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Equality's Frontiers: How Congress's Section 5 Power Can Secure Transformative Equality (as Justice Ginsburg Illustrates in *Coleman*)

This Essay was adapted from remarks delivered at Equality's Frontiers, a panel discussion celebrating Justice Ginsburg's gender-equality jurisprudence and analyzing its relationship with new developments in the law of equality. The discussion preceded Justice Ginsburg's Gruber Distinguished Lecture in Women's Rights, held on October 19, 2012, at Yale University.

Justice Ruth Bader Ginsburg's work continues to illuminate equality's frontiers, as today's intergenerational conversation among friends and colleagues so richly testifies. To illustrate the generativity of her work, it is of course tempting to focus on cases for which Justice Ginsburg is famous. But in these remarks, I would like to draw attention to a recent decision unfamiliar to most, *Coleman v. Court of Appeals*,¹ in which Justice Ginsburg, in dissent, addresses Congress's role in enforcing the Fourteenth Amendment and shows how actors outside courts can help vindicate constitutional rights and implement equality in transformative ways. In *Coleman*, Justice Ginsburg reconstructs several decades of history to illustrate how debate in civil society and in Congress can build consensus to enforce equal protection guarantees, and ultimately move Congress to commit resources to new means of securing the equal protection of the laws. Justice Ginsburg's *Coleman* dissent shows how the Court and Congress acting together can enforce the Constitution's promise of equal citizenship in ways the Court acting alone cannot.

Coleman concerns popular legislation, the Family and Medical Leave Act (FMLA).² The FMLA is a federal law, enacted in 1993, that entitles employees

1. 132 S. Ct. 1327 (2012).

2. 29 U.S.C. § 2601 (2006).

to take up to twelve weeks of unpaid leave per year for family care (for the care of the employee's newborn child,³ for the placement of a child with the employee for adoption or foster care,⁴ or for the care of the employee's spouse, son, daughter, or parent with a serious medical condition⁵) and for self-care (to care for the employee's own serious health condition when the condition interferes with the employee's ability to perform at the workplace).⁶ The Act covers public and private employers and enables employees to bring suit to secure enforcement of the Act's family-care and self-care provisions.⁷

But the precise legal question at issue in *Coleman* was not one about which there is or is likely to be widespread public interest. The question presented in *Coleman* was whether Congress had power to subject state governments to suits under the FMLA for money damages for breach of the Act's self-care provision. States are ordinarily immune to suits for money damages unless they consent to suit and waive their immunity.⁸ But when Congress exercises its power to enforce *constitutional rights*—for example, under Section 5 of the Fourteenth Amendment, which empowers Congress to enact legislation enforcing the Equal Protection Clause—then Congress can authorize suits for money damages against state governments.⁹ So the technical legal question at issue in *Coleman* was whether Section 5 of the Fourteenth Amendment gave Congress power to enact the self-care provision of the FMLA.

By now, you, too, might be asking the question that puzzled the Court: why did Congress claim that legislation giving employees the right to sick leave was a way of enforcing the equal protection of the laws?

The Court had upheld the FMLA's *family-care* provisions as a valid exercise of Congress's Section 5 power in the 2003 case of *Nevada Department of Human Resources v. Hibbs*,¹⁰ where the Court found that the legislation remedied and deterred sex discrimination in the provision of leave benefits. In *Coleman*, however, the Court refused to find that the FMLA's *self-care* provisions were a valid exercise of Congress's Section 5 power. "Without widespread evidence of sex discrimination or sex stereotyping in the administration of sick leave, it is

3. *Id.* § 2612(a)(1)(A).

4. *Id.* § 2612(a)(1)(B).

5. *Id.* § 2612(a)(1)(C).

6. *Id.* § 2612(a)(1)(D).

7. *Id.* § 2617 (a)(2).

8. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 78-79 (2000); *Alden v. Maine*, 527 U.S. 706, 711-12 (1999).

9. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

10. 538 U.S. 721 (2003).

apparent that the congressional purpose in enacting the self-care provision is unrelated to these supposed wrongs,”¹¹ Justice Kennedy reasoned, in an opinion that at times verged on dismissive and that never once addressed arguments raised in Justice Ginsburg’s twenty-page dissent. “There is nothing in particular about self-care leave . . . that connects it to gender discrimination,” he continued.¹² “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.”¹³

The five Justices denying Congress Section 5 power to enforce the FMLA’s self-care provisions through suits for money damages were more concerned about protecting the sovereign immunity of states and the sole authority of the Court to interpret the Equal Protection Clause than they were interested in understanding Congress’s reasons for adopting innovative approaches to enforcing the equal protection guarantee.

Justice Ginsburg, by contrast, approached the question from a very different perspective. In a dissent joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg applied the governing *Boerne*¹⁴ framework that defines Congress’s Section 5 powers,¹⁵ yet did so differently from Justice Kennedy. Justice Ginsburg was interested in understanding the reasons that led Congress to bundle family-care *and* self-care leave in the FMLA, and she respectfully discussed the concerns of the social-movement actors who taught Congress to care about enforcing the equal protection of the laws in this way.¹⁶ Her dissent lives at equality’s frontiers because Justice Ginsburg is attuned to the interplay among social movements, democratic bodies, and courts from which *new* approaches to enforcing equality emerge.

Justice Ginsburg has long lived at equality’s frontiers. After all, the author of the *Coleman* dissent began her career as a litigator for the women’s movement, teaching the Court and the nation new ways to understand their Constitution’s commitment to guarantee all persons the “equal protection of the laws.” While she and the movement for which she litigated succeeded beyond the wildest imagining of any, they did *not* wholly prevail. Forty years ago, they sought ratification of an Equal Rights Amendment, and, with it,

11. *Coleman v. Court of Appeals*, 132 S. Ct. 1327, 1335 (2012).

12. *Id.* at 1337.

13. *Id.*

14. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

15. *Coleman*, 132 S. Ct. at 1339, 1342, 1345 (Ginsburg, J., dissenting) (applying the three-part *Boerne* test for Section 5 legislation).

16. *Id.* at 1340–42.

equality in the conditions in which women conceived and raised children—rights to sex equality in the workplace, to contraception, to abortion, and to publicly supported childcare.¹⁷ We can hear these movement themes in the way then-Professor Ginsburg reasoned about the Court’s sex-equality docket in 1978:

Not only the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: the roles women are to play in society. Are women to have the opportunity to participate in full partnership with men in the nation’s social, political, and economic life? This is a *constitutional* issue, . . . surely one of the most important in this final quarter of the twentieth century.¹⁸

Because the author of the *Coleman* dissent understands equality as a question of social life—involving “the roles women are to play in society”—she understands equality as including not only the right to be free from discrimination, but *also* the rights to make decisions about contraception and abortion.¹⁹ There is more. If sex equality concerns “the roles women are to play in society,” it concerns the organization of our basic institutions, and so will implicate questions of social structure and distributive justice—both positive rights as well as negative rights—that may be beyond the sole competence of courts to vindicate.

Justice Ginsburg and the other dissenting Justices in *Coleman* reason from the expectation that equality is transformative: that it arises from and changes our constitutive social norms and arrangements. Given these ties between equality and social life, equality requires Congress as well as the courts for its vindication.

17. For the movement’s claims, see Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1984–2004 (2003); and Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CALIF. L. REV. 1323, 1366–1414 (2006).

18. Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN’S RTS. L. REP. 143, 143–44 (1978) (footnote omitted) (citing Kenneth L. Karst, Book Review, 89 HARV. L. REV. 1028, 1036 (1976) (reviewing GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (9th ed. 1975))).

19. For arguments concerning reproductive choice that Ruth Bader Ginsburg advanced during this same period, see Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63 (2013).

In *Coleman*, the dissenting Justices approach the FMLA record with an assumption that Congress has an important role to play in enforcing constitutional guarantees; they assume that Congress and the courts acting together can enforce equality values in ways a court acting alone could not. This presumption guides their orientation to the record. Where the Justices who would deny Congress Section 5 power can see no connection between self-care leave and constitutional equality values, the dissenters recognize in Congress's decision to bundle family-care and self-care leave a commitment to provide employees family leave in a form that would not exacerbate employers' tendency to discriminate against young women of childbearing age in hiring and promotion. Congress decided it could promote work-family balance without triggering discrimination by coupling a form of leave employers would expect women to take (family leave) with a form of leave employers would expect employees of both sexes to take (sick leave). The statutory design is Congress's, but, as you read Justice Ginsburg's account, you can appreciate that Congress is guided throughout by the hard-won experience of the women's movement.

The Congress that enacted the FMLA appreciated that the discrimination women face in the workplace arises from role conflicts, both ascribed and actual. *Ascribed*: In this society, we view female employees as having primary responsibility for family care. *Actual*: In this society, we organize work and family relations so that caregivers are at a *real* disadvantage in the workplace. These two forms of role conflict create an advocates' dilemma. Prohibiting discrimination cannot resolve work-family conflicts. But if advocates seek family-leave protections for pregnant women and for those engaged in caregiving work, they increase the chance of the identification of *any* young woman as a prospective caregiver and raise the potential cost of hiring women. In short, the effort to promote equality may exacerbate employers' tendency to stereotype new mothers and mothers-to-be and so create disincentives to hiring all young women.

The solution animating the design of the FMLA, as Justice Ginsburg's dissent explained: seek *universal* rather than targeted leave benefits designed to raise the baseline for *all* employees, rather than singling out women and caregivers for accommodation. The hope: providing gender-neutral family leave and self-care leave to men and women would make all employees prospective leave-takers, rather than singling out women as suspect or expensive hires.²⁰ At the same time, universalizing leave benefits would make it possible for women to take leave and to retain jobs during pregnancy and early

20. See *Coleman*, 132 S. Ct. at 1347-50 (Ginsburg, J., dissenting).

child care, while opening the door to the prospect of *men*, too, taking employment leave for family care.²¹

As Justice Ginsburg described, the Act's gender-neutral self-care and family-leave provisions worked together:

Essential to its design, Congress assiduously avoided a legislative package that, overall, was or would be seen as geared to women only. Congress thereby reduced employers' incentives to prefer men over women, advanced women's economic opportunities, and laid the foundation for a more egalitarian relationship at home and at work. The self-care provision is a key part of that endeavor, and, in my view, a valid exercise of congressional power under §5 of the Fourteenth Amendment.²²

The *Coleman* dissenters view Congress as essential in enforcing equality—if equality is to be transformative—because of the very characteristics that distinguish Congress from the Court. Given its democratic and deliberative structure, Congress can debate for decades what equality in work and family requires; Congress can address distributive questions raised by claims for structural change; and Congress can gather testimony about interventions that are, in practice, likely to succeed given changing sex-role expectations of Americans “at home and at work.” For these reasons, in enacting the FMLA's self-care provisions, Congress was able to enforce the Court's understanding of equal protection (nondiscrimination in employment) by means that no court could command.²³ Justice Ginsburg's *Coleman* dissent appreciates that Congress, enforcing its constitutionally endowed Section 5 powers, can secure for men and women “the equal protection of the laws” in ways that a court acting alone, by its very institutional structure, cannot.

21. Without a doubt, the universal-benefits approach raised the price on the leave package of the FMLA, but Congress negotiated with all players and adopted a compromise framework (exempting smaller employers and restricting leave benefits) that integrated commitments to equality, family, and efficiency. For a brief history of the FMLA as a sex equality statute that negotiated these practical problems, see Post & Siegel, *supra* note 17, at 2014-20.

22. *Coleman*, 132 S. Ct. at 1350 (Ginsburg, J., dissenting).

23. Justice Ginsburg thus sets forth the case for Congress's exercise of its Section 5 power under the *Boerne* framework. Self-care leave is a congruent and proportional means of deterring acts of sex discrimination by public employers that would violate the Constitution as the Court has interpreted it. *See id.* at 1347-50.

SECTION 5 AND TRANSFORMATIVE EQUALITY

It is a rich—or revealing—irony of *Coleman* that the very Justices hostile to affirmative action in the *Fisher* arguments²⁴ were *also* hostile to the equality legislation in *Coleman*. That is, the same block of conservative Justices who harshly questioned the University of Texas about its reasons for consciously considering race in admissions *also* disdained Congress’s reasons for enforcing FMLA gender-neutral self-care leave under Section 5—even though, as Justice Ginsburg’s dissent painstakingly shows, Congress was committed to universalizing, rather than targeting, benefits in the design of the Act.

What this comparison teaches, in conclusion, is that targeting and universalism are strategies that each can be employed in equality’s pursuit. In context, targeting and universalism *each* can be transformative.²⁵ In her *Coleman* dissent, Justice Ginsburg shows reasons why, in the FMLA context, Congress concluded that distribution of leave in universal rather than in targeted form was crucial to deterring sex discrimination in hiring and promotion.

A judicially enforced prohibition on sex discrimination is essential to opening opportunities at work, but, as Congress found, its effects will be limited by entrenched sex-role assumptions and the prevailing organization of family and market work. Long-running public debate was required to identify the problem in enforcing sex-equality principles in the workplace, to devise creative ways of combatting it, and to forge the commitment to do so. Justice Ginsburg’s *Coleman* dissent demonstrates how dialogue among social movements, Congress, and the courts is crucial to realizing constitutional ideals, at equality’s frontiers.

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Justice Ginsburg offered the following response:

Thank you, Reva, for that excellent presentation. You said so much in admirably concise form. *Coleman* was another dissent I summarized from the bench—not to castigate my colleagues, but as an exercise in damage control. I, of course, believe that the view I embraced was the one Congress intended when it enacted the Family and Medical Leave Act. But my pitch was this: the current Court is protective of state

24. Transcript of Oral Argument at 31-58, *Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. argued Oct. 10, 2012).

25. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1357-58 (2011) (discussing when it may be effective to employ universalist regulatory forms in pursuit of equality).

sovereign immunity, and all this decision holds is that you can't get damages from the state if it denies you self-care leave. You can get injunctive relief so the state won't do it in the future, and, further, the FMLA is in full force in the private sector. So, Reva, I didn't read the majority as rejecting my universalist view of how to respond to discrimination. I emphasized that leave for self-care remains the obligation of the private sector, even state governments, except they don't have to pay money out of pocket when they fail to comply with the law.

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Reva B. Siegel is the Nicholas deB. Katzenbach Professor of Law at Yale University. It was an honor for the author to share the day's conversation with Justice Ginsburg and an intergenerational circle of friends, exploring horizons opened by Justice Ginsburg's work.

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