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SYMPOSIUM: WOMEN'S WORK IS NEVER DONE: EMPLOYMENT, FAMILY, AND ACTIVISM: HIBBS AS A FEDERALISM CASE; HIBBS AS A MATERNAL WALL CASE

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BIO:

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SUMMARY:

... It is hard to say what is more amazing about United States Supreme Court Chief Justice William Rehnquist's opinion in Nevada Department of Human Resources v. Hibbs: that it affirmed a Ninth Circuit decision; that it supported a worker's rights against his employer; or that it departed from the Court's line of federalism decisions by siding with the federal government instead of with the states. ... Rehnquist was careful to reiterate Boerne's "congruence and proportionality" test, leading some commentators to argue that the real message of Hibbs was to confirm the Supreme Court's "Father Knows Best" determination to judge, according to one commentator, ... Hibbs, while "truly startling" as a federalism case, fits well into the trend of successful maternal wall cases. ... The specific family value involved is the norm of parental care: the widespread and uncontroversial sense that children need and deserve time with their parents. ... Would you want your child in paid care if you earned that wage? The troubling image and reality of market-based child care reinforces the norm of parental care in the United States. ... Also striking given the Court's focus on gender discrimination is the fact that Hibbs did not involve stereotyping of women: it involved a man who wished to take six months off his job and still stay employed. ... Stereotype Content and Hostile Stereotyping: Mothers Belong at Home ...
I. Introduction

It is hard to say what is more amazing about United States Supreme Court Chief Justice William Rehnquist's opinion in Nevada Department of Human Resources v. Hibbs: n2 that it affirmed a Ninth Circuit decision; that it supported a worker's rights against his employer; or that it departed from the Court's line of federalism decisions by siding with the federal government instead of with the states. In Hibbs, the Court held that state employees can sue their employers for damages under the Family and Medical Leave Act (FMLA). n3

The decision is remarkable, in part, because the Ninth Circuit has the reputation of being the most reversed circuit in the union. n4 Nor does the current Supreme Court have a reputation for being friendly to workers' rights: in Hibbs, Chief Justice Rehnquist and Justice O'Connor defected from the employer-friendly majority that has voted against workers in many pro-business decisions—notably the Watson n5 and Ward's Cove n6 decisions cutting back sharply on Title VII disparate impact theory. n7

Finally one of the signal accomplishments of the Rehnquist Court has been to introduce—some say out of whole cloth—a series of limitations on congressional power in the name of federalism. n8 Hibbs represents "a notable departure" from the Court's recent tendency to shield states from anti-discrimination statutes. n9 Chief Justice Rehnquist, "the guiding force behind the court's trend toward empowering states," n10 himself wrote the Hibbs opinion. n11

What is going on here? Why was the "smart money" wrong? What does Hibbs mean for the future of Eleventh Amendment jurisprudence? Legal commentators who have attempted to answer these questions generally base their predictions on an analysis of the Supreme Court's federalism cases. n12 Part II of this Article suggests that the doctrinal significance of Hibbs cannot be accurately assessed without looking beyond Supreme Court cases. Though Hibbs may be a bit of a mystery when analyzed solely as a federalism case, it clearly fits an emerging body of case law in which parents successfully challenge the "maternal [n367] wall" that negatively affects their job opportunities. n13 In a new legal trend, courts have ruled in favor of family caregivers, mostly pregnant women and mothers, in more than 150 lawsuits brought under roughly a dozen legal theories. n14

A growing body of sociological literature documents the complex interaction between law and social norms, yet in law reviews this analysis has been applied only intermittently, and rarely to individual cases. n15 This Article argues that solving the mystery of Hibbs requires an understanding of the normative environment surrounding maternal wall cases. Only by viewing doctrinal developments as part of a conversation between the courts and the culture at large can we adequately explain the "defections" of Justice O'Connor and Chief Justice Rehnquist. n16

After assessing the significance of Hibbs as a federalism case and a maternal wall case, Part III examines the
impact of Hibbs on two subsequent maternal wall cases, one decided by the United States Court of Appeals for the Second Circuit, Back v. Hastings-on-Hudson Union Free School District, n17 and one a Massachusetts case, Sivieri v. Commonwealth of Massachusetts, Department of Transitional Assistance. n18

Both Back and Sivieri, like Hibbs, rely heavily on the language of stereotyping. All three cases use judicial notice to identify maternal-wall gender stereotyping. The existing literature in empirical social psychology may well help guide judicial notice in this arena and give [*368] courts a better sense of what kind of expert testimony is available should that be required. To aid both projects, Part IV provides a brief review of the empirical social psychology studies of patterns of stereotyping and cognitive bias that affect pregnant women and mothers.

II. Hibbs as a Maternal Wall Case

It seems safe to assume that average Americans, including those who make their way onto juries, have sympathy for employees who take time to care for their families and have little patience with employers who get in the way. n19

From the beginning, Hibbs was important more for doctrinal and symbolic reasons than for practical ones: if Mr. Hibbs had lost, the practical result would have been limited to the 3.4 percent of the workforce comprised of state employees. n20 Yet Hibbs was of vital symbolic importance, both for work/family advocates and for constitutional law. Most commentators who have examined Hibbs analyzed it within the framework of federalism jurisprudence. n21 To place Hibbs within this context, a brief synopsis of the federalism jurisprudence under Section 5 of the Fourteenth Amendment n22 is in order. n23

Section 5 gives Congress the power to enforce the Fourteenth Amendment's guarantees with "appropriate legislation." n24 In 1997, [*369] however, the Rehnquist Court began to rein in this congressional enforcement power in City of Boerne v. Flores. n25 Boerne struck down the Religious Freedom Restoration Act, n26 arguing that the Eleventh Amendment limits Congress's power to prevent or remedy unconstitutional wrongs unless the enactments demonstrate "congruence and proportionality." n27 In 2000, United States v. Morrison n28 struck down the Violence Against Women Act's (VAWA) n29 civil remedy for gender-motivated violence, arguing that VAWA's private cause of action transgressed the limits on congressional power under the Fourteenth Amendment because it was directed not at any state or state actor, but at individuals who committed gender-motivated crimes. n30 In 2001, Board of Trustees of the University of Alabama v. Garrett, n31 the Court prohibited suits by state employees under the Americans with Disabilities Act n32 on the grounds that Congress had gone too far, extending well beyond "irrational" discrimination against disabled individuals. In essence, the Court argued, Congress had tried to rewrite the Equal Protection Clause n33-Congress cannot enact Section 5 legislation unless it first has "identified a history and pattern of unconstitutional . . . state transgressions." n34 In Kimel v. Florida Board of Regents, n35 the Court prohibited state employees' lawsuits under the Age Discrimination in Employment Act (ADEA) n36 on the grounds that the sanction failed the proportionality test and the legislative record lacked sufficient evidence of a widespread pattern of age discrimination by state governments. n37 Kimel, however, noted that "[d]ifficult and intractable problems often require powerful remedies . . . [including] reasonably prophylactic legislation" n38 where there is a documented history of "widespread and persisting deprivation of constitutional rights." n39

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This doctrinal context explains why the "smart money" bet that Mr. Hibbs would lose. Until Hibbs, no statute had survived the Boerne test. n40 Indeed, Chief Justice Rehnquist's majority opinion in Hibbs made it abundantly clear that the case did not signal a change to Boerne. n41 Rehnquist was careful to reiterate Boerne's "congruence and proportionality" test, n42 leading some commentators to argue that the real message of Hibbs was to confirm the
Supreme Court's "Father Knows Best" determination to judge, according to one commentator,

not only the nature of the right asserted, but also whether the legislation passes the "congruence and proportionality" test. . . . substituting its own judgment for that of Congress in reviewing the weight of the congressional findings about the need for prophylactic legislation and the appropriate statutory remedy for the asserted injury. n43

The Court held that the heightened scrutiny n44 triggered by gender discrimination made it "easier for Congress to show a pattern of state constitutional violations." n45 Indeed it did. Whereas in Garrett the Court had insisted on evidence of unconstitutional behavior by the states themselves, n46 in Hibbs the Court also considered evidence of misbehavior both in the private sector and in the federal government, n47 as well as evidence presented to Congress during its several previous attempts to pass the FMLA. n48 Heightened scrutiny also allowed Congress to forbid a "somewhat broader swath of conduct" than that proscribed by the Fourteenth Amendment, n49 an analysis that helps explain how the Court bridged the [*371] gap between a finding of gender discrimination and the FMLA's leave provision.

Heightened scrutiny does not explain, however, why the court chose to analyze the case in a gender-discrimination framework in the first place. n50 That conclusion was not predetermined. The FMLA could have been-and was in Justice Kennedy's dissent-alyzed not as a remedy to gender discrimination but as a "substantive entitlement program," n51 particularly in view of the fact that the FMLA covers a worker's own health problems. n52 Alternatively, the Court could have seen the case as one involving a man's desire to care for his wife, not gender discrimination, and (again) applied rational basis review. n53

As evidenced by the 2004 decision in Tennessee v. Lane, n54 which upheld the right of disabled individuals to sue state governments that fail to make courthouses accessible, Hibbs seems to represent the beginning of an attempt to sketch the outer contours of federalism's limitations on congressional power. n55 Yet this does not explain why this counter-trend began in a case that involved the FMLA. In Hibbs, both Justice O'Connor and Chief Justice Rehnquist, who had voted with the majority in Garrett and Kimel, n56 voted with the liberal justices who had consistently dismissed the conservatives' Eleventh Amendment concerns. n57

Why? Though Hibbs surprised commentators who viewed it through the lens of Rehnquist Court federalism cases, it makes perfect sense when viewed through the lens of the growing number of maternal wall cases. n58 In Beyond the Maternal Wall: Relief For Family Caregivers Who Are Discriminated Against on the Job, published in the summer of 2003, I and a [*372] co-author, Nancy Segal, found roughly twenty cases in which courts had ruled in favor of mothers-and some fathers-who challenged job disadvantages triggered by their status as parents, or by work/family conflicts stemming from caring for elders or ill partners. n59 Despite 15 years of confident pronouncements in law reviews that work/family issues could not be fruitfully litigated, n60 an increasing number of plaintiffs are doing so. n61 We hear of more cases all the time as a result of extensive press coverage of the maternal wall phenomenon n62 and the WorkLife Law Attorney Network, which provides technical guidance for attorneys representing plaintiffs and helps plaintiffs find suitable representation. n63

Hibbs, while "truly startling" n64 as a federalism case, fits well into the trend of successful maternal wall cases. But this conclusion begs the [*373] question of why maternal wall cases are proving successful at a time when the federal judiciary is becoming increasingly conservative. To answer this question, we need to go beyond doctrine to examine the normative framework surrounding issues of family caregiving. Legal scholars have begun to focus on what sociologists studying the law have long recognized: the law both reflects and influences social norms in a complex, iterative process.
The discussion that follows suggests that social-norms analysis offers a respectable way to analyze individual cases as well as overall trends, replacing a situation in which the only common alternative to doctrinal analysis is the vulgar legal realist "what the judge ate for lunch" approach. 

While the defection of Rehnquist and O'Connor may be surprising from a federalism perspective, it makes sense when viewed as a reflection of the social norms surrounding family caregiving: the widespread and uncontroversial sense that sometimes, in a family, the most pressing concern is family, not paid, work. This point emerges clearly in the brilliant brief signed by Georgetown University Law Center Professor Cornelia T. L. Pillard, attorney for Mr. Hibbs.  

William Hibbs was a social worker for the Welfare Division of the Nevada Department of Human Resources. In 1996, his wife, Dianne, suffered a severe neck injury in a car accident. Initial surgery left her by spring of 1997 with severe pain and at grave physical and emotional risk: addiction to prescribed pain medications caused her to become clinically depressed and suicidal, necessitating at one point that she be admitted to a hospital psychiatric unit. She also had a metal plate in her neck from which the screws stripped and loosened, pressing against her esophagus and requiring her to be extremely careful in moving her body so as to avoid a fatal puncture. Her doctors recommended additional surgery, and personal care by her husband in the interim.

One does not have to be an ardent feminist to conclude that the right thing for Mr. Hibbs's employer to do was not to summarily order him back to work and then to fire him when he failed to report because he was contesting the legality of the order.

As in maternal wall cases in which women have been denied jobs, fired, or denied promotions because of their status as mothers, Hibbs clearly presents the question of whether employers should be free to penalize adults who act on widely held norms about the importance of family-delivered care work.

This helps explain how some justices responded to the case. Justice Sandra Day O'Connor, who voted in favor of Mr. Hibbs, has an established track record on family caregiving issues. Perhaps her view is informed by personal experience: she cut back to part-time work for seven years in order to raise her children. In her 2003 book, Justice O'Connor noted that, "Today American women are confronted by 'the juggle.' While many women are able to balance a profession and home admirably, it is nonetheless true that time spent at home is time that cannot be billed to clients or spent making contacts at social or professional organizations." Justice O'Connor remains acutely aware of work/family conflict.

Justice Rehnquist, who also voted in favor of Mr. Hibbs, is not known as a feminist. Yet he has had ample opportunity to experience first-hand various kinds of family caregiving. His wife died of cancer in her sixties. Not only does he have experience with a terminally ill wife; he also has experience with child care. Spending time with his children and grandchildren is one of his main interests outside of work, and he has sometimes left work early to help out when his daughter (a single mother and a lawyer) had child care problems, according to news reports. Moreover, Rehnquist's earlier "anti-feminism" is cut from the same cloth as his current "feminism." As Assistant Attorney General in 1971, he privately opposed the Equal Rights Amendment, worrying that it would "hasten the dissolution of the family" and signal "nothing less than the sharp reduction in importance of the family unit, with the eventual elimination of that unit by no means improbable." The care work agenda aligns with traditionalist family values far better than do most other aspects of the feminist agenda.

While the law review convention is to analyze only the motivations of the justices themselves, let us indulge in a
momentary break from convention and consider the input of the Supreme Court's clerks into Hibbs. Rehnquist's and O'Connor's clerks are of the generation of lawyers for whom work/family conflict looms large. As Supreme Court clerks, they have a clear path to the highest rungs of the legal profession—if they agree to be available for work virtually 24/7 from their mid-twenties until their mid-sixties. Many women see this as inconsistent with their ideals in family life: only about 7 percent of American mothers aged 25 to 44 work 50 or more hours a week year-round. n79 Many Gen-X and Gen-Y men also seek more involvement with family life, and less time at work, than did their fathers. n80 Women from the generation from which Supreme Court law clerks are drawn are the "canaries in the mine" on work/family issues. Through my many conversations with young women lawyers across the country, I have found that they are much more likely than older women to see a workplace that systematically disadvantages mothers as one that discriminates against women.

If Chief Justice Rehnquist understands the challenges of combining work and family, he understands it, in part, from the experience of his daughter ("cherchez la fille") n81 and his law clerks. Both "cherchez la fille" and the "canaries in the mine" syndrome fuel the political potential of work/family issues. n82 Hibbs is properly understood not only to reflect [*376] federalism concerns, but also the commitment of O'Connor and Rehnquist to the importance of family caregiving in American life.

The broad political appeal of family caregiving, and of maternal wall cases, is best illustrated by Knussman v. Maryland. n83 Knussman involved a family in which the expectant mother had developed preeclampsia, a condition in which a pregnant woman's blood pressure skyrocketed so high it is potentially life threatening. n84 To quote Robin Cockey, Kevin Knussman's attorney:

The Knussmans were life-long residents of Maryland's Eastern Shore, an area known for its bedrock conservatism and for family values of the most traditional sort. Kevin Knussman was a Maryland State Trooper with fifteen years service, assigned as a paramedic to the helicopter-borne, Aviation Division. . . . Kevin was a Republican, a fundamentalist Christian and a die-hard law and order man who idolized the agency for [which] he worked. As part of his company man life-style, Kevin had taken few vacations and had accrued a plethora of unused leave. n85

When his wife became sick, Knussman made the "difficult decision" to seek as much leave as possible: four to eight weeks, beginning with the birth of his child. n86

His boss told him there was "no way" he could take more than two weeks, even after Knussman discovered a newly enacted state statute n87 that allowed four weeks paid leave for any caregiver with accrued sick leave who was "responsible for the care and nurturing of a child." n88 The Leave Specialist denied his request, noting that this provision applied only to women and that a man was eligible only "if your wife is in a coma or dead." n89 After his daughter's birth, Knussman "found himself doing it all, taking care not only of the newborn infant, but of his bedridden wife as well." n90 He asked the Division to reconsider its denial of family leave, to which the Leave Specialist replied: "God made women to have babies and, unless [you can] have a baby, there is no way [you can] be primary care[giver]." n91 So Trooper Knussman returned to work, filing a grievance. n92 Eventually, offended when he was told that [*377] his grievance was "a bunch of crap," he filed a lawsuit. n93 Four years later he won, although only after he had suffered a near-breakdown. n94 To quote his lawyer: Knussman's "deep sense of betrayal and frustration at being unable to provide for his family in a time of great emotional and personal need led him into a truly profound depression in which he at one point experienced suicidal ideation." n95

Knussman aptly shows the political reach of maternal wall cases. To quote Knussman's attorney, "the FMLA serves wholesome, widely-held ideals." n96 Cockey continued: "The route Trooper Knussman took to the U.S. District Court
in Baltimore typifies the cross-political, unifying appeal of 'family values.' Knussman, a conservative Christian and volunteer on local Republican campaigns . . . sought the aid of the [local] ACLU. " n97 Cockey saw his role as "seeking redress for a client whose boss did not care about 'family values.' " n98

The specific family value involved is the norm of parental care: the widespread and uncontroversial sense that children need and deserve time with their parents. n99 In its traditional form, the norm is of mother-care: "The notion that mom should be there for the children always and without fail, that her primary job is to tend and nurture them, that without her constant ministrations their future is in jeopardy," noted Lillian Rubin in 1994, "is deeply embedded in our national psyche." n100 One mother lamented, "Every day I leave my kids at day care, I think to myself: What kind of a mother am I? It's like I'm not raising my own children." n101 Recent surveys show that 70 percent of Americans believe that the family is best served if one parent stays at home while children are young. n102 Recent social psychology studies report that a key difference between notions of the "good mother" and the "good father" is that the good mother is always around for her children. n103

The norm of mother-care is gradually broadening into a norm of parental care. Note Cockey's statement that Knussman's depression [*378] reflected his inability "to provide for his family." n104 Traditionally, of course, a man's ability to "provide" reflected only his ability to provide funds; to Knussman, a tough and ideologically conservative state trooper, "providing" included his ability to provide the care needed by his newborn and ill wife.

This hint of a shift in social norms is confirmed by demographic trends. The statistics on "tag teaming" show that one out of three couples with at least one child under age five tag team-they work different shifts so that one parent can always be there for the children. n105 Tag-teamers often echo the sentiment that "I'm happy that one of us gets to stay home with the kids and that they're not raised in a daycare." n106 Tag teaming is probably most prevalent among working class families, given that members of poor families are more likely to work nights and evenings and have less control over their schedules than wealthier families. n107 Professional/managerial couples (PMC) tend to have jobs where "full time" entails such long hours that tag teaming is not a practical child care strategy. n108

We tend to assume that the widespread conviction that children are best off in parental care is universal throughout time and geography. Not so. In the Middle Ages, for example, most teenagers lived in a household other than that of their parents (a strategy that might appeal to some contemporary parents if offered). n109 In the 19th century, many affluent children saw their parents only during the "Children's Hour"; n110 the rest of the time they were cared for by nannies. Poor children worked in factories. n111

The notion that children need sustained parental attention until they are 18 is relatively recent. The view that parental care alone is the ideal is not shared in Europe. n112 In France, for example, the sense that the community has an important interest in raising the next generation of [*379] citizens has led to a network of high-quality neighborhood-based child care centers staffed by teachers and psychologists, with ready access to medical personnel who provide well-child examinations at the center. n113 Even families in which the mother is at home full time fight to get their children admitted because of the belief that the ecole maternelle helps develop social skills. When the prominent American economist Nancy Folbre visited such a child care center and asked the French how they replied to critics of their day care system, they responded that there were no critics. n114

Everyone in France supports maternal schools. There are wide divisions among political parties, which range from communist to proto-fascist. But on the subject of maternal schools, there seems to be no disagreement. "Our children," they say, "are our greatest resource." I tried, in my fractured French, to explain to the mayor of Villejeuf how different things were in the United States. He poured me more wine and told me that we should make another revolution. n115
Nearly all French children between three and five years of age are in an ecole maternelle. n116

U.S. feminists had the same dream, of child care centers as common, and as free, as public libraries. n117 But when Congress passed the Comprehensive Child Development Act n118 in 1971, President Nixon vetoed it after an intense lobbying campaign that decried the Act as "a radical piece of social legislation" designed to effect "communal approaches to child-rearing." n119 A 1975 bill was rejected as an attempt to "sovietize the family." n120

In Europe, the sense that "it takes a village to raise a child" is an integral part of a culture that sees communal responsibilities as a positive expression of solidarity, leading to a high level of social benefits. n121 In sharp contrast, the enshrinement of individualism in the United States [*380] combines with our suspicion of government and fiscophobia to create a political culture in which we interpret as "big government" and "lack of personal responsibility" what Europeans see as solidarity. The result is an intensely privatized vision of childrearing, creating a day care system very different from that in Europe.

Nonparental child care in Europe typically means social provisioning financed through deep government subsidies that keep quality high and costs low; U.S. nonparental child care (except where grandma is available) n122 typically means market-based child care. Whereas child care teachers in France are civil servants paid on the same scale as elementary and secondary school teachers, child care workers in the United States are paid so little (less than parking lot attendants) n123 that they often have to take second jobs to make ends meet. Rock-bottom wages lead to turnover that is among the highest in any job in the country, a situation that is often disruptive of children's need for continuity. n124 One respected study found that 70 percent of child care centers in the United States "provide mediocre care"; n125 the "family care" (often in a neighbor's house) preferred by many Americans tends to be of highly variable quality as well. n126

Thus, while child care in Europe brings forth the vision of children of all classes socialized together by qualified and respected professionals as an expression of social solidarity, child care in the United States brings parents face to face with the vagaries of an impersonal market where you get what you pay for-and many parents cannot pay much. One in four American workers earns less than $ 8.70 per hour. n127 Would you want your child in paid care if you earned that wage? The troubling image and reality of market-based child care reinforces the norm of parental care in the United States. Family-delivered care often seems preferable for very practical reasons.

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Symbolic concerns reinforce these practical concerns. Lacking a language of solidarity, we tend to displace human yearnings for belonging onto the family. The clearest evidence is the strange role of "family values" in contemporary American politics, whereby the privatized family is transmuted into a language of social solidarity, on the grounds that the social solidarity envisioned is merely a defense of the privatized family.

It is not, of course-"family values" stands for a specific political and cultural vision of where our body politic ought to go. The challenge is to tap the language of family values to veer away from homophobia, which is not a family value, towards a political vision that links our cultural commitment to the importance of family caregiving with an insistence on adequate social supports for caregivers. n128 A key message of Hibbs is that "family values" have the potential for helping people envision transformative change: a society where the "breadwinner" and "primary caregiver" models are discarded in favor of a model in which both parents are equally involved in care work and market work, in workplaces reshaped around the values people hold in family life. n129

III. The Impact of Hibbs as a Maternal Wall Case: Back and Beyond
[In Hibbs,] the Court essentially has identified the constellation of work/family issues as one of the important civil rights matters of our day. n130

If constitutional commentators did not immediately get the message that Hibbs is a maternal wall case, judges did. Less than a year after Hibbs, in Back v. Hastings-on-Hudson, n131 the Second Circuit relied on Hibbs in a landmark case involving alleged maternal wall discrimination. n132 Ms. Back was a school psychologist who generally received job evaluations that were either "superior" or "outstanding" during her three-year pre-tenure period, along with persistent assurances that she would receive tenure, according to the Second Circuit. n133 According to Back, "things changed dramatically as her tenure review approached." n134 Ann Brennan, Director of Pupil Personnel Services, and Marilyn Wishnie, the school principal, had begun to make comments shortly after she returned from maternity leave in her third year, including: whether she was "planning on spacing [her] offspring"; "[p]lease do not get pregnant until I retire"; advice to "wait until [her son] was in kindergarten to have another child"; advice to "reconsider whether [you] could be a mother and do this job"; the statement that "It is not possible for [you] to be a good mother and have this job"; advice that her job was "not for a mother"; and worries expressed that Back's apparent job commitment was "just an 'act,'" and that once she had obtained tenure, she would not show the same level of commitment because she had "little ones" at home. n135

Back was denied tenure and terminated. n136 The Second Circuit, citing the memorable statement from Hibbs about cases that strike the persistent "fault line between work and family-precisely where sex-based overgeneralization has been and remains strongest" n137 (lifted virtually word for word from Mr. Hibbs's brief), n138 followed Hibbs in its finding of gender discrimination against mothers, and in linking such discrimination to stereotyping. n139 The Back decision follows so directly from Hibbs that it is necessary to further analyze the Supreme Court's holding in order to better understand the Second Circuit's determinations in Back.

The Hibbs opinion discussed at great length (again relying largely on Mr. Hibbs's brief) n140 its view that states "continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits," n141 in order to establish that the harm at issue was so pervasive that the FMLA was a congruent and proportional remedy for the ills it was designed to address. n142 The Hibbs majority wanted to uphold the entire FMLA, not only those sections that apply to childbearing and childrearing, but also those sections applicable to an employee's own medical leave. This is remarkable because the medical leave provision had been struck down in every circuit, save one, that had heard a relevant case prior to Hibbs. n143

Also striking given the Court's focus on gender discrimination is the fact that Hibbs did not involve stereotyping of women: it involved a man who wished to take six months off his job and still stay employed. n144 To quote from Chief Justice Rehnquist's opinion:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. n145

Although some commentators have noted the perceived irony of all the talk of gender stereotyping in a case that involved a man, n146 work/family experts long have recognized that breadwinner/primary-caregiver stereotypes reflect a gender system that pushes men out of caregiver roles even as it pushes women into them. To quote one influential commentator, Professor Nancy Dowd, "Workplace structures continue to block women from combining wage work with family work, while those same workplace structures block men from greater parenting." n147
In Back, the Second Circuit picked up on Hibbs's formulation of "mutually reinforcing stereotypes," and more generally on the focus on stereotyping in Hibbs. In a discussion that begins with Price Waterhouse v. Hopkins, a Supreme Court case in which the American Psychological Association submitted an amicus curiae brief reviewing empirical social psychology studies of glass ceiling stereotyping, the Back court concluded that it takes no special training to discern stereotyping in the view that a woman cannot "be a good mother" and have a job that requires long hours, or in the statement that a mother who received tenure "would not show the same level of commitment [she] had shown because [she] had little ones at home."

The chief doctrinal significance of Back is its willingness to reject the school district's argument that no discrimination can be proven without evidence of a male comparator:

Defendants are . . . wrong in their contention that Back cannot make out a claim that survives summary judgment unless she demonstrates that the defendants treated similarly situated men differently. Back has admittedly proffered no evidence about the treatment of male administrators with young children. Although her case would be stronger had she provided or alleged the existence of such evidence, there is no requirement that such evidence be adduced.

This is an important holding, and a logical one. In maternal wall cases—which typically involve job penalties associated with a mother's status as a primary caregiver, or with a mother's part-time or flexible schedule—often it will be impossible to find a similarly situated man. In addition, if courts insist on evidence of a similarly situated man, they will bar recovery for the 85 percent of women who work in traditionally female jobs. Back itself illustrates this important problem: it involved a predominantly female workplace that involved maternal wall discrimination by women against women.

How do such situations occur? Several dynamics are at work. One common scenario is where a woman who stayed home with her own children communicates disapproval, or takes job sanctions, against a mother who remains employed when her children are young. Another is where a woman who "forgot to have children"—in other words, who found herself unable to have children because she was so busy trying to meet career demands—is unsympathetic, or worse, to a mother who is trying to "have it all" (both career and family, as men have always had). These "gender wars"—fights among women over the proper gender roles for women—divide not only mothers at home from mothers at work. They also divide mothers who work part-time from those who work full-time, and mothers who work full-time on a 40-hours per week "mommy track" from those who work 50- or 60-hour weeks on the "fast track." In this context, gender divides women against each other. This pattern emerges strongly in Back, where the school principal who worked 12 hours a day told Ms. Back, with apparent belligerence, that she too needed to work long hours.

Social psychology studies stress that women as well as men use gender stereotypes and engage in gender bias. Studies report that while women are slightly less likely than men to use "hostile" stereotypes that express unflattering views of women, they are somewhat more likely to use "benevolent" stereotypes, such as the notion that women are naturally more caring, better mothers, or more sensitive to children's needs. This finding is important in maternal wall contexts because of the many benevolent stereotypes that "explain" why women are more suited than men to be primary caregivers.

Like Hibbs, Back cites few social psychology studies. Neither does another recent maternal wall case, Sivieri v. Commonwealth of Massachusetts, Department of Transitional Assistance, a state case that also relies on a stereotyping theory. Sivieri involved a paralegal who worked for the Administrative Disqualification Unit of the Massachusetts Department of Transitional Assistance (DTA), which is charged with investigating eligibility of
individuals who receive income and other support based on need. Lisa Sivieri received job evaluations of satisfactory or better, yet "[t]hroughout her employment at DTA, Sivieri noticed that employees and agents of DTA made negative comments about children and working mothers. Sivieri also noticed a high proportion of women who were either childless or who had no small children." n164

After her daughter was born, Sivieri requested, and was denied, an extended maternity leave. Offers of promotions and advanced positions stopped, although she continued to be asked to take on a variety of special projects "beyond the customary duties of her position." n165 When promotion opportunities arose, they were given to other paralegals with less experience; three times promotion opportunities were offered to paralegals whom she had trained. When Sivieri asked why, her question triggered intensified job scrutiny and downgraded job evaluations, after which her health deteriorated and she required medical attention. n166 Her complaint alleged:

The Assistant Director told me that she was surprised that I would want to take on more responsibility at work since I have so much responsibility at home and the two women who don't have children can put in the extra hours at work... I am subjected to ongoing comments about small children. Jobs are created for employees [*387] without children and they are accommodated more often than employees with children. I feel that I have been subjected to unlawful discrimination because I am a female with a small child. n167

The Massachusetts court held for Sivieri, noting that the Massachusetts Commission Against Discrimination "has recognized bias based upon the stereotypical belief that women will become the primary caretaker for their children and will not be capable of performing their jobs after they marry and have children." n168 "Taken as true," the court said, Sivieri's allegations "establish a bias against women with young children predicated on the stereotypical belief that women are incapable of doing an effective job while at the same time caring for their young children." n169

IV. What is Maternal Wall Stereotyping?: A Brief Review of Social Psychology Literature

Given the emerging importance of stereotyping analysis in both federal and state maternal wall cases, this Article concludes by setting out a brief summary review of experimental social psychology studies documenting the stereotypes triggered by pregnancy and motherhood. Maternal wall bias, typically triggered when women get pregnant, return from maternity leave, or adopt a reduced-hours or flexible schedule, combines the following:

- prescriptive stereotyping, which sends the message that mothers should adhere to particular norms, and

- descriptive stereotyping, which instead of prescribing traditional behavior for mothers, simply assumes that women will adhere to traditional norms of motherhood, or interprets ambiguous behavior through a filter of traditionalist assumptions.

A. Descriptive Stereotyping of Mothers

1. Negative Competence Assumptions Triggered by Motherhood

The subgroup stereotypes of mothers documented by Susan Fiske, Peter Glick, Amy Cuddy, and their colleagues, are truly sobering. They [*388] document that, whereas subjects rate "businesswomen" as high in competence-close to "businessmen" and "millionaires"-they rate "housewives" as very low in competence, alongside the elderly, blind,
"retarded," and "disabled" (to quote the stigmatized words used by the researchers). n171

Housewives are one of seven groups perceived to be "more warm than competent." n172 A more recent study found that "working mothers" are rated as considerably less competent than working dads or working women without children. n173

2. Negative Competence Assumptions Triggered by Pregnancy and Part-Time Work

One study found that performance reviews of female managers "plummeted" after pregnancy, in part because pregnancy triggers the stereotype of women as irrational and overly emotional. n174 More studies of stereotypes associated with pregnancy are needed. More studies are needed, too, of stereotypes associated with part-time work, given that the classic profile of a voluntary part-timer is a mother who works part-time for child care reasons, n175 and most people who adopt reduced-hours flexible work arrangements are women. n176 One study reports that women who switch from full-time to part-time schedules are not viewed as lower in competence than women in full-time work. n177 This finding is contradicted, however, by sociological studies that report that women who use "flexible work arrangements" (FWAs) often suffer career detriments, n178 and by a social psychology study documenting that women [*389] who work part-time were viewed as less warm and nurturing than homemakers, but as having the same lack of "go-getter" qualities: they seem to get the worst of both worlds. n179

3. Leniency and Attribution Bias: An Absent Dad is Attending a Business Meeting; An Absent Mom is with her Kids n180

Among the most common effects of maternal wall bias concerns differences in attribution, or assumed cause. Attribution bias means, for example, that when a mother is absent or late for work she is assumed to be caring for her children; a similarly-situated father is assumed to be handling a work-related issue. n181 Employers concerned about women's advancement have recognized the challenges of this phenomenon. For example, as part of the Women's Initiative of the accounting firm Deloitte & Touche, one hypothetical used for discussion purposes involved a man and a woman who were late for an early morning meeting. n182 While the team joked about, and then forgot, the man's tardiness, they assumed the woman's late arrival reflected child care difficulties. In the hypothetical, which was carefully designed to highlight the potential inaccuracy of stereotypes, the man's tardiness in fact was due to child care problems while the woman's train was late. Based on unexamined stereotypes, however, the team leader warned the woman that she needed to rethink her priorities.

In another example of attribution bias, n183 one mother told the Project on Attorney Retention n184 that once she changed from full-time to part- [*390] time work hours people assumed that if they did not find her at her desk she was with her children, even when she was at a business meeting. The same lawyer continued:

Also, before I went part-time, people sort of gave me the benefit of the doubt. They assumed that I was giving them as fast a turn-around as was humanly possible. After I went part-time, this stopped, and they assumed that I wasn't doing things fast enough because of my part-time schedule. As a result, before I went part-time, I was getting top-of-the-scale performance reviews. Now I'm not, though as far as I can tell, the quality of my work has not changed. n185

Note also that this lawyer enjoyed the "leniency bias" as long as she worked full-time. Once she went part-time, she was no longer given the benefit of the doubt. n186 To quote Marilyn Brewer, "Coldly objective judgment seems to be reserved for members of out-groups"-here, part-timers. n187
4. Polarized Evaluations

Particularly in the context of flexible work arrangements, employers often point to the "great deal" given to one or a few individuals as evidence of a family friendly workplace. In fact, when only a few superstars have viable flexible work arrangements, the family friendly policy may well be an expression of gender bias rather than a solution to it.

The literature on polarized evaluations suggests the need for a closer examination. It reports that, in heavily masculine environments, the tendency is for a few superstar women to receive outstanding evaluations, while most women—even those just below the superstar level—receive very low evaluations.

The superstar problem can be expected to be common in high-level jobs simply because so few mothers reach such jobs: 93 percent of mothers aged 25 to 44 work less than fifty hours a week year-round. Therefore, the key is to count not how many women are in a given job category, but how many mothers are. Often there will be very few. In one 1998 case, Trezza v. The Hartford Inc., the plaintiff demonstrated that, of the 46 managing attorneys in the relevant district, not one was a mother with school-age children.

B. Prescriptive (Often Combined with Descriptive) Stereotyping of Mothers

1. Stereotype Content and Hostile Stereotyping: Mothers Belong at Home

When one mother phoned to find out when she should return from maternity leave, her employer told her that she "was no longer dependable since she had delivered a child; that [her] place was at home with her child; . . . and that [the company] needed someone more dependable." The court reversed the summary judgment a lower court had granted to the employer.

The statement that mothers belong at home is prescriptive—it describes what mother should do. This employer's "shame on you for not behaving the way mothers should behave" tone communicates hostility to women who do not adhere to traditional gender roles. Note how the "should" statement, the hostile prescriptive stereotyping, combines with descriptive stereotyping: the descriptive statement that mothers are not dependable.

Prescriptive stereotyping also can take the form of informal social sanctions by co-workers. In her well-known study, The Time Bind, Arlie Hochschild quotes the disapproving comment of a woman's colleague when she returned to work after having a baby: "It takes a lot more than paying the mortgage to make a house a home." Once again, the hostility towards working mothers is open and explicit. Note how the informant faced an unsettling choice: she could choose between being dismissed as a defective worker or as a defective mother.

Empirical social psychologists have documented the content of the stereotypes associated with motherhood. Employed mothers are perceived as less family-oriented, more selfish, and less sensitive than unemployed mothers to the needs of others. A mother's dedication to her career may be seen as selfishness on the grounds that she is neglecting her family, further evidence of the unspoken expectation that mothers should be on call for their families 24/7. A mother's decision to remain employed, unlike a father's, is perceived as uncorrelated with her desire to "provide."

Another important series of experiments, by Diane Kobrynowicz and Monica Biernat, documents the stereotype of
the "good mother." In comparing the "good mother" to the "good father," Kobrnyowicz and Biernat found "shifting standards": someone who described himself as a very good father actually spent about the same amount of time with his children as someone who described herself as only an "all right" mother. n198 The "very good mother" was more likely than the "very good father" to be described as "willing to always be there and to do anything for the children," n199 a finding confirmed by a study that found that "good" married mothers, in particular, are seen as "willing to give up her career for family," "will[ing to] do anything for their children." n200

Such studies help explain one of the most difficult barriers faced by working mothers, namely the conflict between the prescriptive image of the 24/7 ideal worker and the prescriptive image of the 24/7 ideal mother. n201 Because no one can serve two masters 24/7, the result is a clash between the ideal-worker norm and the norm of parental care, giving rise to the "hard truth" that a woman cannot be a good worker and a good mother. n202

2. Benevolent Stereotyping: Making it Easy for Mothers to "Do Their Job"

Benevolent stereotyping polices this "hard truth" in a kinder, gentler way. Take the example of a couple who both worked for the same high-hours employer. After she had a baby, she was sent home at 5:30 every night—she had a baby to take care of. He, on the other hand, was kept later than ever—he had a family to support. n203 It does not take much imagination to envision situations where men and women will be treated differently in terms of conditions of their employment when benevolent stereotyping is at work, in potential violation of Title VII.

In Trezza v. The Hartford Inc., which was ultimately settled, the defendant-employer failed to consider the plaintiff-mother for a position that required travel, based on the assumption that she would not want to because she had a family. n204 This is gender policing in a benevolent tone of voice. Sometimes the benevolence melds with undertones of hostility, as when Joann Trezza's supervisor told her that "working mothers cannot be both good mothers and good workers," stating, "I don't see how you can do either job well." n205

The distinction between descriptive and prescriptive stereotyping tends to break down in the context of benevolent stereotyping, as when, in Coble v. Hot Springs School District, n206 a male interviewer stated that he had chosen a male candidate one the grounds that he was more "available" and "dedicated" because he was unmarried and childless. n207 The interviewer did not say explicitly that mothers should be ever-available to their children; but his refusal to hire the mother reflects the stereotype that mothers are dedicated to their families in a way that precludes their ability to be ideal workers.

Should employers be penalized for "doing the right thing?" The simple answer is that benevolent stereotyping is not the right thing. Employers need to treat mothers as they would others, giving them the same options, without making untested and unwarranted assumptions about their interest and availability. n208

3. Role Incongruity and Lack of Fit: An Unsuitable Job for a Mother

In a suit that yielded a $3 million jury verdict (later overturned), a company president asked a chemist, "Do you want to have babies, or do you want a career here?" n209 Sometimes employers send the message not that mothers in general belong at home, but that certain (typically dead-end) jobs are suitable for mothers whereas certain (typically high-powered) jobs are not. Recall the repeated statements by the Back defendants that Elana Back's job was not suitable for someone "with little ones"—although if a school psychologist job is unsuitable for a mother, it is hard to
imagine what type of job would be suitable. This is evidence of what empirical social psychologists have called role incongruity n210 or lack of fit. n211 Sometimes employers intimate that certain "high-powered" jobs are fine if a woman has one child, but not more. For example, in Santiago-Ramos v. Centennial Wireless Corp., n212 the only woman executive in a company was fired after repeated comments expressing skepticism that she could handle her job once she had a second child. n213

4. Are Mothers Expected to Adhere to a Script of Warmth and Unconditional Nurturing?

One study found that some "people like pregnant women better when they behave passively than when they behave assertively and evaluate them more favorably when they occupy a stereotypically feminine rather than masculine work role." n214 Some co-workers also expect pregnant women to conform rigorously to the mandates of traditional femininity, to be "nonauthoritarian, easy to negotiate with, gentle, and neither intimidating nor aggressive, and nice." n215 No wonder many mothers quit. Few people get promoted for being "nice."

V. Conclusion

This Article has important messages about the politics of maternal wall cases, contemporary analysis of antidiscrimination litigation in the federal courts, and the norms of constitutional law scholarship.

Quite a number of commentators predicted that maternal wall plaintiffs would not achieve significant successes in the courts, often citing the significant and growing conservatism of the federal judiciary. n216 The analysis presented here appears to contradict this conventional wisdom. I have long argued that work/family issues are politically volatile. n217 Hibbs showed just that, with conservative judges joining the usual suspects who could be expected to side with discrimination plaintiffs. Hibbs confirms that judicial voting patterns will not necessarily track the conventional liberal/conservative divide, because some conservative judges will see maternal wall cases as family values cases. n218 Mother-judges who have taken time off to care for children, and father-judges concerned about workplace treatment of their daughters, even if they are conservative, may well side with sympathetic maternal wall plaintiffs. n219

My second point is more a question than a conclusion. One commentator has asserted that Title VII is virtually a dead letter n220 and a growing literature documents that employment cases are hard for plaintiffs to win. n221 Some liberals have floated the suggestion that employment discrimination plaintiffs should turn to mediation rather than the courts for relief. n222

I cannot judge the aptness of this conclusion in the race discrimination context. I can say with confidence, however, that maternal wall plaintiffs are turning to the legal system, and that complaints are being filed, demand letters written, cases settled, and some plaintiffs are winning outright. n223 Would employers be as likely to take these cases as seriously if they did not involve the bad press and other social sanctions, as well as the volatile potential for legal liability, that the courtroom entails? I suspect not. Mediation does not play the same role as the open courtroom as a theater in which to negotiate public values. Advocates of a shift to mediation need to think hard about courtrooms' role in enacting the expressive function of the law. n224

In addition, we need to pay more attention to the profound disjuncture between the gloomy pessimism of liberal law professors and the relative optimism of plaintiffs' employment lawyers, who tell us they are seeing more and more maternal wall cases and who react with annoyance and disbelief when informed that some law professors consider Title VII a dead letter. n225 This lapse in communication deserves further attention.
This Article's final message concerns constitutional law scholarship. Most such scholarship, understandably, analyzes constitutional cases from the standpoint of established debates over federalism and other doctrinal issues. This approach is obviously useful to lawyers who need to use constitutional cases to write persuasive briefs. But it is only one approach to constitutional law. When trying to figure out why specific decisions went a certain way—particularly when the way they went was unexpected—Supreme Court analysts should consider cultural context. A welcome step is Robert C. Post's proposal to draw on anthropology to argue that "constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture." Post's approach, as enriched by Reva Siegel's profound knowledge of legal history, reminds us that legal historians called nearly twenty years ago for a study of the interaction of constitutional litigation with constitutional consciousness.

Another resource is the legal scholarship on social norms. While the law review literature on social norms addresses complex questions about the interaction of law and social norms, some remains limited by its roots in critiquing the simplistic rational-actor premises of law and economics. This strain of social norms analysis has less interest for those of us who never confused neo-classical modeling techniques with day to day life in a complex stew of gender pressures, racial hierarchy, other social power differentials, and additional factors that create a world that too often fails to follow neo-classical premises of perfect information and equal bargaining power.

A final resource is the sociological literature often called the new institutionalism. The new institutionalism has several concrete resources to help commentators understand the complex interactions between constitutional doctrine and "social norms" (to use the law reviews' terminology) or "rights talk" (to use historians' terminology). The new institutionalists have documented how compliance with ambiguous legal mandates is interpreted and implemented through complex and iterative interactions between the courts, intermediaries such as human resources personnel, the press, and the larger public. Much of new institutionalism discusses statutory antidiscrimination law, which makes it particularly applicable to the study of equal protection mandates in constitutional law. The new institutionalists focus on the role of intermediaries in defining the content of ambiguous legal rulings within different organizational contexts: the role of ritual in institutionalizing compliance; the role of symbolism in signaling compliance; and the role of unquestioned assumptions and cognitive bias in shaping institutional norms and interpretations. These are themes that become relevant in a wide range of constitutional contexts. This literature is available to help when constitutional law commentators are faced with a decision-like Hibbs—that seems a mystery when viewed solely from within the confines of constitutional doctrine.

Legal Topics:
For related research and practice materials, see the following legal topics:
Constitutional LawEqual ProtectionDisabilityConstitutional LawEqual ProtectionGender & SexLabor & Employment LawDiscriminationGender & Sex DiscriminationEmployment PracticesCompensation

FOOTNOTES:


As it turns out, this reputation may be due more to radio talk show hosts than to statistics. In 2001, the Ninth Circuit was reversed 76 percent of the time; lower courts in general are reversed 75 percent of the time. Erwin Chemerinsky, Not So Far Out After All, Nat'l L.J., Oct. 7, 2002, at A12.


See, e.g., United States v. Lopez, 514 U.S. 549 (1995) (holding that in order for Congress to exercise its powers under the Commerce Clause the regulated activity must be economic in nature and must substantially affect interstate commerce and invalidating Gun Free School Zones Act); City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (finding that the Religious Freedom Restoration Act was an invalid exercise of Congress's powers under Section Five of the Fourteenth Amendment because it was not congruent and proportional to a legitimate goal); Printz v. United States, 521 U.S. 898, 935 (1997) (confirming "that Congress cannot compel the States to enact or enforce a federal regulatory program" and invalidating certain portions of the Brady Handgun Violence Prevention Act).


Hudson, supra note 1, at 21.


See, e.g., Barbara K. Bucholtz, Father Knows Best: The Court's Result-Oriented Activism Continues Apace: Selected Business-Related Decisions from the 2002-2003 Term, 39 Tulsa L. Rev. 75, 83-84 (2003) (arguing that Hibbs does not indicate that the Court has any intention of relaxing its powers of judicial review); Timothy J. Cahill & Betsy Malloy, Overcoming the Obstacles of Garrett: An "As Applied" Saving Construction for the ADA's Title II, 39 Wake Forest L. Rev. 133, 161-62 (2004) (explaining that the heightened level of judicial scrutiny previously applied by the Court to gender classifications allowed the Court to presume that the FMLA was constitutional); Mark R. Killenbeck, A Strange Apparent Cruelty?, 57 Ark. L. Rev. 93, 103-04


n14 See generally Joan C. Williams & Nancy Segal, Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job, 26 Harv. Women's L.J. 77 (2003) (discussing and summarizing over twenty maternal wall cases); see also Program on WorkLife Law, Technical Guidance: Using Employment and Civil Rights Laws to Protect Working Families (forthcoming) (on file with author) [hereinafter Technical Guidance] (discussing approximately 150 maternal wall cases).


n16 See Post, supra note 11, at 8 (arguing that "constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture"); see also William N. Eskridge, Jr., Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century, 100 Mich. L. Rev. 2062 ("My thesis is that most twentieth century changes in constitutional protection of individual rights were driven by or in response to the great identity-based social movements ('IBSMs') of the twentieth century."); cf. William N. Eskridge, Jr., Dynamic Statutory Interpretation (1994).

n17 365 F.3d 107 (2d Cir. 2004).


n20 See Marcia L. McCormick, Federalism Re-Constructed: The Eleventh Amendment's Illogical Impact on Congress' Power, 37 Ind. L. Rev. 345, 373 (2004). But see Banks & Katz, supra note 9, at S7 (stating that state employees nonetheless include roughly 5 million people).

n21 See sources cited supra notes 11-12. But see, e.g., Nancy E. Dowd, Race, Gender, and Work/Family Policy, 15 Wash. U. J.L. & Pol'y 219, 238-40 (analyzing Hibbs within the context of racial and class based
inequities); Katharine B. Silbaugh, Is the Work-Family Conflict Pathological or Normal Under the FMLA?: The Potential of the FMLA to Cover Ordinary Work-Family Conflicts, 15 Wash. U. J.L. & Pol’y. 193 (2004) (suggesting that the FMLA is not expansive enough to truly protect working families); Serena Mayeri, Constitutional Choices: Legal Feminism and the Historical Dynamics of Change, 92 Cal. L. Rev. 755 (2004) (discussing Hibbs from the context of the historical development of American feminism). Some commentators have argued that the logic underpinning the Eleventh Amendment immunity argument—the need for Congress to respect the dignity of the states—implies that no difference should exist between contexts involving constitutional categories such as strict scrutiny and those that require a less stringent standard. See, e.g., Killenbeck, supra note 12, at 103-04. This argument is unpersuasive because a concern for the dignity of the states does not necessarily dictate that state dignity always trumps other constitutional values.

n22 U.S. Const. amend. XIV, § 5.

n23 For a discussion of the cases that limit congressional power to regulate under the Commerce Clause, see, for example, Norman W. Spaulding, Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory, 103 Colum. L. Rev. 1992 (2003).

n24 See U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). For a discussion, see Calvin Massey, Congressional Power to Regulate Sex Discrimination: The Effect of the Supreme Court's "New Federalism," 55 Me. L. Rev. 63, 68 (2003).


n27 Boerne, 521 U.S. at 520.


n30 See Morrison, 529 U.S. at 626; see also Spaulding, supra note 23, at 2012 (discussing the "vigorous judicial review" applied by the Court in Morrison); Christopher P. Banks, The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment, 36 Akron L. Rev. 425, 463 (2003) (stating that the Court found that the VAWA did not address a "protected right").


n33 See Garrett, 531 U.S. at 374; see also Massey, supra note 24, at 72.
n34 Garrett, 531 U.S. at 368.


n37 Kimel, 528 U.S. at 83-87, 89.

n38 Id. at 88.

n39 See Massey, supra note 24, at 70; see also City of Boerne v. Flores, 521 U.S. 507, 526 (1997).

n40 See Spaulding, supra note 23, at 2008 n.92 (clarifying that "the voting rights cases (decided before the federalism revival) are the only modern example the Court gives of 'appropriate' prophylactic legislation supported by sufficiently detailed congressional findings").


n42 See Hibbs, 538 U.S. at 728. But see id. at 740 (Souter, J., concurring) (stating that Justices Souter, Ginsburg, and Breyer reject the Boerne test). See also Spaulding, supra note 23, at 2008 n.92.

n43 Bucholtz, supra note 12, at 83-84.

n44 One commentator complains that the Court "relied heavily on the judicial tiers of equal protection scrutiny as a shortcut to principled analysis." See The Supreme Court, 2002 Term-Leading Cases, 117 Harv. L. Rev. 236, 243 (2003). I disagree. It seems appropriate that Congress should be given broader latitude when it passes remedial legislation in heightened scrutiny contexts. Congress needs latitude to balance states' need for constitutional 'dignity' and individuals' need for constitutional rights in contexts where the Court has expressed such heightened concern for individual rights that it has adopted a strict scrutiny standard.

n45 Hibbs, 538 U.S. at 736.

n46 Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

n47 See Hibbs, 538 U.S. at 730-31. The Court also considered evidence from local governments, which is logical given that such localities are arms of state government. See Joan C. Williams, The Invention of the Municipal Corporation: A Case Study in Legal Change, 34 Am. U. L. Rev. 369 (1985) (discussing Dillon's Rule).

n48 See McCormick, supra note 20, at 360-61.
n49 *Hibbs*, 538 U.S. at 727.

n50 Robert Post argues convincingly that Hibbs's "heightened level of scrutiny" analysis reflects the logic of the "enforcement model," which posits that the role of Congress is to enforce substantive constitutional guarantees as defined by the Supreme Court. See Post, supra note 11, at 16-17.

n51 *Hibbs*, 538 U.S. at 754 (Kennedy, J., dissenting). But see *id.* at 737-38 (holding that the FMLA is not a "substantive entitlement program").

n52 See Cahill & Malloy, supra note 12, at 161-62. Federal courts in seven circuits that heard cases challenging the FMLA struck down the personal medical leave sections, arguing that Congress had no power to impose such leave on the states; only the Ninth Circuit upheld the personal medical leave. See Massey, supra note 24, at 73.

n53 See Tibben, supra note 12, at 614.


n55 Some scholars argue that, had the Court held that Nevada was protected by sovereign immunity in *Hibbs*, it would have little choice but to apply its federalism principles to preclude suits by state employees under the Pregnancy Discrimination Act and the Equal Pay Act, and perhaps even Title VII. See Massey, supra note 24, at 85-86.


n57 See *Garrett*, 531 U.S. at 376 (Breyer, J. dissenting) (Souter, Ginsburg, and Stephens joined); see also *Kimel*, 528 U.S. at 92 (Stevens, J. dissenting) (Souter, Ginsburg, and Breyer joined); see also *United States v. Morrison*, 529 U.S. 598, 628 (2000) (Souter, J. dissenting) (Stevens, Ginsburg, and Breyer joined).

n58 See *Williams & Segal*, supra note 14.

n59 See generally id.


n61 See Technical Guidance, supra note 14 passim.


n63 The technical guidance will soon be available from the Program on WorkLife Law, American University, Washington College of Law, http://www.worklifelaw.org. WorkLife Law also plans to develop a training for management-side lawyers to help educate their clients on how to avoid maternal wall bias.

n64 Post, supra note 11, at 17. Post here is referring to the flexibility Hibbs shows in accepting "an extraordinarily generous account of the constitutional harm of sex discrimination . . . it never demonstrates a pattern of violations that a court would find violates Section 1 of the Fourteenth Amendment." Id. at 17-18. Post posits that Rehnquist's motive is to "avoid a major constitutional controversy over the constitutional status of Title VII." Id. at 19.

n65 Lauren B. Edelman et. al., The Endogeneity of Legal Regulation: Greivance Procedures as Rational Myth, 105 Am. J. Soc. 406 (1999); see also Post, supra note 11, at 8 (not citing sociologists, but making a parallel argument that "constitutional law and culture are locked in a dialectical relationship."); 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, 2022-23 (2003) (arguing for a "policentric" interpretation of the constitution by the courts, Congress, and social movements).

n66 For a sophisticated version of this analysis, positing a dichotomy between judges who discover the law and those who make it (or judges who "enforce the law" as opposed to "doing politics"), see Mark E. Brandon, States, Courts, and Founders: Remarks on Killenbeck, 57 Ark. L. Rev. 69 (2004).

n68 Id. at 6-7.

n69 Id. at 9-10.

n70 See, e.g., Senuta v. City of Groton, No. 3:01-CV-475, 2002 U.S. Dist. LEXIS 10792, at 1 (D. Conn. Mar. 5, 2002) (granting injunctive relief to a female plaintiff when an employer hired men who scored lower than she did and refused to hire her after asking her how she would care for her children while on duty).

n71 See, e.g., Sigmon v. Parker, Chapin, Flattau, & Klimpl, 901 F. Supp. 667 (S.D.N.Y. 1995) (validating Title VII claim of female attorney who was fired after informing her employer of her pregnancy); Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46 (1st Cir. 2000) (allowing Title VII claim to proceed where employer told employee that "he preferred unmarried, childless women because they would give 150% to the job").

n72 See, e.g., Carter v. Shop Rite Foods, Inc., 470 F. Supp. 1150 (N.D. Tex. 1979) (finding Title VII violation where employer denied promotion to a female grocery clerk on the grounds that her children would interfere with her work schedule); Moore v. Alabama State University, 980 F. Supp. 426, 431 (M.D. Ala. 1997) (refusing summary judgment to an employer who, after seeing that an employee was pregnant said, "I was going to put you in charge of the office, but look at you now.").


n74 Of course, an additional motivation for Rehnquist, once O'Connor's vote was known, was to ensure that he could write the majority opinion so as to protect the federalism jurisprudence in whose development he has played such a central role. See Banks & Katz, supra note 9, at S7. O'Connor arguably would have done so, too, although in view of Tennessee v. Lane, Rehnquist may have had his doubts.


n76 Alan J. Borsuk, The Rehnquist Difference, Milwaukee Journal Sentinel, June 27, 2004, at 1A.

n77 See Silbaugh, supra note 21, at 208.

n78 See Mayeri, supra note 21, at 813-14.

n79 See Williams, supra note 13, at 2 (mothers aged 25 to 44).

n80 See Catherine Loughlin & Julie Barlin, Young Workers' Work Values, Attitudes, and Behaviors, 74 J. Occupational & Org. Psychol. 543, 545 (2001); Radcliffe Public Policy Center, with Harris Interactive, Life's Work: Generational Attitudes Towards Work/Family Integration (2001); Bruce Tulgan, Managing Generation X (2000).
n81 See Williams & Segal, supra note 14, at 119 ("look for the daughter").


n83 272 F.3d 625 (4th Cir. 2001).

n84 Id. at 628.

n85 See Cockey, supra note 19, at 5.

n86 See id. at 6.


n88 See Knussman, 272 F.3d at 628.

n89 Id. at 650 n.3 (Lee, J., concurring in part and dissenting in part).

n90 See Cockey, supra note 19, at 7.

n91 Id. at 7-8.

n92 See Knussman, 272 F.3d at 630.

n93 See Cockey, supra note 19, at 9.

n94 See id. at 17-18

n95 Id. at 1.

n96 Id. at 8.

n97 Id. at 9.

n98 Id. at 1.

n99 See Williams, supra note 13, at 48.

n101 Id.


n104 See Cockey, supra note 19, at 12.


n106 Juggling Work and Family, with Hedrick Smith (PBS special television broadcast, 2001).


n108 In their study of dual-earning couples in central and upstate New York, sociologists Phyllis Moen and Stephen Sweet found that couples in which both people had professional, high status jobs regularly put in enough hours for three workers-110 hours per week. Phyllis Moen & Steven Sweet, Time Clocks: Work- Hour Strategies, in It's About Time: Couples and Careers 17 (Phyllis Moen ed., 2003).

n109 Philippe Aries, Centuries of Childhood 209 (1962).


n112 See Williams, supra note 13, at 49.

n113 See id.


n115 Id.

n116 See id. at 133. The French "nursery schools" are called ecoles maternelles, which literally means
"maternal schools."

n117 See generally id. at 49; see also Post & Siegel, supra note 65 at 1989 (quoting Eleanor Holmes Norton, "My mandate to enforce the law against sex discrimination is an empty mandate unless women can have twenty-four-hour day-care centers to leave their children while they work.").

n118 H.R. 6748, 92d Cong. (1971).

n119 See Williams, supra note 13, at 49.

n120 See id.; see also Post & Siegel, supra note 65, at 2006-11. Post and Siegel elegantly document the role of the feminist movement in shifting constitutional consciousness on gender equality.


n122 See Heather Boushey, Who Cares? The Child Care Choices of Working Mothers (Ctr. for Econ. & Policy Research Data Brief No. 1, May 6, 2003) (providing that "one-third of working mothers (30.9 percent) rely on relatives"), at http://www.cepr.net/Data Brief Child Care.htm (on file with author); see also Tamar Lewin, Grandparents Play Big Part in Grandchildren's Lives, Survey Finds, N.Y. Times, Jan. 6, 2000, at A16 ("One in 10 grandparents is either rearing a grandchild or regularly providing day care.").

n123 http://www.aflcio.org/familyfunresources/childcare/index.cfm (on file with author).


n126 See Boushey, supra note 122.

n127 See Beth Shulman, The Betrayal of Work 5 (2000). One in four American workers is about 30 million people.

n128 For a study of laws and policies in other countries, see Gornick & Meyers, supra note 121 (discussing a variety of social supports for caregivers, including paid family leave, subsidized child care, working hours initiatives, and others); Juliet Bourke, Using the Law to Support Work/Life Issues: The Australian Experience, 12 Am. U. J. Gender Soc. Pol'y & L. 19 (2004).

n129 For an extensive discussion of the role of the women's rights movement in developing the
constitutional consciousness expressed in Hibbs, see Post & Siegel, supra note 65, at 1986-89.


n131 365 F.3d 107 (2d Cir. 2004).


n134 See Back, 365 F.3d at 115.

n135 Id. (first three alterations in original).

n136 Id. at 113.

n137 Id. at 113.

n138 Compare Brief for Respondent William Hibbs at 1, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2002) (No. 01-1368) ("The FMLA is directly targeted at the fault line between work and family, precisely where sex-based over-generalization has been and remains at its strongest.") with Hibbs, 538 U.S. at 723, (2003) ("The FMLA is narrowly targeted at the fault line between work and family—precisely whether sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship."). Mr. Hibbs's brief was jointly written by Cornelia Pillard, the National Partnership for Women and Families, Wilmer, Cutler & Pickering, and local counsel Treva Hearne.
n139 Compare Back, 365 F.3d at 119-22, with Hibbs, 538 U.S. at 736-40.

n140 See Brief for Respondent William Hibbs at 23, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2002) (No. 01-1368) ("[T]he FMLA targets States' practices, in some cases very recent, of offering women more family leave than men.").

n141 Hibbs, 538 U.S at 730. The long and elaborate description of gender stereotyping probably had its origin in Rehnquist's desire to protect the Boerne test. See McCormick, supra note 20, at 360-63. The Court picked up on this description, in the process examining not only the evidence of unconstitutional leave policies by the states themselves, but also considering evidence from the private sector and the federal government in addition to evidence from local governments (but that makes sense, given that localities' authority to govern comes from the states). See supra note 47. The Court also considered evidence presented to Congress on its several previous attempts to pass the FMLA. See Joan Williams, The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law, 1986 Wis. L. Rev. 83, 89 (1986) (describing "Dillon's Rule" as being that "localities had no inherent sovereignty because the sovereign people delegated their entire sovereignty to the states"). Prior case law seemed to indicate that only evidence of unconstitutional behavior by the states themselves was relevant. This is further evidence of the daring advocacy in the Brief for Mr. Hibbs, as well as the brief for the United States.

n142 See Hibbs, 538 U.S. at 740.

n143 See Laro v. New Hampshire, 259 F.3d 1, 16 (1st Cir. 2001); Hale v. Mann, 219 F.3d 61, 68-69 (2d Cir. 2000); Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 223, 229 (3d Cir. 2000); Kazmier v. Widmann, 225 F.3d 519, 529 (5th Cir. 2000); Sims v. Univ. of Cincinnati, 219 F.3d 559, 566 (6th Cir. 2000); Townsel v. Missouri, 233 F.3d 1094, 1096 (8th Cir. 2000); see also McCormick, supra note 20, at 73.

n144 See Hibbs, 538 U.S. at 725.

n145 Id. at 736.


n147 See Dowd, supra note 21, at 230.


n149 The term glass ceiling refers to systematic ways in which employers disadvantage women who attempt to reach the summits of their professions. See Williams, supra note 13, at 69.

n150 Id. at 120. For a discussion of other cases involving similar maternal wall conflicts, see generally Williams & Segal, supra note 14, at 77.
n151 See Back, 365 F.3d at 121-22.

n152 Id. at 121.

n153 See Williams & Segal, supra note 14, at 101-02.


n155 See Williams, supra note 13, at 145-50 (discussing gender wars among women).


n157 See Back, 365 F.3d at 115.

n158 Sometimes women are actually harder on other women than men are. See, e.g., Laurie A. Rudman, Self-Promotion as a Risk Factor for Women: The Cost and Benefits of Counterstereotypical Impression Management, J. Personality & Soc. Psychol. 629, 634 (1998) (arguing that women react more negatively than men to women whose behavior is perceived as self- promotion).


n160 See Back, 365 F.3d at 125 n.16 (citing Madeline E. Heilman, Sex Stereotypes and Their Effects in the Workplace: What we Know and What we Don't Know, 10 J. Soc. Behav. & Personality 3, 4-7 (1995)).


n162 See generally id.

n163 Id. at 532.

n164 Id.

n165 Id.

n166 Id.

n167 Id.
n168 Id. at 533.

n169 Id.

n170 For a full discussion, see Joan C. Williams, The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense, 7 Employee Rts. & Emp. Pol'y J. 401 (2004).


n172 Fiske et al., supra note 171, at 879.


n179 Alice H. Eagly & Valerie J. Steffen, Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees, 10 Psychol. Women Q. 252, 259 (1986).


n183 For more discussion of attribution bias, see Linda Hamilton Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161, 1190 (1995) (explaining that observers tend to attribute the behavior of others to factors such as gender and then expect others of the same gender to behave in a similar fashion). Attribution bias disadvantages women seeking professional achievement. Id.

n184 The Project for Attorney Retention (PAR) is an initiative of The Program on WorkLife Law of American University Washington College of Law, funded by the Alfred P. Sloan Foundation and supported by the Women's Bar Association of the District of Columbia. PAR seeks to improve recruiting and retention of talented attorneys through the use of work schedules that allow attorneys to better balance the competing demands of their work and their lives outside the office. See http://www.pardc.org/ (last visited Oct. 14, 2004).

n185 Williams & Segal, supra note 14, at 97.


n187 Id. at 65.

n188 See id. (discussing polarized evaluations).

n189 Williams, supra note 13, at 2.


n191 Id. at *3.


n193 Id. at 505.

n194 Hochschild, supra note 178, at 106-07.
n195 See Claire Etaugh & Gina Gilomen Study, Perceptions of Mothers: Effects of Employment Status, Marital Status, and Age of Child, 20 Sex Roles 59, 67 (1989) (finding employed mothers to be less family-dedicated, more dedicated to their careers, 'more selfish,' and 'less sensitive to the needs of others' than unemployed mothers).

n196 See id. (studying people's perceptions of employed and unemployed mothers).

n197 See Eagly & Steffen, supra note 179, at 254.

n198 Kobrynnowicz & Biernat, supra note 103, at 592.

n199 Id. at 587.


n201 See Cecilia L. Ridgeway & Shelley J. Correll, Motherhood as a Status Characteristic, 60 J. Soc. Issues 683, 690 (2004) (stating, "Contemporary cultural beliefs about the mother role include a normative expectation that mothers will and should engage in 'intensive' mothering that prioritizes meeting the needs of dependent children above all other activities," and further explaining how this conflicts with the notion of the ideal worker who is always on call) (citation omitted); see also Joan Acker, Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations, 4 Gender & Soc'y 139 (1990) (describing the impossible expectations that society imposes upon mothers to have nearly super-human capacities and put their families ahead of everything else, including their careers); Etaugh & Study, supra note 195, at 67 (discussing the "motherhood mandate"); Claire Etaugh & Denise Folger, Perceptions of Parents Whose Work and Parenting Behaviors Deviate from Role Expectations, 39 Sex Roles 215, 222 (1998); Ganong & Coleman, supra note 200, at 496-98.

n202 See Williams, supra note 13, at 40-63.

n203 See Williams & Segal, supra note 14, at 95-96.


n205 Id. at *2.

n206 682 F.2d 721 (8th Cir. 1982).

n207 Id. at 724. The court described the interview as follows: During the interview [the male interviewer] stated that he thought that [the male candidate ultimately chosen for the position over the plaintiff] was the more "available" and "dedicated" of the two candidates . . . . During the interview [the male interviewer] referred to the fact that [the male candidate] was not married and had no "immediate family." Id.
n208 *Williams & Segal*, supra note 14, at 95-96.


n210 See Eagly & Karau, supra note 180, at 574 (stating that "a potential for prejudice exists when social perceivers hold a stereotype about a social group that are incongruent with the attributes that are thought to be required for success in certain classes of social roles").

n211 Madeline E. Heilman, Sex Bias in Work Settings: The Lack of Fit Model, 5 Res. in Org. Behav. 269, 278 (1983) (defining the lack of fit model as one that starts with the following premise: "Expectations about how successful or unsuccessful an individual will be when working at a particular job are determined by the fit between the perception of an individual's attributes and the perception of the job's requirements in terms of skill and abilities.").

n212 217 F.3d 46 (1st Cir. 2000).

n213 Id. at 55-58.

n214 Sara J. Corse, Pregnant Managers and their Subordinates: The Effects of Gender Expectations on Hierarchical Relationships, 26 J. App. Behav. Sci. 25, 40 (1990) (citations omitted); see also Halpert et al., supra note 174, at 650-51.

n215 Corse, supra note 214, at 39.

n216 See supra sources cited at note 21.


n218 See *Williams & Segal*, supra note 14, at 199.

n219 Id.

n220 See, e.g., Becker, supra note 60 ("Title VII is an empty remedy in all but the most extreme cases.").


n222 Audience Comment, Faculty Workshop by Wendy Parker, American University, Washington College


n226 Post, supra note 11, at 8.

n227 See Post & Siegel, supra note 65.


