 521 U.S. 507, 536 (1997).
131. *Id.* at 515–16 (quoting 42 U.S.C. § 2000bb-1 (1993)).

of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[132] The legislation put so high a burden on states that the Court held that Congress had attempted to make substantive changes in constitutional protections, rather than pass preventive legislation.[133] Here, the self-care provision is not expansive.[134] It reaches only employers that have eligible employees, and it requires them to provide medical leave only for a documented disability and for only the number of days that the person's doctor proscribes, not to exceed twelve weeks.[135] This is far from the vast intrusion of the RFRA.

Second, in *Kimel v. Florida Board of Regents*,[136] the Court held that the Age Discrimination in Employment Act of 1967 (ADEA)[137] was not a valid exercise of Congress's Section 5 power to abrogate states' immunity. The ADEA targeted age discrimination.[138] Age is not a suspect class under the Equal Protection Clause and age discrimination does not violate "the Fourteenth Amendment if the age classification . . . is rationally related to a legitimate state interest."[139] The ADEA was not congruent and proportional to remedy or prevent unconstitutional behavior because its target—age discrimination—is reviewed for rational basis and the behavior is often found to be constitutional.[140] Unlike the ADEA, which targets an unprotected class, the FMLA targets gender, a protected class.[141] The aim of the self-care provision, then, is at primarily unconstitutional behavior—gender discrimination in employment as a result of the pervasive stereotype that would cause employers to view the family-care provisions as a benefit for women only.[142]

Third, in *United States v. Morrison*,[143] the Court held that a federal civil remedy for victims of gender-motivated violence was

132. *Id.* at 532.
133. *Id.*
134. *See Coleman* 132 S. Ct. at 1346–47 (Ginsburg, J., dissenting).
135. *Id.*
136. 528 U.S. 62 (2000).
137. 29 U.S.C. §§ 621–34 (2006).
138. *Kimel*, 528 U.S. at 66.
139. *Id.* at 83.
140. *See id.* at 82–83.
141. Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1349 (2012) (Ginsburg, J., dissenting).
142. *Id.* at 1347.
143. 529 U.S. 598 (2000).

not a valid exercise of Congress's Section 5 power.[144] Congress passed the law in order to combat the pervasive bias against these victims in state justice systems.[145] The law targeted unconstitutional behavior; however, it was not congruent and proportional to this goal because the law's consequences affected the perpetrators of the violence, rather than the perpetrators of the bias.[146] In contrast, the self-care provision targets employers, and the consequences affect employers.[147]

Finally, in *Tennessee v. Lane*,[148] the Court held that Title II of the Americans with Disabilities Act was a valid exercise of Congress's Section 5 power.[149] Title II was aimed at the "pervasive unequal treatment in the administration of state services and programs."[150] Title II reached a broad range of conduct and could potentially have vast applicability, but it was nonetheless congruent and proportional to the harm it sought to remedy because it required states only to make reasonable modifications and "only when the individual seeking modification [was] otherwise eligible for the service."[151] Although Congress did not phrase the self-care provision to require only "reasonable" leave, it provided restrictions that effectuate the reasonableness of the requirement. Employers are required only to provide medical leave for a documented disability, only for the number of days that the person's doctor prescribes, not to exceed twelve weeks, and only for employees that meet eligibility requirements.[152]

Comparing the Court's holdings in these cases provides ample support that the Court could and should have held that the self-care provision was congruent and proportional to the goal of preventing the inevitable gender discrimination that would result from passing the FMLA with the family-care provisions alone.

144. *Id.* at 627.
145. *Id.* at 619.
146. *Id.* at 626.
147. *See* 29 U.S.C. § 2612 (2006), *declared unconstitutional in part by* Coleman v. Court of Appeals of Md., 132 S. Ct. 1327 (2012).
148. 541 U.S. 509 (2004).
149. *Id.* at 533–34.
150. *Id.* at 524.
151. *Id.* at 532.
152. *Coleman*, 132 S. Ct. at 1346–47 (Ginsburg, J., dissenting).

V. CONCLUSION

The family-care provisions of the FMLA were framed to ensure equal treatment of women in the workplace. But without the self-care provision, the FMLA would have likely resulted in unequal opportunity for women. Gender discrimination in treatment and opportunity are both violations of the Fourteenth Amendment, which would make legislation remedying each a valid exercise of Congress's Section 5 power if done in a congruent and proportional manner. The plurality dismissed this argument, stating that "Congress must rely on more than abstract generalities to subject the States to suits for damages."[153] But the stereotype was neither abstract nor general. The plurality needed to look no further than the Court's decision in *Hibbs*.[154] The congressional findings that the *Hibbs* Court confirmed were enough to uphold the self-care provision, as were the additional findings that Justice Ginsburg illuminated in the dissent.[155] But, the plurality characterized these findings as a "few fleeting references."[156] Because of this characterization, states cannot be subject to suits for money damages when they violate the FMLA's self-care provision. Accordingly, there is no financial incentive for states to adhere to the self-care provision, which will encourage them to discriminate when hiring.

Post-*Coleman*, states are free to violate the self-care provision, a provision that applies equally to men and women. On the other hand, there is a cost to violations of the family-care provisions, provisions that stereotypically apply to women only. Thus the states now have a financial incentive to discriminate in hiring, and the opportunities for women will accordingly become unequal when it comes to public employment. Because this result completely thwarts the very purpose of the FMLA, the *Coleman* plurality got it wrong.

153. *Id.* at 1337 (plurality opinion).

154. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 729–30 (2003) (finding that (1) states had laws based on the belief that "a woman is, and should remain, 'the center of home and family life'"; (2) states felt withholding women's opportunities were justified; (3) state gender discrimination had not ceased as a result of previous legislation; and (4) the gender discrimination was a result of "reliance on such stereotypes" (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)).

155. *Coleman*, 132 S. Ct. at 1339–50 (Ginsburg, J., dissenting).

156. *Id.* at 1336 (plurality opinion) (quoting Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 644 (1999)).