Catholic University Law Review

Volume 52
Issue 3 *Spring 2003*

Article 5

4-1-2003

# Nevada Department of Human Resources v. Hibbs: The Eleventh Amendment in a States' Rights Era: Sword or Shield?

Todd B. Tatelman

Follow this and additional works at: https://scholarship.law.edu/lawreview

Recommended Citation
Todd B. Tatelman, *Nevada Department of Human Resources v. Hibbs: The Eleventh Amendment in a States' Rights Era: Sword or Shield?*, 52 Cath. U. L. Rev. 683 (2003).
Available at: https://scholarship.law.edu/lawreview/vol52/iss3/5

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

# COMMENTS

# *NEVADA DEPARTMENT OF HUMAN RESOURCES V. HIBBS*: THE ELEVENTH AMENDMENT IN A STATES' RIGHTS ERA: SWORD OR SHIELD?

*Todd B. Tatelman*[+]

The precise operation of federalism in the American system of government is the "oldest question of constitutional law."[1] The concept of sovereign immunity is integral to a full and complete understanding of this complex debate. The sovereign immunity of the several states, however, has been a contentious issue since the drafting and ratification of the Constitution.[2] Article III of the Constitution, by its language, provides for federal court jurisdiction "between a State and Citizens of another State."[3] The Eleventh Amendment, however, ratified after both the original Constitution and the Bill of Rights, removes this jurisdiction from the federal courts.[4]

Since the conclusion of the Civil War, the precise scope and meaning of the Eleventh Amendment and its impact on federal court jurisdiction have together been the major focal point in the debate concerning principles of federalism.[5] Post-Civil War amendments to the

---

+ J.D. Candidate, May 2003, The Catholic University of America, Columbus School of Law.

1. H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 635 (1993) (quoting New York v. United States, 505 U.S. 144, 149 (1992)).

2. *See* THE FEDERALIST NO. 81, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It has been suggested that an assignment of the public securities of one State to the citizens of another would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.").

3. U.S. CONST. art. III, § 2.

4. *See* U.S. CONST. amend. XI. The amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*

5. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.3 (3d ed. 1999) (describing competing theories about what the Eleventh Amendment means or prohibits). Professor Chemerinsky describes the three competing theories of sovereign immunity. *Id.* The first theory, supported by the current Supreme Court's "conservative" majority, "sees the Eleventh Amendment as a restriction on the subject matter jurisdiction of the federal courts that bars all suits against state governments." *Id.* The second theory, supported by the remainder of the current Justices, would limit the restriction on subject matter

Constitution, particularly Section 5 of the Fourteenth Amendment,[6] along with a growing federal concern over the civil rights of all citizens,[7] have created a tension between the principles of sovereign immunity and the power of the federal government.[8]

Starting in 1995, a series of Supreme Court cases has aimed to reduce this tension.[9] The result has been a severe reduction in Congress's constitutional authority to provide private rights of action for damages against state governments.[10] The Court has yet to adjudicate Congress's authority to provide such remedies through the Family and Medical Leave Act of 1993 (FMLA).[11]

This Comment focuses on the tension between the Eleventh Amendment, which grants states immunity from private damage actions in federal court, and Section 5 of the Fourteenth Amendment, which

---

jurisdiction only to those cases that are brought exclusively under diversity jurisdiction. *See id.* Finally, Professor Chemerinsky indicates that a third theory holds that the Eleventh Amendment "reinstates the common law immunity from suit enjoyed by states prior to the adoption of Article III and, perhaps, prior to the Supreme Court's decision in *Chisholm v. Georgia.*" *Id.* at n.1; *see also* Vicki C. Jackson, *The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 104-13 (1988); Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 57-60 (1990).

6. Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

7. *See* RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1048 (4th ed. 1996) (noting that before the Civil War, "the Supreme Court faced relatively few cases involving the Eleventh Amendment").

8. *See* CHEMERINSKY, *supra* note 5, at § 7.7 (addressing the question of abrogation of Eleventh Amendment by Congress).

9. *See* Timothy S. McFadden, Note, *The New Age of the Eleventh Amendment: A Survey of the Supreme Court's Eleventh Amendment Jurisprudence and a Review of* Kimel v. Flordia Board of Regents, 27 J.C. & U.L. 519, 519 (2000) (concluding, as the title suggests, that the decisions by the Court since 1995 have resulted in a "new age in Eleventh Amendment jurisprudence, limiting the circumstances in which private lawsuits for money damages may be brought against states and their arms").

10. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (striking down portions of the Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994)); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (striking down portions of the Age Discrimination and Employment Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (striking down two sections of the Plant Variety Protection Remedy Clarification Act); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 666 (1999) (interpreting the Trademark Act of 1946); City of Boerne v. Flores, 521 U.S. 507 (1997) (finding unconstitutional the Religious Freedom Restoration Act of 1993); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (applying the Indian Gaming Regulatory Act).

11. Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified in part at 29 U.S.C. §§ 2601-54 (2000)).

authorizes Congress to abrogate that immunity to enforce the anti-discrimination provisions of the Fourteenth Amendment. This Comment first examines both the language of the two constitutional provisions and the relevant Supreme Court interpretations of each. This Comment then examines the series of recent Supreme Court decisions limiting Congress's Section 5 power. Next, the Comment discusses the FMLA, exploring the Ninth Circuit's analysis in support of the conclusion that Congress's extension of full FMLA remedies against the states is a proper exercise of its Section 5 power.[12] Finally, this Comment demonstrates that with the development of a pro-states' rights jurisprudence, the Eleventh Amendment has evolved from a shield designed to protect the several states from frivolous lawsuits into a sword employed to thwart federal legislation aimed at protecting citizens' civil and other rights. This Comment concludes that the FMLA is a constitutional use of Congress's Section 5 power and that the Eleventh Amendment's proper place is as a shield protecting the states, not a sword empowering them to frustrate effectuation of federal legislation that is well within Congress's power to enact.

## I. THE DEVELOPMENT OF THE SOVEREIGN IMMUNITY DOCTRINE

### *A. The Pre-Eleventh Amendment Period: Article III and Sovereign Immunity*

In 1793, shortly after the ratification of the Constitution, the Supreme Court heard and decided "its first great case, *Chisholm v. Georgia*."[13] The issue before the Court in *Chisholm* was whether a citizen of South Carolina could bring an action in federal court against the state of Georgia to collect payment on bonds issued during the Revolutionary War.[14] The Court held, by a four-to-one majority, that the Supreme Court had jurisdiction and that a judgment of default would enter against Georgia.[15] A majority of the Supreme Court accepted Attorney General

---

12. Hibbs v. Dep't of Human Resources, 273 F.3d 844 (9th Cir. 2001), *cert. granted sub nom.* Nevada Dep't of Human Resources v. Hibbs, 536 U.S. 938 (2002) (mem.).

13. John V. Orth, *The Truth About Justice Iredell's Dissent in* Chisholm v. Georgia (1793), 73 N.C. L. REV. 255, 256 (1994).

14. *See id.*; Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31, 39 (2001). More precisely, the question was: "[W]ill an action of assumpit lie against a State?" Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 430 (1793) (Iredell, J., dissenting).

15. Orth, *supra* note 13, at 256. Chief Justice Jay and Justices Blair, Wilson, and Cushing ruled that there was jurisdiction. *See Chisholm*, 2 U.S. (2 Dall.) at 479 (Jay, C.J.); *id.* at 450-53 (Blair, J.); *id.* at 466 (Wilson, J.); *id.* at 469 (Cushing, J.). Justice Iredell dissented on the narrow question of whether there was an action in assumpit against a

Edmund Randolph's argument that both the "letter" and the "[s]pirit of the Constitution" gave the Court jurisdiction over the suit.[16] Article III of the Constitution clearly extended judicial power to controversies "between a State and Citizens of another State."[17] In addition, the Judiciary Act of 1789 had codified the jurisdiction permitted under Article III,[18] and the Supreme Court had previously exercised jurisdiction over a suit brought against a state by citizens of foreign nations.[19]

Reaction to the Court's decision in *Chisholm* was swift and teetered on the verge of outrage.[20] The majority of states were concerned not only with their sovereignty, but also with the financial implications given the large amount of debt from the Revolutionary War.[21] On March 4, 1794, approximately three weeks after the Court's decision in *Chisholm,* Congress enacted, and sent to the states for ratification, what was to become the Eleventh Amendment.[22]

### *B. Interpretation of the Eleventh Amendment: The Creation of a Broad Grant of Immunity*

During the ninety-five years that followed the ratification of the Eleventh Amendment, the Supreme Court heard only one case relating to the states' sovereign immunity.[23] The case, *Cohens v. Virginia,*[24] was Chief Justice Marshall's only opportunity to articulate his views on the meaning, scope, and breadth of the Eleventh Amendment.[25] Marshall, in

---

state, but he also indicated that he disagreed with the other Justices on the larger question of jurisdiction. *See id.* at 449 (Iredell, J., dissenting).

16. *Chisholm*, 2 U.S. (2 Dall.) at 420-21.

17. U.S. CONST. art. III, § 2. Attorney General Randolph referred to this textual basis. *Chisholm*, 2 U.S. (2 Dall.) at 420. Each of the Justices mentioned it as well. *See id.* at 430-31 (Iredell, J., dissenting); *id.* at 450 (Blair, J.); *id.* at 466 (Wilson, J.); *id.* at 466-67 (Cushing, J.); *id.* at 475 (Jay, C.J.).

18. *See* CHEMERINSKY, *supra* note 5, § 7.2, at 394 (citing The Judiciary Act of 1789, ch. 20, 1 Stat. 73, 80, at § 13.).

19. *Id.* (citing Vanstophorst v. Maryland, 2 U.S. (2 Dall.) 401 (1791)).

20. For example, the state of Georgia enacted a statute holding people attempting to enforce the Court's decision "to be guilty of felony, and shall suffer death, without the benefit of clergy, by being hanged." PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 810 (4th ed. 1998); *see also* William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033, 1058 (1983).

21. *See* Fletcher, *supra* note 20, at 1058 n.114.

22. *Id.* at 1059. The amendment passed both houses of Congress by overwhelming majorities. *Id.* at 1059 n.121. The House of Representatives approved the proposed amendment by a vote of 81-9 and the Senate by a vote of 23-2. *Id.*

23. *See* Gottesman, *supra* note 14, at 43.

24. 19 U.S. (6 Wheat.) 264 (1823).

25. *See* Gottesman, *supra* note 14, at 41-43.

strengthening the Supreme Court's power to hear cases involving federal questions, held that "a case arising under the constitution or laws of the United States, is cognizable in the Courts of the Union, whoever may be the parties to that case."[26] Despite Chief Justice Marshall's reading of the Eleventh Amendment, at the next opportunity to interpret the language, the Supreme Court opted for a much broader grant of immunity.[27]

In *Hans v. Louisiana,*[28] the Supreme Court was presented with another dispute involving the obligation of a state to pay its war bond debt.[29] Louisiana, refusing to pay interest on its bonds, argued that the "[p]laintiff cannot sue the state without its permission; the constitution and laws do not give this honorable court jurisdiction of a suit against the state."[30] In an attempt to avoid the Eleventh Amendment issue altogether, Hans responded that Louisiana's refusal to pay the debt was tantamount to an attempt to impair the validity of a contract.[31] Therefore, jurisdiction arose because Louisiana violated Article I, Section 10 of the Constitution.[32] The Court, cognizant of the outrage that erupted after *Chisholm,* held that the Eleventh Amendment extends beyond the literal language contained in its text and, therefore, the Court lacked subject matter jurisdiction to hear the case.[33]

---

26. *Cohens*, 19 U.S. (6 Wheat.) at 383. Chief Justice Marshall proceeded to narrow the meaning of the Eleventh Amendment even further by stating that the impetus behind the language of the amendment was only to relieve the states from the demands made upon them in federal court, not "to strip the [federal] government of the means of protecting, by the instrumentality of its Courts, the constitution and laws from active violation." *Id.* at 407.

27. *See* CHEMERINSKY, *supra* note 5, § 7.3, at 397-98 (discussing the holding in *Hans v. Louisiana*, 134 U.S. 1 (1890)). Professor Chemerinsky concludes that "since *Hans*, states have been immune to suits both by their own citizens and by citizens of other states." *Id.* §7.3, at 397. This conclusion creates a larger grant of immunity than that given by both the original text of the amendment and the decision in *Cohens v. Virginia.*

28. 134 U.S. 1 (1890).

29. *Id.* at 1.

30. *Id.* at 3.

31. *See id.*

32. *See id.* Article I, § 10 of the Constitution states:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or *Law impairing the Obligation of Contracts*, or grant any Title of Nobility.

U.S. CONST. art. I, § 10 (emphasis added).

33. *Hans*, 134 U.S. at 21; *see also id.* at 11 (commenting on the reaction to *Chisholm*).

The meaning of *Hans* is disputed even among the current Supreme Court Justices.[34] The result is apparently grounded in common law notions of sovereign immunity combined with the Court's reading of the "correct" interpretation of Article III.[35] In other words, the *Hans* Court relied on the fact that allowing Hans to reformulate his debt claims as the impairment of contract obligations created the anomalous result that the Eleventh Amendment was designed to prevent.[36] Therefore, despite the awkward language of the amendment, a citizen of a state cannot bring suit against that state in federal court.[37] The Court's decision in *Hans* resulted in the states enjoying an almost absolute grant of immunity from federal court jurisdiction.[38]

### *C. Civil Rights and Congress's Ability To Abrogate State Sovereign Immunity*

#### *1. Section 5 of the Fourteenth Amendment:* Fitzpatrick *and the Affirmative Grant of Power*

After the Court's decision in *Hans,* Eleventh Amendment jurisprudence went without significant challenge until 1976 when a group of Connecticut state employees sued the state claiming that "certain provisions in the state's statutory retirement benefit plan discriminated against them because of their sex."[39] *Fitzpatrick v. Bitzer*[40] was the first

---

34. *See* CHEMERINSKY, *supra* note 5, § 7.3, at 397-98 (explaining the split within the current Supreme Court); *see also infra* note 79 (discussing the split between the Justices over the meaning of the *Hans* decision in *Seminole Tribe*).

35. *See* CHEMERINSKY, *supra* note 5, § 7.3, at 397; *see also* Gottesman, *supra* note 14, at 43 n.60 (arguing that the Court in *Hans* overcame the textual problem of the amendment by "observing that the Eleventh Amendment was intended to reinstate the original, 'correct' meaning of Article III of the Constitution, which had been misconstrued in *Chisholm*").

36. *See Hans*, 134 U.S. at 11-12; *see also* CHEMERINSKY, *supra* note 5, § 7.3, at 397; Gottesman, *supra* note 14, at 43-44. The *Hans* Court regarded Chief Justice Marshall's formulation in *Cohens v. Virginia* as "unnecessary to the decision, and in that sense extra judicial, and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion." *Hans*, 134 U.S. at 20.

37. *Hans*, 134 U.S. at 21.

38. *See* CHEMERINSKY, *supra* note 5, § 7.3, at 397. Professor Chemerinsky describes the majority view on the current Supreme Court as reading the "Eleventh Amendment as a restriction on the subject matter jurisdiction of the federal courts that bars *all* suits against state governments." *Id.* §7.3, at 396 (emphasis added).

39. Fitzpatrick v. Bitzer, 427 U.S. 445, 448 (1976). The claim relied on the 1972 Amendments to Title VII of the Civil Rights Act of 1964, which allowed federal courts to award money damages to private individuals against a state government that discriminated on the basis of "race, color, religion, sex, or national origin." *See id.* at 447-48 (citing Section 703(a) of the Civil Rights Act of 1964, 78 Stat. 225, 42 U.S.C. § 2000e-2(a) (1970 ed. and Supp. IV)).

case in which a state asserted the Eleventh Amendment as a defense against a statutory provision enacted by Congress under Section 5 of the Fourteenth Amendment.[41]

The majority opinion, written by then-Justice Rehnquist, cautiously concluded that the Fourteenth Amendment is itself a restriction on state sovereignty.[42] Therefore, "in determining what is 'appropriate legislation' . . . [Congress can] provide for private suits against States or state officials which are constitutionally impermissible in other contexts."[43] Specifically, the Court "recognized that the Fourteenth Amendment . . . had fundamentally altered the balance of state and federal power struck by the Constitution."[44]

The decision in *Fitzpatrick* demonstrates that the Fourteenth Amendment provides Congress with the authority necessary to abrogate the sovereign immunity of the states.[45] The majority, however, clearly invited future litigation when, in a footnote, it reminded states that Connecticut, in asserting the Eleventh Amendment defense, did "not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under [Section] 5 of the Fourteenth Amendment."[46] This carefully worded footnote signals a much larger issue facing congressional enactments under Section 5. With this language, the Court suggested that the Eleventh Amendment might

---

40. 427 U.S. 445 (1976).

41. *See id.* at 452-53. The Court found that "[t]here is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment." *Id.* at 453 n.9 (citing H.R. REP. NO. 92-238, at 19 (1971); S. REP. NO. 92-415, at 10-11 (1971); National League of Cities v. Usery, 426 U.S. 833 (1976)).

42. *Id.* at 456 (stating that "[w]hen Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority"); *see also* CHEMERINSKY, *supra* note 5, § 7.7, at 438 (stating that "[t]he Court reasoned that the Fourteenth Amendment specifically was intended to limit state sovereignty, and therefore congressional legislation under the Fourteenth Amendment can authorize suits directly against the states in federal court"); Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1269 (2001) (arguing that "the Court has never held or even implied that the Fourteenth Amendment abrogates state immunity by itself, only that it authorizes Congress to do so and even then only when Congress speaks clearly").

43. *Fitzpatrick*, 427 U.S. at 456.

44. Seminole Tribe v. Florida, 517 U.S. 44, 59 (1996) (citing *Fitzpatrick*, 427 U.S. at 455).

45. *Fitzpatrick*, 427 U.S. at 452 (finding the "threshold fact of congressional authorization" for abrogating immunity under Title VII) (citing Edelman v. Jordan, 415 U.S. 651, 672 (1974)).

46. *Id.* at 456 n.11.

be used to substantively challenge congressional enactments abrogating state sovereign immunity.[47]

While *Fitzpatrick* generally stands for the proposition that Congress, acting pursuant to its power under Section 5 of the Fourteenth Amendment, can abrogate states' sovereign immunity, that power is not without limitation.[48] Subsequent cases have held that Congress must be explicit in its intent to override sovereign immunity.[49] The explicit intent, however, does not have to be found in the actual text of the statute; it can be located in the legislative history and inferred from the general structure of the statute.[50] Later formulations of this standard have required Congress to make its abrogation intent "unmistakably clear."[51] *Fitzpatrick* and its progeny, however, are limited to congressional power exercised under Section 5 of the Fourteenth Amendment.[52] These cases intimated nothing about other possible sources of abrogation power, such as the enumerated powers found in Article I.

---

47. *See* Fletcher, *supra* note 20, at 1113.

48. *See Fitzpatrick*, 427 U.S. at 456 (suggesting that Section 5 legislation is limited by the constitutional grant of authority embodied within the prior sections of the Fourteenth Amendment).

49. *See* Quern v. Jordan, 440 U.S. 332, 345 (1979) (holding that 42 U.S.C. § 1983 "does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States"). The decision in *Quern* was not without its critics. *See* CHEMERINSKY, *supra* note 5, § 7.7, at 439. Justices Brennan and Marshall, concurring in the result and dissenting in part, argued that the facts in *Quern* were not sufficient to reach the question of whether § 1983 abrogated the Eleventh Amendment. *Id.* Therefore, the majority's discussion on that issue is dicta. *Id.*

50. *See* CHEMERINSKY, *supra* note 5, § 7.7, at 438-40. *See generally* Hutto v. Finney, 437 U.S. 678 (1978) (holding that awards for attorney's fees are permissible as a form of ancillary relief against states under 42 U.S.C. § 1988).

51. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (holding that the Rehabilitation Act of 1973 did not authorize private suits against the states for monetary damages).

52. *See Fitzpatrick*, 427 U.S. at 456. In discussing the constitutional authority for abrogating state sovereign immunity, the Court specifically refers only to Section 5 by stating:

> [W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. . . . When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

*Id.* (internal citation omitted).

### 2. *The Commerce Clause and Other Sources of Congressional Power*

#### *a.* Pennsylvania v. Union Gas Co.: *The Height of Congress's Abrogation Power*

In 1988, the Supreme Court had the opportunity to address the question of whether Congress's Commerce Clause power under Article I[53] gave it the authority to abrogate states' sovereign immunity.[54] In *Pennsylvania v. Union Gas Co.,*[55] a heavily divided Court held that when legislating pursuant to its plenary powers under Article I of the Constitution, Congress could abrogate state sovereign immunity.[56] The plurality's decision in *Union Gas* represented the height of Congress's abrogation authority.[57] However, the dispute between the Justices over the basis for that authority drew more attention than the decision reached by the *Union Gas* Court.[58]

---

53. U.S. CONST. art. I, § 8, cl. 3.

54. Pennsylvania v. Union Gas Co., 491 U.S. 1, 5 (1989).

55. 491 U.S. 1 (1989).

56. *See id.* at 3-4. Justice Brennan, writing for a plurality of the Court, held that Congress could abrogate state sovereign immunity under the Commerce Clause. *Id.* at 19 (Brennan, J.); *see also id.* at 15 (ruling that "careful regard for precedent still would mandate the conclusion that Congress has the power to abrogate immunity when exercising its plenary authority to regulate interstate commerce"). Justice White did not think that the statutes showed adequate intent to abrogate but provided a fifth vote for Congress's ability to abrogate immunity under the powers enumerated in Article I. *Id.* at 45, 56-57 (White, J., concurring in part and dissenting in part).

57. *See* Ann Carey Juliano, *The More You Spend, the More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?*, 46 VILL. L. REV. 1111, 1122 (2001) (pointing out that the plenary power granted to Congress by *Union Gas* was "short-lived"); *see also* Robert H. Freilich et al., *Reagan's Legacy: A Conservative Majority Rules on Civil Rights, Civil Liberties and State and Local Government Issues*, 21 URB. LAW. 633, 672 (1989) (stating that, after *Union Gas*, "there is nothing more than political restraint and a commitment to federalist principles to inhibit future congressional abrogation of States' immunity").

58. *See, e.g.*, James K. Floyd, Note, *Piercing the Veil of Sovereign Immunity: Holding States Liable in* Pennsylvania v. Union Gas Co., 35 S.D. L. REV. 341, 349-50 (1990) (suggesting that the abrogation power found by the Court is contained in the legislative history, purpose, and policy of the statutes at issue); *see also* Donald L. Boren, *Congressional Power To Grant Federal Courts Jurisdiction Over States: The Impact of* Pennsylvania v. Union Gas, 24 AKRON L. REV. 9, 17-19 (1990) (providing a detailed analysis of the differences between Justice Brennan's plurality opinion and Justice Scalia's dissent on whether Article I provides Congress with the power to abrogate Eleventh Amendment immunity); Victoria L. Calkins, Note, *State Sovereign Immunity After* Pennsylvania v. Union Gas Co.: *The Demise of the Eleventh Amendment*, 32 WM. & MARY L. REV. 439, 441, 472-73 (1991) (arguing that *Union Gas* reduced the immunity of the states to a privilege and suggesting that a stricter "state consent" standard would be more true to principles of federalism).

Justice Brennan, writing for a four-Justice plurality,[59] relied on two very separate and distinct notions in determining that the Commerce Clause authorizes abrogation of sovereign immunity.[60] First, Justice Brennan applied the Court's justification for abrogation under Section 5 in *Fitzpatrick v. Bitzer,* concluding that "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States."[61] Thus, in ratifying the Constitution, the states consented to be sued whenever Congress acts pursuant to its plenary powers.[62] The second notion upon which Justice Brennan relied was that the Commerce Clause is unique in its power to preempt the states, even when dormant.[63] If this

59. To understand how the votes were counted, it is helpful to note that there were two holdings in *Union Gas.* The first holding, that Congress intended to permit private suits under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 was joined by Justices Brennan, Marshall, Blackmun, Stevens, and Scalia. *See Union Gas*, 491 U.S. at 3, 13; *see also* CHEMERINSKY, *supra* note 5, § 7.7, at 441-42. The second holding, that Congress has the authority to abrogate state sovereign immunity through the Commerce Clause, had the votes of Justices Brennan, Marshall, Blackmun, Stevens, and White. *See Union Gas*, 491 U.S. at 3-4, 19, 57; *see also* CHEMERINSKY, *supra* note 5, § 7.7, at 441-42. Justice White cast the crucial fifth vote on this second holding in his concurring opinion, stating that "[o]n [the question of whether the Commerce Clause grants Congress abrogation power], I concur in Justice Brennan's conclusion, but not his reasoning." *See Union Gas*, 491 U.S. at 45 (White, J., concurring in the judgment in part and dissenting in part). Justice White provided no reasoning as to why he only agreed with the conclusion, prompting the following question: "Doesn't a Justice who casts the deciding vote have some obligation to provide an explanation that is intelligible to the legal community?" FALLON ET AL., *supra* note 7, at 1102.

60. *See Union Gas*, 491 U.S. at 20.

61. *Id.* at 16. Justice Brennan's reasoning on this point relied on the following passage from *Ex parte Virginia*, quoted in *Fitzpatrick*:

> Such enforcement [of the prohibitions of the Fourteenth Amendment] is invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States empowered Congress to enact. . . . [I]n excursing her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

Fitzpatrick v. Bitzer, 427 U.S. 445, 454-55 (1976) (quoting *Ex Parte Virginia*, 100 U.S. 339, 346-48 (1880)).

62. *See* FALLON ET AL., *supra* note 7, at 1102.

63. *See Union Gas*, 491 U.S. at 19-20. The Court stated:

> The Commerce Clause, we have long held, displaces state authority even where Congress has chosen not to act, and it sometimes precludes state regulation even though existing federal law does not pre-empt it. Since the States may not legislate at all in these last two situations, a conclusion that Congress may not create a cause of action for money damages against the States would mean that

second rationale were the basis of the *Union Gas* holding, Congress's abrogation power would be limited to the Commerce Clause.[64]

Justice Scalia, dissenting, relied on the Court's decision in *Hans v. Louisiana.*[65] He argued that the *Hans* Court upheld principles of federalism found in the Eleventh Amendment, which provided for the retention of sovereign immunity by the states.[66] In addition to attacking the plurality's understanding of federalism and *Hans,* Justice Scalia assaulted the plurality's reliance on *Fitzpatrick* and Congress's Section 5 abrogation powers.[67] Finally, Justice Scalia attempted to clarify the proper distinction between Article I powers and Section 5 powers by drawing Justice Brennan's first rationale to its logical conclusion.[68] According to Justice Scalia, "[a]n interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable."[69] Therefore, the only power that can plausibly grant Congress abrogation authority is the Fourteenth Amendment because it was specifically "directed against the power of the States and permits abrogation of their sovereign immunity only for a limited purpose."[70] In Justice Scalia's view, if sovereign immunity is to retain any constitutional value, its abrogation must be restricted to those constitutional provisions expressly directed at the states.[71]

#### *b.* Seminole Tribe v. Florida*: Scaling Back Congress's Power*

Despite these deep disagreements, the essential holding in *Union Gas* remained undisturbed until 1996, when the Supreme Court decided

---

> no one could do so. And in many situations, it is only money damages that will carry out Congress' legitimate objectives under the Commerce Clause.

*Id.* at 20 (internal citations omitted).

64. *See* FALLON ET AL., *supra* note 7, at 1102 (stating that Justice Brennan's first rationale would permit Congress to abrogate sovereign immunity under any Article I power, while the second rationale might not).

65. *See Union Gas*, 491 U.S. at 39 (Scalia, J., concurring in part and dissenting in part).

66. *See id.*

67. *Id.* at 41-42. According to Justice Scalia, the *Fitzpatrick* Court held:

> [T]he Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited by the later [Fourteenth] Amendment, whose substantive provisions were by express terms directed at the States, and were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress.

*Id.* (internal citations and quotation marks omitted).

68. *See id.*

69. *Id.* at 42.

70. *Id.*

71. *See id.*

*Seminole Tribe v. Florida.*[72] This landmark holding overruled *Union Gas* and limited Congress's abrogation power to Section 5 of the Fourteenth Amendment.[73] *Seminole Tribe* presented a dispute over the Indian Gaming Regulatory Act, enacted under Congress's Indian Commerce Clause powers.[74] The Act required states to negotiate in good faith with Indian tribes with respect to gaming activities.[75] The Act also authorized tribes to bring enforcement suits in federal court.[76] Writing for the majority, Chief Justice Rehnquist divided his inquiry into two separate questions: "first, whether Congress has unequivocally expressed its intent to abrogate the immunity, and second, whether Congress has acted pursuant to a valid exercise of power."[77] The Court answered the first question affirmatively and without much analysis.[78] The second question, however, was answered negatively, and a sharply divided Court overturned *Union Gas.*[79]

---

72. 517 U.S. 44 (1996). In the period between *Union Gas* and *Seminole Tribe*, the Court heard several Eleventh Amendment cases, but none were decided on the basis of *Union Gas*; rather, all were struck down on other grounds. *See, e.g.,* Dellmuth v. Muth, 491 U.S. 293 (1989) (holding that states could not be sued under the Education of the Handicapped Act because the statute did not expressly authorize the suits in federal courts); Hoffman v. Conn. Dep't of Income Maintenance, 492 U.S. 96, 98, 104 (1989) (ruling by four justices that states could not be sued in federal court under the provisions of the Bankruptcy Code because the language did not meet the unmistakably clear standard).

73. *Seminole Tribe,* 517 U.S. at 72-73.

74. *See id.* at 47. The Indian Commerce Clause is U.S. CONST. art. I, § 8, cl. 3.

75. *See Seminole Tribe,* 517 U.S. at 47 (citing 25 U.S.C. §§ 2710(d)(1)(C), 2710 (d)(3)(A)).

76. *Id.* (citing 25 U.S.C. § 2710(d)(7)).

77. *Id.* at 55 (internal citations and quotation marks omitted).

78. *See id.* at 56-57 (stating that "[i]n sum, we think that the numerous references to the 'State' in the text of § 2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit").

79. *See id.* at 72-73. The decision to overrule *Union Gas* produced an oft-occurring division within the Court. In a five-to-four decision, Justices Kennedy, O'Connor, Scalia, and Thomas joined the Chief Justice's opinion, while Justices Souter, Breyer, Stevens, and Ginsburg dissented. *See id.* at 46. Justices Souter and Stevens filed separate dissenting opinions, which contained two very different, yet compelling arguments against the Court's holding.

Justice Stevens's dissent focused primarily on the majority's use and interpretation of both *Hans v. Louisiana* and Justice Iredell's opinion in *Chisholm v. Georgia. See id.* at 78 (Stevens, J., dissenting). Justice Stevens first asserted that these cases involved the interpretation of a congressional act, not the lack of constitutional power to abrogate state immunity. *Id.* According to Justice Stevens, the dissent in *Chisholm* interpreted the Judiciary Act of 1789 and not Article III of the Constitution; thus, there was no constitutional basis for the lack of jurisdiction. *Id.* at 78-79.

Turning his attention next to *Hans*, Justice Stevens unleashed his most poignant attack on the majority's position. *See id.* at 84. Justice Stevens argued that the majority interpreted the holding in *Hans* too broadly. *Id.* Relying on his own concurring opinion in

*Union Gas*, Stevens contended that *Hans* held that the federal courts should not hear suits against non-consenting states as a matter of federal common law. *Id.* Therefore, "[b]ecause *Hans* did not announce a constitutionally mandated jurisdictional bar, one need not overrule *Hans*, or even question its reasoning, in order to conclude that Congress may direct the federal courts to reject sovereign immunity in those suits not mentioned by the Eleventh Amendment." *Id.* Justice Stevens, quoting extensively from the language in *Hans*, concluded that the *Hans* Court characterized sovereign immunity as a "presumption." *See id.* at 85-86. Thus, if immunity is merely a presumption, it can be rebutted, and "*Hans* provides affirmative support for the view that Congress may create federal-court jurisdiction over private causes of action against unconsenting States brought by their own citizens." *Id.* at 86. Because Congress has the power to create such jurisdiction, its action in the Indian Regulatory Gaming Act was a constitutional use of congressional power. *Id.*

Finally, Justice Stevens distinguished *Hans* from *Seminole Tribe* on its facts. *See id.* at 86-87. In *Hans*, the dispute involved an implied right of action, while in *Seminole Tribe,* Congress clearly stated its intention to provide the federal courts with the appropriate jurisdiction. *Id.* at 87. For Justice Stevens, this distinction required that "the Court's decision to apply the common law doctrine of sovereign immunity in [*Hans*] clearly should not control the outcome here." *Id.* Moreover, if the decision in *Hans* controlled in situations of express jurisdictional grant, the entire body of "clear-statement" cases like *Atascadero State Hospital v. Scanlon* and *Hoffman v. Connecticut Department of Income Maintenance* would be meaningless because Congress would have lacked the constitutional power to enact such requirements in the first place, regardless of the language Congress invoked. *Id.* at 90.

In contrast, Justice Souter's dissenting opinion offers a scholarly exposition of the history of sovereign immunity that divides the issues into three distinct areas of inquiry: first, whether States enjoyed sovereign immunity prior to the ratification of the Constitution; second, what the precise entitlement to sovereign immunity was after the ratification of the Constitution; and third, what abrogation power, if any, Congress possesses. *Id.* at 101 (Souter, J., dissenting). In addressing the first question, Justice Souter relied on English common law, as well as early colonial and constitutional writings. *Id.* at 102-06. From his extensive review, Justice Souter concluded that common law sovereign immunity had its roots in the thirteenth century, when "it was recognized that the king could not be sued in his own courts." *Id.* at 103 (quoting C. JACOBS, ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 5 (1972)). Whether this notion was transferred into American law, however, is not, according to Justice Souter, entirely clear. *Id.* Pointing to the 1787 drafting of the Constitution, Justice Souter noted that because of the novel system of dual sovereignty, the drafters of the Constitution were presented with numerous options. *Id.* at 104. They might have dealt with sovereign immunity by completely eliminating immunity altogether; by recognizing a form of immunity, but subjecting it to abrogation powers by Congress; or by including an inviolable provision in the text of the Constitution guaranteeing the states common law immunity from suits in federal court. *Id.* (citing Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 536-38 (1977)). Despite these three possibilities, the Constitution is silent on the issue, and therefore, it is for the Court to decide the proper place of sovereign immunity within the constitutional scheme. *See id.*

Like Justice Stevens, Justice Souter tackled the question of abrogation by evaluating the majority's reliance on *Chishlom* and *Hans*. After an exhaustive review of these decisions as well as the scholarly analysis written about them, Justice Souter contended that the majority, in adopting *Hans*'s rationale, compounded the three major errors of that decision. *Id.* at 130. According to Justice Souter:

After summarizing much of the Court's precedent from *Fitzpatrick* through *Union Gas,* Chief Justice Rehnquist latched upon the petitioner's analogy between the Indian Commerce Clause and the Interstate Commerce Clause as a basis for reevaluating the Court's decision to grant abrogation power under Article I.[80] The Court agreed that the Indian Commerce Clause is indistinguishable from the Interstate Commerce Clause and then discussed the continuing validity of *Union Gas.*[81] Ultimately, the Court concluded that "*Union Gas* was wrongly decided and that it should be, and now is, overruled."[82] As a result of the Court's opinion in *Seminole Tribe,* Congress's power to abrogate state sovereign immunity resides exclusively in Section 5 of the Fourteenth Amendment and nowhere else.[83]

---

> [T]he *Hans* Court misread the Eleventh Amendment. It also misunderstood the conditions under which common-law doctrines [of sovereign immunity] were received or rejected at the time of the founding, and it fundamentally mistook the very nature of sovereignty in the young Republic that was supposed to entail a State's immunity to federal-question jurisdiction in a federal court.

*Id.* (internal citation omitted). Justice Souter reviewed in great detail the drafting of the Constitution and the surrounding ratification debates for support for his proposition. *See generally id.* 131-69.

Finally, Justice Souter returned to the present for a discussion of Congress's abrogation power. *Id.* at 170. Discussing first the inconsistencies between *Seminole Tribe* and *Ex parte Young*, Justice Souter contended that the majority could have decided the case on these grounds and thus rendered the constitutional holding unnecessary. *Id.* at 182. Absent a finding consistent with *Young*, Justice Souter concluded his dissent by following the holding in *Union Gas* and upholding Congress's right to abrogate state immunity under its Article I enumerated powers. *Id.* at 182-85.

80. *See id.* at 60. The Court stated:

> [A]ccepting the lower court's conclusion that the Act was passed pursuant to Congress' power under the Indian Commerce Clause, petitioner now asks us to consider whether that Clause grants Congress the power to abrogate the States' sovereign immunity.
>
> Petitioner begins with the plurality decision in *Union Gas* and contends that '[t]here is no principled basis for finding that congressional power under the Indian Commerce Clause is less than that conferred by the Interstate Commerce Clause.'

*Id.* (citing Brief for Petitioners).

81. *See id.* at 63.

82. *Id.* at 66.

83. *See id.* at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."). Despite the Chief Justice's powerful declaration regarding the use of Article I powers with respect to abrogation, the Circuit Courts have continued to entertain and decide abrogation cases involving various Article I powers. *See* Paul E. McGreal, *Saving Article I From* Seminole Tribe: *A View from the Federalist Papers*, 55 S.M.U. L. Rev. 393, 411 n. 93 (2002). Recently, the Sixth Circuit Court of Appeals addressed the issue of whether the Constitution's Bankruptcy Clause, Article I, section 8, clause 4, provides Congress with the authority to abrogate the sovereign immunity of the

## *D. The Limits on Congress's Ability To Abrogate Sovereign Immunity Under Section 5*

### *1. The Congruence and Proportionality Requirement*

After *Seminole Tribe,* one commentator described the burden on a party seeking to sue a state in federal court as such: "the party asserting abrogation must show that (1) Congress made a sufficiently clear statement of its intent to abrogate, (2) Congress acted pursuant to its Section 5 power, and (3) the exercise of Section 5 power was valid under the circumstances."[84] *City of Boerne v. Flores*[85] represents the Court's

---

states. *See Hood v. Tenn. Student Assistance Corp. (In re Hood),* No. 01-5769, slip op. (6th Cir. 2003).

By addressing the issue of abrogation in bankruptcy proceedings, the Sixth Circuit became the sixth Circuit Court to address the issue, and the first to rule that the Bankruptcy Clause provides Congress with abrogation power. *Compare* Hood v. Tenn. Student Assistance Corp. (*In re* Hood), No. 01-5769, slip op. (6th Cir. 2003), *with* Nelson v. La Crosse County Dist. Attorney *(In re* Nelson), 301 F.3d 820, 832 (7th Cir. 2002); Mitchell v. Franchise Tax Bd. *(In re* Mitchell), 209 F.3d 1111, 1121 (9th Cir. 2000); Sacred Heart Hosp. of Norristown v. Pennsylvania *(In re* Sacred Heart Hosp. of Norristown*),* 133 F.3d 237, 243 (3d Cir. 1998); Fernandez v. PNL Asset Mgmt. Co. LLC *(In re* Fernandez*),* 123 F.3d 241, 243 (5th Cir. 1997), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997); Schlossberg v. Maryland *(In re* Creative Goldsmiths of Washington, D.C.*),* 119 F.3d 1140, 1145-46 (4th Cir. 1997), *cert. denied,* 523 U.S. 1075 (1998). As its basis for decision, the Sixth Circuit relied on the framework established in *Seminole Tribe* and *Alden v. Maine,* the text of the Constitution, and the Federalist Papers. *See* Hood v. Tenn. Student Assistance Corp. (*In re* Hood), No. 01-5769, slip op. at 9-19 (6th Cir. 2003). Relying specifically on the Supreme Court's opinion in *Alden v. Maine,* the Sixth Circuit argued that "when determining whether Congress may abrogate state sovereign immunity, courts are to look at the original structure of the Constitution." *See id.* at 9 (citing Alden v. Maine, 527 U.S. 706, 713 (1999)). Turning to the text of the Constitution, the court latched onto the word "uniform" contained in the Bankruptcy Clause, arguing that "[g]ranting the federal government the power to make uniform laws is, at least to some extent, inconsistent with states retaining the power to make laws over that issue." *See id.* at 10. Finally, as a means of providing additional support for its contention, the court referred to THE FEDERALIST PAPERS NO.'S 32 and 81, both written by Alexander Hamilton. *See id.* at 15. The court argued that in THE FEDERALIST NO. 81 Hamilton suggested that there were specific circumstances where the states surrendered their sovereign immunity and that those circumstances were discussed previously in the "article of taxation." *See id.* at 15 (citing THE FEDERALIST NO. 81, at 422). According to the majority, the article on taxation to which Hamilton referred was THE FEDERALIST NO. 32, where Hamilton stated that "the state government would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States." *Id.* (citing THE FEDERALIST NO. 32, at 155). According to the majority, the word "uniform" in the Bankruptcy Clause indicates the delegation of exclusive authority to the United States and, therefore, "the Constitution's text and Hamilton's reference in THE FEDERALIST NO. 81 . . . suggest that, with the Bankruptcy Clause, the states granted Congress the power to abrogate state sovereign immunity." *Id.* at 18.

84. Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity From Private Damage Suits After* Boerne, 24 N.Y.U. REV. LAW & SOC. CHANGE 481, 488

articulation of the standards for determining whether Congress's use of its Section 5 power is valid and whether the third step is satisfied.[86]

In *City of Boerne,* the Court was presented with the Religious Freedom Restoration Act (RFRA), which limited governments' ability to pass laws that "substantially burden[ed] a person's exercise of religion."[87] In determining whether this statute was a legitimate use of Congress's Section 5 power, the Court first had to define the extent of that power.[88] In doing so, the Court developed a broad formulation that included the power to enact both preventive and remedial legislation.[89] The Court, however, was also determined to set boundaries on this broad grant of power by holding that "[t]he design of the Amendment and the text of [Section] 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."[90]

Once the scope of the power was defined, the Court turned its attention to the standard of review that was to be applied in Section 5

---

(1998). Professor Hartley points out that there was some dispute among lower courts as to the second step of his three-part test. *Id.* at n. 40; *Compare* Coger v. Bd. of Regents, 154 F.3d 296, 303 (6th Cir. 1998) *vacated by* 528 U.S. 1110 (2000) (holding specific intent to legislate under Section 5 is irrelevant if Congress actually possesses the legislative authority), *and* Scott v. Univ. of Miss., 148 F.3d 493, 501 (5th Cir. 1998) (finding that Congress does not have to recite the power under which it enacts legislation), *with* Driesse v. Fla. Bd. of Regents, 26 F. Supp. 2d 1328, 1332 (M.D. Fla. 1998) (maintaining that for Congress to use its Section 5 power it should indicate that the statute is combating the violation of Fourteenth Amendment rights). Subsequent formulations by the Supreme Court, however, have solidified Professor Hartley's interpretation of the analytical steps required to determine the validity of Section 5 legislation. *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000) (stating that "Congress's Section 5 power is not confined to the precise wording of the Fourteenth Amendment").

85. 521 U.S. 507 (1997).

86. *See id.* at 536 (holding that the Religious Freedom Restoration Act (RFRA) was not a valid use of Congress's power under Section 5 of the Fourteenth Amendment).

87. 42 U.S.C. §§ 2000bb-1(a), (b) (2000). The RFRA specifically prohibited laws that "substantially burden[ed] a person's exercise of religion" unless they advanced a "compelling governmental interest" and were the "least restrictive means of furthering that compelling governmental interest." *Id.*

88. *See Boerne*, 521 U.S. at 519.

89. *See id.* at 524 (finding that Congress's power under Section 5 is both "remedial and preventive"). The Court also provided for the possibility that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *See id.* at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

90. *See id.* at 519. This statement seems to be a warning shot across the bow of Congress, politely yet forcefully reminding Congress of its place with respect to constitutional interpretation. The opinion has been described by a commentator as an effort "to put down what it saw as a congressional rebellion." Stephen Gardbaum, *The Federalism Implications of* Flores, 39 WM. & MARY L. REV. 665, 669 (1998).

cases. The Court introduced what has become known as the "congruence and proportionality" test.[91] This test requires Congress to demonstrate "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[92] While *City of Boerne* itself did not overrule any legislation other than certain provisions in the RFRA, it set the stage for additional challenges resulting in further restrictions on Congress's Section 5 power to abrogate sovereign immunity.[93]

### 2. *The Application of* City of Boerne *to Federal Law Abrogating Sovereign Immunity*

The Court's first opportunity to apply the principles of *City of Boerne* to a congressional attempt to abrogate state sovereign immunity occurred in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*.[94] There, the Court held that the provisions in the Patent and Plant Variety Protection Remedy Clarification Act,[95] which allowed patent holders to sue infringing states, constituted an unconstitutional use of congressional power.[96] The Court considered whether any of the three separate and independent grants of power

91. *See Boerne*, 521 U.S. at 520.

92. *Id.* In attempting to add some meaning to this language, one commentator noted that the test "permits the Court to probe more deeply the telic relationship between the legislation that regulates constitutional conduct by the states and the Fourteenth Amendment violations to be prevented or remedied." Hartley, *supra* note 84, at 495. Professor Hartley added that the test is "more demanding than the rational basis test." *Id.* Further commentary has stated that the test "reset the federal-state balance" and "confirmed in unambiguous terms just how serious it is about protecting federalism." Gardbaum, *supra* note 90, at 666.

93. At the time *Boerne* was decided, multiple observers foresaw the importance of the decision. According to Douglas Laycock, the attorney for Archbishop Flores, "if *Boerne*] mean[s] what it says, [than *Boerne*] is by far the most important of the recent round of federalism decisions. Several statutes that were previously uncontroversial are subject to serious constitutional attack . . . . Nothing is overruled, but everything is changed." Hartley, *supra* note 84, at 495 n.83 (quoting Douglas Laycock, *Conceptual Gulf in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 744 (1998)); *see also* Marci A. Hamilton, City of Boerne v. Flores: *A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699, 722 (1998) (stating that *Boerne* "is a strong message to Congress to act with responsibility, accountability, and independent judgment").

94. 527 U.S. 627 (1999).

95. Pub. L. No. 102-560, 106 Stat. 4230 (1992) (adding sections 271(h) and 296 to Title 35, United States Code).

96. *See Florida Prepaid*, 527 U.S. at 635-36, 647 (holding that none of the three justifications used by Congress – the Patent and Copyright Clause, the Interstate Commerce Clause and Section 5 of the Fourteenth Amendment – could be used to abrogate the sovereign immunity of the states in this case).

would permit Congress to enact the statute.[97] The Court dismissed the first two potential sources of authority – the Commerce Clause and the Patent Clause – by stating that "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers."[98] In assessing the statute under Congress's Section 5 power, the Court focused on the legislative record, as it had in *City of Boerne*.[99] According to the majority, Congress failed to show patterns of state patent infringement, "let alone a patern of constitutional violations."[100] Relying on procedural due process precedent regarding patents,[101] the majority concluded that "Congress . . . barely considered the availability of state remedies for patent infringement and hence whether the States' conduct might have amounted to a constitutional violation of the Fourteenth Amendment."[102] Therefore, according to the majority, the Patent Remedy Act failed the test articulated in *City of Boerne*, as "there was no constitutional problem that needed fixing."[103]

---

97. *Id.* at 635-36.

98. *Id.* at 636.

99. *See id.* at 640-41.

100. *Id.*

101. *See id.* at 642-43. Interestingly for a Section 5 case, the Court focused on notions of procedural, rather than substantive, due process. *Id.* Specifically, the Court stated that "[i]n procedural due process claims, the deprivation by state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law." *Id.* at 643 (quoting Zinerman v. Burch, 494 U.S. 113, 125 (1990)). Thus, the Court could focus on the available state remedies for patent infringement rather than the violation of a substantive right. *See id.* at 642-43.

102. *Id.* at 643.

103. Gottesman, *supra* note 14, at 64. Justice Stevens' dissent first accused the majority of "strik[ing] down Congress' Act based on an absence of findings supporting a requirement this Court had not yet articulated." *Florida Prepaid*, 527 U.S. at 654 (Stevens, J., dissenting). Justice Stevens continued:

> This Court has never mandated that Congress must find widespread and persisting deprivation of constitutional rights in order to employ its § 5 authority. It is not surprising, therefore, that Congress did not compile an extensive legislative record analyzing the due process (or lack thereof) that each State might afford for a patent infringement suit retooled as an action in tort. In 1992, Congress had no reason to believe it needed to do such a thing; indeed, it should not have to do so today.

*Id.* at 660 (internal citation and quotation marks omitted). In addition, Justice Stevens accused the Court of misreading the holding in *City of Boerne* by stating that "[t]he Court's opinion today threatens to read Congress' power to pass prophylactic legislation out of § 5 altogether; its holding is unsupported by *City of Boerne* and in fact conflicts with our reasoning in that case." *Id.* Finally, Justice Stevens launched a full assault on the majority's recent application of the Eleventh Amendment, referencing *Seminole Tribe* and stating:

> The full reach of that case's dramatic expansion of the judge-made doctrine of sovereign immunity is unpredictable; its dimensions are defined only by the

The following term, the Supreme Court reviewed another congressional statute abrogating state sovereign immunity and enacted under Section 5 of the Fourteenth Amendment.[104] This time, the private suits were brought against the state of Florida under the Age Discrimination in Employment Act of 1967 (ADEA).[105] The majority applied the congruence and proportionality test and concluded that Congress did not have the power under Section 5 of the Fourteenth Amendment to provide for abrogation of sovereign immunity in the ADEA.[106]

*Kimel v. Florida Board of Regents*[107] is significant because of the way in which Justice O'Connor, writing for the Court, applied the congruence and proportionality test to the ADEA.[108] Justice O'Connor's majority opinion first demonstrated that the legality of age discrimination by states is determined by an exercise of rational basis review.[109] In light of this highly deferential standard, Justice O'Connor concluded that "the ADEA prohibits very little conduct likely to be held unconstitutional."[110] Therefore, the ADEA failed the "congruence" portion of the test.[111]

The Court, however, did not consider this failure alone to be fatal.[112] In addition, Justice O'Connor, just as the Court had in *City of Boerne* and *Florida Prepaid,* carefully scrutinized the legislative history and found that "Congress had virtually no reason to believe that state and

---

> present majority's perception of constitutional penumbras rather than constitutional text. Until this expansive and judicially created protection of States' rights runs its course, I shall continue to register my agreement with the views expressed in the *Seminole* dissents and in the scholarly commentary on that case.

*Id.* at 665 (citation omitted).

104. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

105. 29 U.S.C. §§ 621-34 (2000). The ADEA prohibits employers, including states, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." *Id.* § 623(a)(1).

106. *Kimel*, 528 U.S. at 82-83 ("[T]he ADEA is not 'appropriate legislation' under § 5 of the Fourteenth Amendment.").

107. 528 U.S. 62 (2000).

108. *See generally id.* at 83-91.

109. *Id.* at 83-84. The Court contrasts this situation with one in which the state discriminates on the basis of race or gender, stating that those circumstances "require a tighter fit between the discriminatory means and the legitimate ends they serve." *Id.* at 84. For further discussion on this issue, see Gottesman, *supra* note 14, at 65.

110. *Kimel*, 528 U.S. at 88.

111. *See* Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After* Garrett, 28 J.C. & U.L. 41, 49 (2001). Professor Hartley uses the term "overbreadth," defined as "creat[ing] rights that exceed those provided in Section 1 of the Fourteenth Amendment," to describe the scope of a federal statute that will fail the congruence portion of the congruence and proportionality test. *See id.*

112. *Kimel*, 528 U.S. at 88.

local governments were unconstitutionally discriminating against their employees on the basis of age."[113] Therefore, not only was the ADEA incongruent, but it was disproportionate as well. The ADEA thus failed both portions of the *City of Boerne* test.[114]

*3. The ADA: The Most Recent Statute To Fail*

The most recent challenge to Congress's Section 5 power came in *Board of Trustees of the University of Alabama v. Garrett.*[115] In *Garrett,* the Supreme Court analyzed Title I of the Americans with Disabilities Act of 1990 (ADA),[116] which prohibits employers, including states, from discriminating against individuals in the workplace because of a disability.[117] The ADA also provided federal court jurisdiction over suits against states for violations of its provisions.[118] The question in *Garrett* was whether "Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA."[119]

In reversing the Eleventh Circuit and finding this provision of the ADA unconstitutional,[120] the majority opinion divided its analysis into three parts. First, the majority set out to "identify with some precision the scope of the constitutional right at issue."[121] Applying the decision in *Kimel,* the Court examined precedent regarding challenges of disability discrimination in violation of the Fourteenth Amendment.[122] Relying heavily on the rationale of *City of Cleburne v. Cleburne Living Center,*

---

113. *Id.* at 91.

114. *See id.* ("In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment.").

115. 531 U.S. 356 (2001).

116. 42 U.S.C. §§ 12111-17 (2000); *see also Garrett,* 531 U.S. at 360.

117. The relevant portion of the ADA forbids employers from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

118. *Id.* § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

119. *Garrett,* 531 U.S. at 364.

120. *Id.* at 374.

121. *Id.* at 365.

122. *Id.*

*Inc.*,[123] the Court held that "[i]f special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."[124]

Once the boundaries of the constitutional right were established, the Court moved to its second analytical step, considering Congress's attempt to demonstrate a "history and pattern" of discrimination by state governments with respect to the disabled.[125] Here, the majority carefully scrutinized the legislative record compiled by Congress and concluded that the record fell "far short of even suggesting the pattern of unconstitutional discrimination on which [Section] 5 legislation must be based."[126]

---

123. 473 U.S. 432 (1985) (holding that mental retardation did not qualify as a quasi-suspect classification under the Equal Protection Clause and thus the legislation was subject only to a rational basis standard of judicial review).

124. *Garrett*, 531 U.S. at 368. On the subject of positive law, the majority noted that at "the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures. . . . A number of these provisions, however, did not go as far as the ADA did in requiring accommodation." *Id.* at 386 n.5.

125. *Id.* at 368 (asking "whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled").

126. *Id.* at 370 (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89-91 (2000)). The majority in *Garrett* cited the evidence Congress provided, which included the following:

> A department head at the University of North Carolina refused to hire an applicant for the position of health administrator because he was blind; similarly, a student at a state university in South Dakota was denied an opportunity to practice teach because the dean at that time was convinced that blind people could not teach in public schools. A microfilmer at the Kansas Department of Transportation was fired because he had epilepsy; deaf workers at the University of Oklahoma were paid a lower salary than those who could hear. The Indiana State Personnel Office informed a woman with a concealed disability that she should not disclose it if she wished to obtain employment.

*Id.* at 369.

The dissent by Justice Breyer took exception to the Court's conclusion with respect to the validity of the evidence supplied by Congress. *See id.* at 382 (Breyer, J., dissenting). Accusing the majority of "[r]eviewing the congressional record as if it were an administrative agency record," Justice Breyer contended that the majority's "failure to find sufficient evidentiary support may well rest upon its decision to hold Congress to a strict, judicially created evidentiary standard, particularly in respect to lack of justification." *Id.* at 376, 382. This standard, according to Justice Breyer and other constitutional commentators, appears to shift the burden from the individual challenging economic and social legislation to Congress. *See id.* at 383; *see also* A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 339 (2001) (showing origins of record review in *United States v. Lopez*, 514 U.S. 549 (1995)). In other words, prior to *Lopez*, *Kimel*, *Garrett*, and other federalism decisions, the presumption was that legislation passed by Congress was valid until sufficiently rebutted by challengers. *See* Bryant & Simeone, *supra*, at 341-42. Now, the presumption, without specific language to this effect by the Court, seems to be that legislation is invalid and that Congress bears

Finally, the majority applied the "congruence and proportionality" test established in *City of Boerne*.[127] Without offering a very detailed analysis, the majority concluded that the requirements were not met by the ADA.[128] The ADA's "application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*. Section 5 does not so broadly enlarge congressional authority."[129]

At the time of *Garrett*, the ADA was the Section 5 legislation most likely to survive judicial review.[130] The latest battle over Congress's Section 5 power is being fought over the Family and Medical Leave Act of 1993 (FMLA),[131] which also provides for private suits for money damages against the states in federal court.[132] As explained in the next part of this Comment, the circuits are currently split on the propriety of

---

the burden of justifying its actions with respect to economic and social legislation. *See id.* at 340.

The *Garrett* dissent also called into question the standard of review used by the majority in reviewing congressional enactments pursuant to Section 5. *See Garrett*, 531 U.S. at 387. Justice Breyer stated: "[I]t is difficult to understand why the Court, which applies 'minimum "rational-basis" review' to statutes that *burden* persons with disabilities, subjects to far stricter scrutiny a statute that seeks to *help* those same individuals." *Id.* at 387-88 (internal citation omitted).

127. *Garrett*, 531 U.S at 372.

128. *See id.* at 372-73. The majority's analysis focused on the "reasonable accommodation" requirement provisions of the ADA, stating that the "accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer." *Id.* at 373. The Court proceeded to compare the ADA to the Voting Rights Act of 1965, finding a "stark" contrast between the evidence of constitutional violations presented in that legislative record and the evidence supplied in the ADA's legislative record. *See id.* at 373-74. This direct comparison to a non-analogous statutory scheme may signal reluctance by the current Supreme Court to extend Congress's Section 5 powers beyond the limited area of voting rights.

129. *Id.* at 374 (footnote omitted). The Court pointed out the limits of its holding in a footnote and stated:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

*Id.* at 374 n.9.

130. *See* Gottesman, *supra* note 14, at 32. *See generally id.* at 76-96.

131. Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 29 U.S.C. §§ 2601-54 (2000)).

132. 29 U.S.C. § 2617 (a)(2) (2000).

Congress's use of Section 5 in the FMLA. The Court's resolution of the issue could yet again dramatically alter the law of sovereign immunity.

## II. THE FAMILY AND MEDICAL LEAVE ACT: GENDER DISCRIMINATION AND ELEVENTH AMENDMENT ABROGATION

Taken together, *City of Boerne,*[133] *Kimel,*[134] and *Garrett*[135] provide the states with a fully brandished, incredibly sharp sword that has been, and can continue to be, used to attack congressional legislation from imposing private suits for money damages against the states.[136] The latest battleground involving Section 5 power concerns the abrogation provisions in the FMLA.[137] Two cases, one from the Fifth Circuit[138] and one from the Ninth Circuit,[139] specifically address this issue. In each case, the Circuit Court applied the Supreme Court precedent but reached contradictory conclusions regarding the validity of Congress's use of its Section 5 powers to enact the FMLA.[140]

### *A. The Family and Medical Leave Act: Fighting Unconstitutional Gender Discrimination*

The FMLA represents a direct attempt by Congress to combat unconstitutional gender discrimination.[141] At the time of FMLA's

133. *See supra* Part I.D.1.

134. *See supra* Part I.D.2.

135. *See supra* Part I.D.3.

136. *See generally* Bd. of Trs. of the Univ. of Alabama v. Garrett, 531 U.S. 396 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); City of Boerne v. Flores, 521 U.S. 507 (1995); *see also* Alden v. Maine, 527 U.S. 706 (1999) (holding that Article I does not give Congress the power to subject non-consenting states to private suits for money damages in state courts).

137. *Compare* Hibbs v. Dep't of Human Res., 273 F.3d 844 (9th Cir. 2001), *cert. granted sub nom.* Nev. Dep't of Human Resources v. Hibbs, 536 U.S. 938 (2002) (mem.) (holding that Congress, in enacting the FMLA, properly abrogated Nevada's sovereign immunity under Section 5), *with* Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000) (holding the FMLA's abrogation language invalid as an exercise of Congress's Section 5 power); Laro v. New Hampshire, 259 F.3d 1 (1st Cir. 2001) (same); Townsel v. Missouri, 233 F.3d 1094 (8th Cir. 2000) (same); Chittister v. Dep't of Cmty. & Econ. Dev., 226 F.3d 233 (3d Cir. 2000) (same); Sims v. Univ. of Cincinnati, 219 F.3d 559 (6th Cir. 2000) (same); Hale v. Mann, 219 F.3d 61 (2d Cir. 2000) (same).

138. *Kazmier*, 225 F.3d at 526, 529 (holding that two subsections of the FMLA do not validly abrogate the state of Louisiana's sovereign immunity).

139. *Hibbs*, 273 F.3d at 873 (holding that the FMLA was a valid exercise of Congress's Section 5 powers).

140. *Compare Kazmier*, 225 F.3d at 533, *with Hibbs*, 273 F.3d at 873.

141. *See* 29 U.S.C. § 2601(b)(4) (2000). The FMLA's statement of purpose contains express language that the intent of the law is to "minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for . . . compelling family reasons, on a gender-neutral basis." *Id.*

enactment, Congress recognized that the "absence of adequate policies allowing for extended family leave inhibited women's roles in the workplace."[142] The legislative history of the FMLA contains abundant findings, both in the form of testimony and floor statements, reflecting this clear intent.[143]

The FMLA was not strictly limited to women's issues such as maternity leave.[144] In fact, the legislation was designed to encourage fathers to take a more active, participatory role in all aspects of family life, "thereby relieving family burdens from women and reducing stereotypical assumptions that only women are able to care for sick and young family members."[145] The statute is gender-neutral, requiring that twelve weeks of leave be granted to both men and women.[146]

In addition, Congress documented studies that substantiated the existence of gender discrimination in the leave programs and policies afforded to state employees.[147] A close examination of the legislative

---

142. Stephanie C. Bovee, Note, *The Family Medical Leave Act: State Sovereignty and the Narrowing of Fourteenth Amendment Protection*, 7 WM. & MARY J. WOMEN & L. 1011, 1019 (2001) (citing Martin Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1047, 1047 (1994)).

143. *See, e.g., Parental and Medical Leave Act of 1987: Hearings Before the Subcom. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources on S. 249, Part 2*, 100th Cong. 536 (1988) (statement of Prof. Susan Deller Ross, Georgetown University Law Center) ("[T]here are a number of studies . . . in which it's shown that employers in this country that are giving family leaves to their workers are not giving it non-discriminatorily; they are, by and large, giving it only to women, not to men. It's fairly flagrant discrimination."); *see also Family and Medical Leave Act of 1991: Hearing Before the Subcomm. on Children, Family, Drugs and Alcoholism of the Senate Comm. on Labor and Human Resources on S. 5*, 102d Cong. 10 (1991) (statement of Sen. Brock Adams, Member, Senate Comm. on Labor and Human Resources) ("[T]he reality today is that women are the primary caregivers for elderly parents. . . . It is the daughters, whether biological or through marriage, that account for the majority of caregivers.").

144. *See* 29 U.S.C. § 2601 (b) (2000).

145. Bovee, *supra* note 142, at 1019 (citing Robin R. Cockey & Deborah A. Jeon, *The Family Medical Leave Act at Work: Getting Employers To Value Families*, 4 VA. J. SOC. POL'Y & L. 225, 228 (1996)).

146. *See id.* at 1019-20. Evidence shows that 41.8% of leave-takers are men, as compared to 48.2% for women. *See id.* at 1019 n. 67 (citing COMM'N OF FAMILY AND MED. LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY MEDICAL LEAVE POLICIES 149 (1996)). The reason for the slight discrepancy is "partly because men do not bear children" and also "partly because women are somewhat more likely to care for infants or seriously ill family members than are men." *Id.* (quoting A WORKABLE BALANCE, *supra*, at 149-50).

147. *The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 99th Cong. 30 (1986) (statement of Meryl Frank, Director, Yale Bush Center Infant Care Leave Project) ("We found that public sector leaves don't vary very much from private sector leaves."). Frank's results were from an extensive survey of private and public employers. *See id.* at 29-30. The legislative history includes

history reveals that Congress heard numerous pieces of testimony substantiating that the expectation of women's continued responsibilities in the domestic realm was directly affecting their ability to succeed in the workplace.[148] Also, the legislative history addressed the issue of state employees and family leave, finding that while many states had laws protecting private sector employees, few, if any, had laws providing state employees with medical leave.[149] With legislative history relating to gender discrimination as the foundation, both the Fifth and Ninth Circuit Courts of Appeals were forced to apply the Supreme Court precedent holding gender discrimination to a "heightened" scrutiny[150] to the more recent and narrow Section 5 holdings of *City of Boerne, Kimel,* and *Garrett.*

### *B. The Fifth Circuit's Approach to the FMLA and Section 5: Neither Congruent nor Proportional*

In 2000, the Fifth Circuit was presented with *Kazmier v. Widmann,*[151] a challenge to the FMLA by the state of Louisiana.[152] Janice Kazmier, an

---

statistics on private sector leave from a 1990 study of the Bureau of Labor Statistics. *See* S. REP. NO. 103-3, at 14-15, *reprinted in* 1993 U.S.C.C.A.N. 3, 17. ("37 percent of full-time employees working in private business with more than 100 workers are covered by unpaid 'maternity leave'; 18 percent are covered by unpaid 'paternity leave.').

148. *See The Family and Medical Leave Act of 1987: Joint Hearings Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the House Comm. on Education and Labor,* 100th Cong. 235 (1987) (statement of Donna Lenhoff, Associate Director, Women's Legal Defense Fund). Ms. Lenhoff stated:

> [O]ur social structures, and most particularly our employment policies, continue to operate as if women's role is to stay home and care for the family and men's role is to work outside the home for a paycheck.
>
> [W]e have not accommodated our institutions to the simple reality that men and women no longer operate in separate spheres, but rather that all employees, male and female, have family as well as employment responsibilities. Such accommodation is necessary if workers, and especially women workers, are to be able to exercise their right to equal employment and at the same time to preserve their family lives.

*Id.*; *see also* H.R. REP. NO. 103-8(I), at 16-17 (1993) ("The typical worker is no longer a man supporting a wife who stays at home, with the woman caring for the children and tending to other family needs. . . . Yet our workplaces are still too often modeled on the unrealistic and outmoded idea of workers unencumbered by family responsibilities."); S. REP. NO. 102-68, at 28 (1991) ("In the absence of a family leave standard, childbirth and the need to care for a sick child or parent have an adverse impact on women's earnings.").

149. *See* H.R. REP. NO. 103-8(I), at 77-83 (attachment 13). Congress stated: "The debate on family and medical leave suggests that many States have already passed such leave benefits as are contained in [FMLA]. Yet, that is not the case. . . . No State has chosen to pass State legislation that is as broad in scope and coverage as that pending in Congress." *Id.* at 78.

150. *See* United States v. Virginia, 518 U.S. 515, 533 (1996).

151. 225 F.3d 519 (5th Cir. 2000).

employee of the Louisiana Department of Social Services (LDSS), was terminated from her job in early 1996 for failure to report to work.[153] Ms. Kazimer responded by filing a lawsuit in federal district court, claiming that her termination violated the FMLA.[154] LDSS filed a motion to dismiss pursuant to the Eleventh Amendment; the district court denied the motion.[155]

The Fifth Circuit applied the test articulated in *Kimel* as the "clearest guidance for determining whether legislation that purports to enforce the Fourteenth Amendment's Equal Protection Clause against the States is 'congruent and proportional.'"[156] Having established the legal precedent for its analysis, the Fifth Circuit proceeded to address subsections C and D of the FMLA separately,[157] thereby acknowledging the possibility of severability.[158]

---

152. *Id.* at 522.

153. *Id.* at 522-23. Ms. Kazmier took leave intermittently throughout 1995 for various reasons. *Id.* Initially, in May 1995, she took leave to care for a broken arm suffered while bicycling. *Id.* In addition, she took leave in October 1995 to care for her elderly father. *Id.* Finally, according to the court, she took leave again to care for a broken wrist. *Id.*

154. *Id.* at 523. Specifically, Ms. Kazimer claimed that the termination was in violation of § 2612(a)(1)(C) and § 2612(a)(1)(D). *Id.* at 525. These provisions require employers to grant leave to an eligible employee "[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition" or [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. §§ 2612(a)(1)(C),(D).

155. *Kazmier*, 225 F.3d at 523.

156. *Id.* at 524. The Fifth Circuit described the two-part *Kimel* test by stating:

> At the first step, we begin our analysis by determining what type of constitutional violation the statute under review is designed to prevent. The outermost limits of Congress's potential authority to enact prophylactic legislation is directly linked to the level of scrutiny that we apply in assessing the validity of discriminatory classifications of the targeted type. . . . [W]e examine, at *Kimel*'s second step, the legislative record of the statute under review to see whether it contains evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statute's provisions.

*Id.* at 524.

157. *See id.* at 525.

158. *Id.* The court claimed that it "discover[ed] no reason why the provisions of one of the FMLA's subsections could not validly abrogate . . . immunity even if the provisions of some or all of the remaining subsections fail to do so. *Id.* Severablilty, however, is far from a settled issue and the FMLA might not be severable in the way that the Fifth Circuit intended.

A statute is severable "if after an invalid portion of it has been stricken out, that which remains is self-sustaining and capable of separate enforcement without regard to the stricken portion, in which case that which remains should be sustained." BLACK'S LAW DICTIONARY 1374 (6th ed. 1990). Whether the FMLA is a "severable statute" is a question of statutory construction. The test for severability was first articulated by the Supreme Court in 1932. John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 204 (1993) (citing Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)). The

Subsection C, according to the majority, was enacted by Congress in response to evidence of private sector gender discrimination against men when it came to granting family leave.[159] Because of the heightened scrutiny afforded to discrimination based on sex, the Fifth Circuit acknowledged that "Congress potentially has wide latitude under Section 5 to enact broad prophylactic legislation designed to prevent the States from discriminating on the basis of sex."[160] This broad discretion, however, was not broad enough for the FMLA to survive the *Kimel* test.[161] According to the Fifth Circuit, Congress had failed to identify a pattern of discrimination in the public sector, and the court was not willing to "infer from private sector conduct that the States are willfully violating their constitutional duty to refrain from engaging in sex

---

*Champlin* test for severability depends on two factors: "(1) legislative intent, and (2) the ability of the statute to function without the offending provision." *Id.* at 215; *see also Champlin*, 286 U.S. at 234 ("Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.").

Despite the test, severablility seems dependent on the presence or absence of a "severability clause." *See* Nagle, *supra*, at 222. The presence of such a clause creates a presumption of severability but is not dispositive of the issue. *Id.* Courts analyzing legislative intent can easily overcome this presumption; the Supreme Court found three statutes non-severable despite the existence of a severability clause. *Id.* at 223-24 (citing Williams v. Standard Oil Co., 278 U.S. 235, 241-44 (1928); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330, 362 (1935), *overruled by* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); Carter v. Carter Coal Co., 298 U.S. 238, 312-16 (1936)). One commentator captured the confusion beautifully in a seminal article on severability when he wrote: "Separability clause[s] are thus now significant only because of their absence. Like articles of clothing, if they are present little attention is paid to them, but if they are absent they may be missed." Robert L. Stern, *Separability and Separability Clauses in the Supreme Court*, 51 HARV. L. REV. 76, 122 (1937).

The problem with the Fifth Circuit's treatment of the severability of the FMLA is its lack of analysis. *See Kazmier*, 225 F.3d at 525. Instead, severability is presumed. Yet, after two portions of the statute are found unconstitutional, the statute is significantly different. *See id.* at 525-29. This presumption of severability may be a violation of separation of powers as it results in a "new" statute that "has not been enacted in conformity with the Constitution's bicameralism and presentment requirements." Nagle, *supra*, at 228 (citing Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 21-23 (1984)); *see also* Clinton v. City of New York, 524 U.S 417, 442-49 (1998) (holding that the Line Item Veto Act violated the Presentment Clause by departing from "finely wrought" constitutional procedure for enactment of law). If legislative intent is the determinative factor for severability, the FMLA would appear to be non-severable, as the Fifth Circuit was unable to point to any statutory language or legislative history that justifies its presumption of severablity. *See Kazmier*, 225 F.3d at 525. Thus, whether the construction of the statute adopted by the Fifth Circuit is permissible under the severablility analysis remains an open question for the Supreme Court in evaluating the constitutionality of the FMLA.

159. *Kazmier*, 225 F.3d at 525.

160. *Id.* at 526.

161. *See id.*

discrimination."[162] Thus, because the legislation was prophylactic in nature, for the law to be congruent and proportional, Congress had to have made detailed findings of unconstitutional behavior by the states.[163] If the legislation had been remedial, there would be no strict evidentiary requirement.[164]

The Fifth Circuit dealt an even stronger blow to subsection D of the FMLA.[165] In addition to holding it unconstitutional under the test established in *Kimel,* the court found that "[t]he legislative record contains the additional suggestion that Congress meant for this provision to prevent discrimination against women on the basis of pregnancy-related disability."[166] Relying on the 1974 Supreme Court decision, *Geduldig v. Aiello,*[167] the court held that "to the extent that subsection D targets such discrimination, it does not fall within Congress's enforcement powers under Section 5 of the Fourteenth Amendment."[168] By defining the purpose of the legislation entirely outside the bounds of the Fourteenth Amendment,[169] the court was able to hold that the FMLA was analogous to the ADEA and the ADA, both of which attempted to prevent discrimination based on conditions outside the bounds of the Fourteenth Amendment.[170]

The approach taken by the Fifth Circuit can be generally characterized as a strict interpretation of *Kimel.* The Fifth Circuit has held that where a federal statute lacks evidence of unconstitutional discrimination by the states, abrogation of the sovereign immunity guaranteed by the Eleventh Amendment is not within Congress's Section 5 powers and is therefore unconstitutional.[171]

---

162. *Id.* at 526 n.28; *see also id.* at 526 ("Finally, the United States' argument that Congress found substantial age discrimination in the private sector . . . is beside the point. Congress made no such findings with respect to the States.") (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 90 (2000)).

163. *See id.* at 526.

164. *Id.* ("If subsection (C) were solely remedial in nature the absence of evidence of constitutional violations might not present a problem.").

165. *See id.* at 527-29.

166. *Id.* at 527.

167. *Id.* (citing Geduldig v. Aiello, 417 U.S. 484 (1974) (holding denial of benefits for work loss resulting from normal pregnancy did not violate the Equal Protection Clause)).

168. *Id.* at 528.

169. *Id.* The Court determined that, because the legislation aimed to prevent discrimination based on pregnancy, it was designed to prevent discrimination based on a "temporary disability." *Id.*

170. *See supra* notes 107-14 and accompanying text; notes 120-29 and accompanying text.

171. *See Kazmier*, 225 F.3d at 529.

### *C. The Ninth Circuit's Approach to the FMLA: Dulling the Blade of* Kimel

In sharp contrast to the Fifth Circuit's holding in *Kazmier* is the Ninth Circuit holding in *Hibbs v. Department of Human Resources.*[172] In *Hibbs,* the Ninth Circuit ruled that the FMLA's abrogation of states' Eleventh Amendment sovereign immunity is valid under Section 5 of the Fourteenth Amendment.[173]

The Ninth Circuit began its analysis utilizing the framework provided by the Supreme Court in *Kimel.*[174] The court noted that the FMLA was designed to combat gender discrimination, which is a type of preferential treatment that receives heightened constitutional scrutiny.[175] The existence of a heightened standard of constitutional review for gender discrimination creates a presumption that discrimination on the basis of gender is unconstitutional.[176] Unlike age and disability discrimination, the subjects of *Kimel* and *Garrett,*[177] in gender discrimination cases, according to the Ninth Circuit, the state has the burden of defending its discriminatory practices; the individual does not have the burden of proving otherwise.[178]

Due to the heightened scrutiny afforded gender discrimination, the Ninth Circuit was confronted with the problem of how to deal with the substantial "overbreadth" contained in the FMLA.[179] The court

---

172. 273 F.3d 844 (9th Cir. 2001), *cert. granted sub nom.* Nev. Dep't of Human Resources v. Hibbs, 536 U.S. 938 (2002) (mem.).

173. *Id.* at 873.

174. *Id.* at 853. The court held:

> The congruence and proportionality inquiry requires a reviewing court (1) "to identify with some precision the scope of the constitutional right at issue," *Garrett,* 121 S.Ct. at 963, and (2) to determine whether the statute in question is "an appropriate remedy" for violations of that right, perhaps by scrutinizing the statute's legislative history. *Kimel,* 528 U.S. at 88.

*Id.*

175. *Id.* at 854 (citing United States v. Virginia, 518 U.S. 515, 533 (1996)). Because gender discrimination is subject to heightened scrutiny, "[s]uch discrimination is thus unconstitutional unless it is substantially related to the achievement of an important governmental interest." *Id.* at 855 (citing Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 150 (1980)) (stating "precedents require that gender-based discriminations must serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of those objectives"). In addition, the Court pointed to the fact that, under heightened scrutiny, "the burden is on the defender of such discrimination to prove that the standard has been met." *Id.*

176. *Id.* (stating that heightened scrutiny "has the effect of creating a rebuttable presumption of unconstitutionality for state-sponsored gender discrimination").

177. *See id.* at 855-56 (citing the allocation of burdens used by the Supreme Court in *Kimel* and *Garrett*).

178. *Id.* at 855.

179. *See id.* at 856.

concluded that the mere fact that the FMLA encompasses more behavior than is prohibited by the Fourteenth Amendment is not sufficient to find its enactment an invalid use of Congress's Section 5 powers.[180] Therefore, the court was left with the question of whether the FMLA is "'just such an appropriate remedy or, instead, merely an attempt to substantively redefine States' legal obligations' under the Fourteenth Amendment."[181] Phrasing the question in this manner presented a conflict between the Supreme Court's holdings in *Garrett* and *Kimel* with respect to the appropriate role of legislative history.[182] In addressing this conflict, the Ninth Circuit adopted the *Kimel* approach, holding that "[e]xamination of legislative history is merely one means by which a court can determine whether the broad prophylactic legislation under consideration is justified by the existence of sufficiently difficult and intractable problems."[183]

This approach, combined with the heightened scrutiny afforded gender discrimination, allowed the court to make a further distinction between this case and *Garrett*.[184] According to the court, the failure to find evidence of unconstitutional behavior within the legislative history subjected the statutes in *Kimel* and *Garrett* to a "presumption of unconstitutionality."[185] The existence of this presumption placed the burden on Congress to prove the constitutionality of its enactments.[186] As the court pointed out, this presumption has a "flip side"; if the rational basis test produces a presumption of unconstitutionality, heightened scrutiny must create a presumption of constitutionality.[187]

---

180. *See id.* at 856 (stating that "'[d]ifficult and intractable problems often require powerful remedies,' which may include 'reasonably prophylactic legislation'" (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000)).

181. *Id.*

182. *See id.* The court pointed out that *Garrett* "could be taken to imply that adequate support in the legislative record is *always* a requirement for a valid exercise of Congress' section 5 power." *Id.* According to the court, this position is in direct conflict with both *Kimel* and *Florida Prepaid Bank*, which hold that lack of evidence in the legislative history is not determinative of a violation of Section 5. *Id.*; *see also* Fla. Prepaid Postsecondary Educ. Expense Board v. College Savings Bank, 527 U.S. 627, 646 (1999) (stating that "the lack of support in the legislative record is not determinative").

183. *Hibbs*, 273 F.3d at 857; *see also* Kilcullen v. N.Y. State Dep't of Labor, 205 F.3d 77, 81 (2d Cir. 2000), *overruled on other grounds*, 531 U.S. 356 (2001) ("The ultimate question remains not whether Congress created a sufficient legislative record, but rather whether, given all of the information before the Court, it appears that the statute in question can appropriately be characterized as legitimate remedial legislation.").

184. *Hibbs*, 273 F.3d at 857.

185. *Id.*

186. *See id.*

187. *Id.* at 857-58 (stating that "the burden is on the challenger of the legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct").

Having clearly placed the burden on the challenger of the legislation, the court concluded that the FMLA was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.[188]

### *D. Comparing the Rulings: The Depth of the Circuit Split and the Importance of Another Eleventh Amendment Ruling by the Supreme Court*

Close examination of the decisions by the Fifth and Ninth Circuits reveals a three-pronged dispute that the Supreme Court must address: first, whether the definition of the constitutional right is at issue; second, whether the division is based on the allocation of the burdens of proof; and third, the proper role of legislative history.[189]

Neither the Fifth nor the Ninth Circuit Court of Appeals disputed the claim that the goal of the FMLA is to prevent gender discrimination with respect to employment leave policies.[190] The difference between the courts with respect to the constitutional basis of the right, however, enabled each court to find varying levels of congruence and to arrive at opposite conclusions.[191] The Ninth Circuit's construction of the constitutional right allowed it to assert that the legislation was congruent because the burden was on the state to disprove discrimination or because the statute swept a substantial amount of unconstitutional behavior within its borders.[192] Constructing the scope of the right strictly, as the Fifth Circuit did, compelled the conclusion that the statute is not

---

188. *Id.* at 858 ("Consequently we conclude that Congress has validly exercised its [S]ection 5 power by giving private individuals the right to sue states for violations of § 2612(a)(1)(C)."). The court, however, provided an alternate holding after reviewing the very legislative history that it concluded was not required under *Kimel*. *See id.* 858-60. These alternative holdings would seem to suggest that the judges of the Ninth Circuit, having decided to uphold the FMLA as a valid use of Congress's Section 5 power, anticipated an appeal to the United States Supreme Court. It seems that using the gender discrimination issue as the main reason for upholding the law, the Ninth Circuit requested the Supreme Court to address the distinctions between the FMLA, ADEA, and ADA. The posture of this case forces the Supreme Court to answer the open question of exactly how courts are to deal with laws enacted to remedy discrimination that is afforded constitutional analysis somewhere between strict scrutiny and rational basis.

189. *Compare* Hibbs v. Dep't of Human Res., 273 F.3d 844 (9th Cir. 2001), *cert. granted sub nom.* Nev. Dep't of Human Resources v. Hibbs, 536 U.S. 938 (2002) (mem.), *with* Kazimer v. Widmann, 225 F.3d 519 (5th Cir. 2000); *see also* Kimberly E. Dean, Note, *In Light of the Evil Presented: What Kind of Prophylactic Anti-Discrimination Legislation Can Congress Enact After* Garrett, 43 B.C. L. REV. 697, 730-31 (2002).

190. *See Hibbs*, 273 F.3d at 854-55; *Kazmier*, 225 F.3d at 525.

191. *See Hibbs*, 273 F.3d at 858; *see also* Hartley, *supra* note 111, at 49 ("If the legislation contains overbreadth, Congress possesses Section 5 authority to enact it only if the principal aim of the legislation is to deter or remedy unconstitutional conduct.").

192. *Hibbs*, 273 F.3d at 858-60.

congruent because it prohibits too much behavior considered constitutional under the Fourteenth Amendment.[193]

The conflict over the allocation of the burden of proof in these cases is central to understanding the courts' approaches to the issue.[194] Presuming the legislation unconstitutional, as the Fifth Circuit did, places the burden on Congress to justify its actions.[195] This burden carries with it the potential to make legislative findings more important than the text of the legislation itself.[196] Conversely, presuming the constitutionality of a challenged statute does not, as the Ninth Circuit's decision in *Hibbs* suggests, rid the courts of the need to review and carefully consider the legislative record.[197] The presumption of constitutionality places the

---

193. *See Kazmier*, 225 F.3d at 526, 528.

194. *See Hibbs*, 273 F.3d at 857-58; *Kazmier*, 225 F.3d at 526, 529.

195. *Compare Hibbs*, 273 F.3d at 858, *with Kazmier*, 225 F.3d at 526.

196. *Hibbs*, 273 F.3d at 855-56. Constitutional law scholars and careful observers of the current Supreme Court will balk at this burden allocation because it appears to be contrary to the "new textualism," a theory of statutory interpretation that has been developed and popularized by, among others, Justice Antonin Scalia and Seventh Circuit Judge Frank Easterbrook. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 742-43 (3d ed. 2001). Scholarly attempts to define and characterize this form of statutory interpretation generally conclude that new textualist theory "posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant." William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990); *see also* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 282 (1990). Much of the support for the textualist approach stems from the formalist opinion in *INS v. Chadha*, where the Court held that the legislative veto violated both the bicameralism and presentment clauses contained in Article I. *See generally* INS v. Chadha, 462 U.S. 919 (1983). Thus, under *Chadha* formalism, reliance on materials outside of the text of a statute, such as legislative history, is impermissible "because Congress has a voice as a constitutional player only through its finally enacted statues, not through any supplementary explanation thereof." Wald, *supra*, at 285. For textualists, therefore, legislative history cannot be utilized unless the plain text of the statute yields absurd results or is completely ambiguous. *See* Eskridge, *supra*, at 654.

Adherence to the rigid formalism of *Chadha* would seem to create a problem for any court requiring a close examination of the legislative history in Section 5 cases. Examining as primary something other than the statutory text, which itself clearly abrogates Eleventh Amendment immunity, may in itself violate Article I of the Constitution. Because Justice Scalia, the largest proponent of textualism, has been silent on abrogation issues since his dissent in *Union Gas*, however, it is uncertain whether the legislative record requirement can be justified under this theory of interpretation or whether some other justification for the legislative record review is required.

197. *See Hibbs*, 273 F.3d at 858 ("We find *Kazmier*'s analysis unpersuasive and we decline to follow it for the reasons we have given. In particular . . . it assumes that adequate evidentiary support in the legislative history is *always* a requirement for a valid exercise of the [S]ection 5 power. . . .").

burden on the state to show that Congress failed in its duty to establish a clear pattern of unconstitutional behavior.[198]

The importance of the legislative record, a centerpiece of the Supreme Court's analysis in *Kimel* and *Garrett,* now appears to depend on which party has the burden of proof.[199] In other words, under the *Hibbs* analysis, as the legislation at issue becomes more targeted at constitutionally suspect state actions, the burden of proof shifts from Congress to the state.[200] In this instance, the likelihood of the legislative record withstanding scrutiny is greatest; as more suspect behavior is targeted, the easier it will be to establish a pattern.[201] The contrary approach, taken by *Kazmier,* holds that if the legislation encompasses a small amount of constitutional behavior, the burden of proof is on Congress to justify its actions.[202] In this scenario, the legislative record becomes the determinative factor for establishing a pattern and achieving abrogation of the states' sovereign immunity.[203] The intricate interplay between these important factors creates space in the law that the Supreme Court must attempt to fill in deciding the fate of the FMLA. This dispute displays all the markings of a potential landmark case in the area of Congress's ability to abrogate Eleventh Amendment immunity under Section 5.

## III. BLUNTING THE SWORD: WHY THE SUPREME COURT SHOULD UPHOLD THE FMLA OR, IN THE ALTERNATIVE, DECIDE THE ISSUE ON NARROW CONSTITUTIONAL PRINCIPLES

The intriguing aspect of this case is that, in addition to deciding the fate of the FMLA's constitutionality, it also sets two series of constitutional law cases against each other. On one hand, there are cases that presume state action to be constitutional unless and until individual rights that are protected by the Fourteenth Amendment are implicated.[204]

198. *Id.* at 857-58 ("[T]he burden is on the challenger of legislation to prove that states have *not* engaged in a pattern of unconstitutional conduct.").

199. *See Hibbs*, 273 F.3d at 858; William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 99 (2001) ("The scope of legislative power depends in crucial respects on the approach a court takes to determining the existence of such predicates.").

200. *See Hibbs*, 273 F.3d at 858.

201. *Id.* ("[The Fifth Circuit's analysis in *Kazmier*] fails to acknowledge the ways in which the heightened scrutiny to which state-sponsored gender discrimination is subject justifies shifting or modifying the burden of proof in the legislative history inquiry.").

202. *See* Kazmier v. Widmann, 225 F.3d 519, 524 (5th Cir. 2000).

203. *Id.* ("[W]e examine, at *Kimel*'s second step, the legislative record of the statute under review to see whether it contains evidence of *actual constitutional violations by the States* sufficient to justify the full scope of the statute's provisions.").

204. *See supra* note 201.

On the other hand, there is a line of recent sovereign immunity cases restricting congressional action favoring state sovereignty over individual civil rights.[205] Given the heightened importance of the *Hibbs* case, the scope and rationale of the Court's decision are as important, if not more important, than its eventual holding.

### *A. The Constitutionality of the FMLA: Distinguishing Gender Discrimination From Age and Disability Discrimination*

The principal argument advanced against the FMLA is that it fails the congruence and proportionality test established in *City of Boerne* and relied upon in both *Kimel* and *Garrett*.[206] As the Ninth Circuit argued in *Hibbs*, however, the FMLA was enacted to combat gender discrimination, a form of discrimination that receives more constitutional protection than either age or disability discrimination.[207] This distinction is significant if the Supreme Court is willing to do three things. First, the Supreme Court must be willing to find that a form of discrimination receiving heightened scrutiny justifies an expansion of Congress's Section 5 power.[208] Second, the Court must conclude that the FMLA is in fact aimed at attacking gender discrimination by the states in employment. Third, irrespective of the level of scrutiny, the Court must be willing to locate support within the legislative record to substantiate the claim that the states were engaged in sufficient unconstitutional behavior to justify federal legislation.[209]

A review of Court precedent and its application to the FMLA indicates that, although the FMLA might survive the first two steps of this analysis, the legislation will likely fail the third step. To make this point clear, imagine that Congress's Section 5 power is a set of three glasses: one very small (8 oz.); one medium-sized (24 oz.); and one quite large (32 oz.). Each glass represents Congress's ability to establish the

---

205. *See infra* note 241.

206. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80-82 (2000); *see also* Brief for the Petitioner at 18-19, Nev. Dep't of Human Res. v. Hibbs (No. 01-1368).

207. Hibbs v. Dep't of Human Res., 273 F.3d 844, 854 (9th Cir. 2001), *cert. granted sub nom.* Nev. Dep't of Human Resources v. Hibbs, 536 U.S. 938 (2002) (mem.) (reporting that the United States defended "the constitutionality of the FMLA on the ground that it is aimed at remedying and preventing gender discrimination, and gender discrimination is subject to heightened scrutiny").

208. *See Kimel*, 528 U.S. at 84 (stating that "when a State discriminates on the basis of race or gender, we require a tighter fit between the discriminatory means and the legitimate ends they serve") (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

209. *See* Florida Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 639 (1999); *Kimel*, 528 U.S. at 91.

necessary "pattern" with respect to various forms of discrimination. The smallest glass represents the vessel used in the holdings of *Kimel* and *Garrett.*[210] When the discrimination combated is not subject to heightened scrutiny under the Equal Protection Clause, Congress's ability is truncated because very little of the behavior prohibited by the statute is unconstitutional.[211] Most of the incidents in the legislative record fall outside the smallest glass.

The largest glass is also consistent with *Kimel* and *Garrett,* as well as *Fitzpatrick v. Bitzer* and the line of voting rights cases.[212] When the scrutiny is strict, more statutorily-prohibited behavior is unconstitutional, so the congressional vessel is more likely to capture events described in the legislative record; a "pattern" is thus more easily established.[213]

Precedent now leaves the medium-sized glass – and an open question regarding the corresponding ability of Congress to establish the necessary "pattern" of violations by the states when the discrimination combated is subject to intermediate or heightened scrutiny.[214] Presenting the issue in this manner seems to require that the Court address the following question: is heightened scrutiny closer to strict scrutiny or rational basis? While either outcome can be rationally supported, case law seems to suggest that heightened scrutiny is closer to strict scrutiny,[215]

---

210. *See Garrett,* 531 U.S. at 373-74 (comparing the ADA unfavorably to the Voting Rights Act of 1965); *Kimel,* 528 U.S. at 90-91.

211. *See Garrett,* 531 U.S. at 367 ("States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational."); *Kimel,* 528 U.S. at 83 ("States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.").

212. *See Garrett,* 531 U.S. at 373-74; Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976); South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

213. *See Fitzpatrick,* 427 U.S. at 455 ("There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States.").

214. Some scholars, however, have argued that "the scope of congressional power thus turns not on whether a classification is subject to heightened judicial scrutiny, but on whether, at least sometimes, state action based on such a classification results in unconstitutional conduct." Thomas W. Beimers, *Searching for the Structural Vision of* City of Boerne v. Flores*: Vertical and Horizontal Tensions in the New Constitutional Architecture,* 26 HASTINGS CONST. L.Q. 789, 811 (1999) (citing Velasquez v. Frapwell, 160 F.3d 389, 391-92 (7th Cir. 1998)).

215. *See* United States v. Virginia, 518 U.S. 515, 531-34 (1998). Many scholars have concluded that the majority opinion in *Virginia* placed heightened scrutiny closer to strict scrutiny. *See* Steven A. Delchin, United States v. Virginia *and Our Evolving "Constitution": Playing Peek-a-boo With the Standard of Scrutiny for Sex-Based Classifications,* 47 CASE W. RES. L. REV. 1121, 1154 (1997) (arguing that Justice Ginsburg moved the standard of review toward strict scrutiny in gender discrimination cases, in part as a response to the changing role of men and women in society); Christina Gleason,

thereby supporting a greater view of congressional power under Section 5.[216] Even a victory for the FMLA at this threshold stage, however, does not automatically save the legislation from being found unconstitutional.

The next hurdle the FMLA faces is more practical than theoretical: is the legislation's aim truly to combat unconstitutional discrimination based on gender? Statements of Congress notwithstanding,[217] the answer to this question depends on evidence of a "pattern" of unconstitutional discrimination by the states. The FMLA provides leave for four different categories: the birth or care of a child,[218] the placement of a child with the employee for adoption or foster care,[219] care for certain family members,[220] or serious health conditions of the employee.[221] The first of these provisions, regarding pregnancy, is limited to women, thereby making the possibility of disparate treatment possible. The remaining three provisions, however, do not involve anything that requires, or even hints at, the possibility of differentiation between men and women. While general stereotypes about the respective roles of men and women might bring the FMLA within the boundaries of the Fourteenth Amendment,[222] defenders of the FMLA must address the case of *Geduldig v. Aiello,* a substantial legal impediment.[223] *Geduldig* stands for the proposition that disparate treatment for normal pregnancy is not a violation of the Fourteenth Amendment.[224] To the extent that this remains good law today, it presents a serious obstacle for the constitutionality of the FMLA.[225]

---

Comment, United States v. Virginia: *Skeptical Scrutiny and the Future of Gender Discrimination Law*, 70 ST. JOHN'S L. REV. 801, 809 (1996) (arguing that, although the majority opinion did not change gender classification review from heightened scrutiny to strict scrutiny, the Court did move closer towards strict scrutiny as part of a long-term plan); Collin O. Udell, Note, *Signaling a New Direction in Gender Classification Scrutiny:* United States v. Virginia, 29 CONN. L. REV. 521, 521 (1996) (arguing that the majority's decision in *United States v. Virginia* has moved the Court closer to a strict scrutiny standard for classifications based on gender).

216. *See Fitzpatrick*, 427 U.S. at 455-56.

217. *See* 29 U.S.C. § 2601(b)(4) (2000); *see also supra* notes 146-49.

218. 29 U.S.C. § 2612(a)(1)(A) (2000).

219. *Id.* § 2612(a)(1)(B).

220. *Id.* § 2612(a)(1)(C).

221. *Id.* § 2612(a)(1)(D).

222. *See supra* notes 146-151 and accompanying text.

223. 417 U.S. 484 (1974) (holding that the denial of insurance benefits for work loss resulting from normal pregnancy did not violate the Equal Protection Clause).

224. *Id.* at 497.

225. While *Geduldig* has never been overruled, its value as precedent in a case with different facts is minimal. While *Geduldig* stands for the proposition that the denial of insurance coverage for disabilities resulting from pregnancy was not discrimination under the Fourteenth Amendment, the Court recognized that "it does not follow that every legislative classification concerning pregnancy is a sex-based classification." *Id.* at 496

For the FMLA to survive judicial scrutiny and be considered legislation aimed at combating unconstitutional gender discrimination, the legislation must overcome an exacting review of its legislative record. This record is what the Court consults to ascertain the "aim" of legislation by scanning for a "pattern" of constitutional violations by the states.[226] Given the analysis provided by the Fifth Circuit in *Kazmier,*[227] combined with the fact that the Ninth Circuit addressed this issue as its alternate holding,[228] the likelihood of success on this prong of the analysis is slim. While the possibility remains that, like the Ninth Circuit,[229] the Supreme Court will reduce the evidentiary requirements for legislation combating gender discrimination, this possibility does not appear to be likely. If the standards for congruence and proportionality are the legislative histories of monumental legislation such as the Voting Rights Act of 1965,[230] this portion of the analysis becomes a kill-all that would

---

n.20. Therefore, some legislative enactments may qualify as gender discrimination. Justice Stevens recognized this principle when he stated, "Nor should *Geduldig* be understood as holding that, as a matter of law, pregnancy-based classifications never violate the Equal Protection Clause." Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 327 (1993) (Stevens, J., dissenting). In fact, the Court has held that policies involving pregnancy violate Title VII. *See* Nashville Gas Co. v. Satty, 434 U.S. 136 (1977). In *Satty*, the Court held that an employer's policy of not granting seniority to women returning from pregnancy leave burdened women only and thus violated Title VII. *Id.* at 142. An analysis of the benefits and burdens in *Satty* was determinative of the outcome. *Id.* The Court held that "[t]he distinction between benefits and burdens is more than one of semantics." *Id.* Thus, if there are *burdens* imposed on women by the legislation concerning pregnancy that are not imposed on men, the legislation may violate the Fourteenth Amendment.

In light of the holding in *Satty*, the government may be able to argue that the provisions of the FMLA dealing with maternity leave are necessary to prevent burdens from being imposed upon women employed by the states. If women, because of pregnancy, are denied leave benefits and are forced to adjust their work schedules, pay rates, or seniority status, they are suffering unconstitutional burdens that can be corrected by congressional action. The unconstitutional behavior to be corrected is not pregnancy-based discrimination, but the unconstitutional burdens placed on women forced to take leave to give birth to a child. An argument of this type might allow the Court to preserve the ruling in *Geduldig* with respect to situations where the burdens are equal, while at the same time allowing the provision in the FMLA to be considered combative of gender discrimination.

226. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001).

227. Kazmier v. Widmann, 225 F.3d 519, 526-27 (5th Cir. 2000).

228. *See* Hibbs v. Dep't of Human Resources, 273 F.3d 844, 858-71 (2001), *cert granted sub nom.* Nev. Dep't of Human Resources v. Hibbs, 536 U.S. 938 (2002) (mem.).

229. *See id.* at 857-58.

230. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified in 42 U.S.C. §§ 1971, 1973bb-1). In *Garrett*, the Court referenced the legislative history of the Voting Rights Act of 1965 as the benchmark for congruence and proportionality. *See Garrett*, 531 U.S. at 358 ("The ADA's constitutional shortcomings are apparent when it is compared to the Voting Rights Act of 1965.").

have the effect of destroying any federal legislation enacted under Section 5 that does not combat racial discrimination or discrimination against "discrete and insular minorities."[231]

Whether the FMLA prevails or is struck down, however, is only half of what makes this case potentially revolutionary. The grounds on which the decision is based could have a drastic impact on other litigation involving Section 5 legislation.

### *B. Shifting the Presumptions of Constitutionality: The Key to Unlocking the Court's Eleventh Amendment Jurisprudence*

If the issue in *Hibbs* were limited to the constitutionality of one federal statute, it would not be of great interest to constitutional scholars. The nature of the underlying dispute, however, gives *Hibbs* the capacity to be a tremendously interesting and highly controversial decision. Beneath the superficial concerns regarding Congress's ability to enact the FMLA under Section 5 of the Fourteenth Amendment, this case addresses the very intriguing question of, not what the parties have to prove, but who has the burden of proof.[232] The "presumption of constitutionality" is critical to many constitutional decisions.[233] This presumption serves to assign the burden of proof in a constitutional dispute.[234] For example, when a state government enacts legislation, the law is presumed to be constitutional until the challenger of the statute can convince a court that

---

231. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). In one of the most famous Supreme Court footnotes, Justice Harlan F. Stone, discussing the various standards of review, indicated that a stricter review ought to be considered when the case involves certain kinds of legislation. Justice Stone stated:

> There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.
>
> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, or national, or racial minorities: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* (internal citations omitted).

232. *See supra* note 201 and accompanying text.

233. *See generally* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

234. *Id.*

the law violates a provision of the Constitution.[235] Under current constitutional law the presumption shifts only when fundamental constitutional rights are violated or when a classification is suspect.[236] In cases involving these two categories, the presumption is reversed; the state law is presumed to be *un*constitutional and the state, not the individual challenger, has the burden of showing that the law is narrowly tailored to meet a compelling governmental interest.[237] Thus, one could say that the difference between the rational basis and strict scrutiny tests is that under rational basis the state enjoys the presumption of constitutionality, while under strict scrutiny it does not.[238] In other words, fundamental rights and suspect classifications serve to trump the states' presumption of constitutionality. When the state law deals directly with one of these areas, the presumption is automatically rebutted, and the state is placed in the position of defending its actions.

Applying this presumption analysis to the Court's Eleventh Amendment jurisprudence, the Court's holdings since *City of Boerne* have effectively removed the presumption of constitutionality given to legislation that seeks to abrogate the sovereign immunity of the states. In each of the post-*City of Boerne* cases,[239] the Court has required, through the exacting application of the congruence and proportionality test, that Congress prove, via the legislative record, that the states have

---

235. *See id.* at 19-20. Professor Gunther argued:

> [The Equal Protection Clause] permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

*Id.*

236. *See* Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 MD. L. REV. 132, 180 n.252 (1995) (stating that "the Court nearly conclusively presumes the reasonableness of any legislative classification which involves neither suspect classifications nor fundamental rights").

237. Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56, 88 (1997) ("In these vast doctrinal areas, statutes and policies that classify on suspect bases or infringe on fundamental rights are strongly presumptively unconstitutional; they can be upheld only if necessary to serve a compelling governmental interest.").

238. *See id.* (stating that "statutes and policies outside the suspect category enjoy a robust presumption of constitutionality under traditional rational basis review").

239. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding the ADA of 1990 unconstitutional); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding the ADEA of 1967 unconstitutional); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (holding the Patent Act of 1992 unconstitutional).

engaged in a pattern of unconstitutional behavior sufficient to justify enacting Section 5 legislation.[240] Generally speaking, therefore, Congress enjoys a presumption of constitutionality when legislating *except* when the legislation intrudes into the sovereign immunity of the states.[241] When Congress intrudes upon sovereign immunity, the presumption is shifted against Congress and in favor of the state. In other words, the Court seemingly has added sovereign immunity to suspect classification and fundamental rights to the list of areas of law shifting the presumption of constitutionality.

All of this is by way of establishing the issues apparently in play for the Court in *Hibbs*. If sovereign immunity indeed triggers a presumption shift in favor of the states, and the intrusion into fundamental rights triggers a presumption shift against the states, what happens to the burdens of proof when Congress intrudes upon sovereign immunity to protect a fundamental right? To address the split between the Fifth and Ninth Circuits effectively,[242] in deciding the *Hibbs* case, the Supreme Court must address the tension between these two conflicting doctrines. If the Court finds, with the Ninth Circuit, that the burden of proof rests with the challenging state, then the state must demonstrate that at the time of the FMLA's enactment, it was not engaging in a pattern of discrimination that would have violated the Fourteenth Amendment.[243] A decision of this nature would have the effect of diminishing the importance of the FMLA's legislative record because Congress would not be required to have established a pattern of constitutional violations. On the other hand, a decision reversing the Ninth Circuit returns the focus to Congress's legislative record and strengthens the Eleventh Amendment's position as tantamount to a fundamental right. Equating the Eleventh Amendment's principles of sovereign immunity with fundamental rights sharpens the sword and encourages more states to wield their sword against legislation that purports to abrogate sovereign immunity under Section 5.

---

240. *See supra* note 239.

241. *See* Christina Bohannan, *Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives*, 77 N.Y.U. L. REV. 273, 286-87 (2002) (arguing that the Court has elevated the sovereign immunity of the states to a status equal to that enjoyed by fundamental rights).

242. *Compare* Kazmier v. Widmann, 225 F.3d 519, 533 (5th Cir. 2000), *with* Hibbs v. Dep't of Human Res., 273 F.3d 844, 857-58 (9th Cir. 2001), *cert. granted sub nom.* Nev. Dep't of Human Res. v Hibbs, 536 U.S. 938 (2002) (mem.).

243. *See Hibbs*, 273 F.3d at 858.

### *C. Section 5 v. The Eleventh Amendment: The Future Battle Grounds*

A cursory review of the case law that has pitted Section 5 legislation against Eleventh Amendment concerns reveals the subtle fact that since *City of Boerne,* every Section 5 case that has been decided utilizing the congruence and proportionality test has been found unconstitutional.[244] A closer examination of these cases finds that the general basis for holding the legislation unconstitutional has been the lack of evidence of discrimination in the legislative history.[245] The fact that each of these congressional enactments occurred before 1995, the year in which *City of Boerne* was decided, presents two constitutional concerns. The first concern is whether "on the record" review of Section 5 legislation is constitutional.[246] The second concern is whether the *City of Boerne* test can, and should, be applied to legislation retroactively.[247] In other words, can the Court apply the heightened standard to bills enacted before Congress was aware of the legislative record requirements?[248]

---

244. *See generally* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding the ADA of 1990 unconstitutional); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding the ADEA of 1967 unconstitutional); Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627 (1999) (holding the Patent Act of 1992 unconstitutional); City of Boerne v. Flores, 521 U.S. 507 (1995) (holding the RFRA of 1994 unconstitutional).

245. *Garrett,* 531 U.S. at 368-70; *Kimel,* 528 U.S. at 91; *Florida Prepaid,* 527 U.S. at 646-47; *City of Boerne,* 521 U.S. at 530.

246. Bryant & Simeone, *supra* note 126, at 369-70. Bryant and Simeone argue that the new standard of review should not apply to Congress because

> [t]he Court's imposition of new, procedural conditions on Congress's exercise of its legislative authority raises substantial constitutional questions under the Rules and Journal Clauses, the Speech or Debate Clause, and the political question doctrine, [and the] new approach is simply inconsistent with the realities of congressional fact-finding as envisioned by the Constitution.

*Id.*; *see also* Buzbee & Schapiro, *supra* note 199, at 90 (stating that legislative record review "threatens to impose procedural and substantive constraints on legislative action that have no support in precedent or in constitutional text or structure").

247. *See* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach,* 110 HARV. L. REV. 1055, 1075-79 (1997). Fisch addresses the common argument that Article III requires adjudication, by its very nature, to be retroactive. *Id.* at 1079. For support of this principal, Fisch looks to Justice Scalia's position that "[f]ully retroactive decisionmaking [is] considered a principal distinction between the judicial and the legislative power." *Id.* at 1076 (quoting Harper v. Va. Dep't of Taxation, 509 U.S. 86, 107 (1993) (Scalia, J., concurring)).

248. Bryant & Simeone, *supra* note 126, at 370-83. Bryant and Simeone raise two constitutional concerns regarding the close review of Congress's work by the Court. *Id.* at 373. First, it is unclear whether "the Court's now well-established authority to review statutes supplies any affirmative grant of power for the Court to influence Congress's deliberation prior to enacting a law." *Id.* Second, they argue that "the Constitution itself both expressly and implicitly imposes limits on judicial intrusion into the workings of Congress." *Id.*

The fact that, facially, the *Hibbs* case and the FMLA are distinguishable from previous cases presents the Court with the opportunity to refine its Eleventh Amendment jurisprudence.[249] This refinement can take either a narrow scope or a broad scope. The narrow possibility is identical to that suggested and implored by the Ninth Circuit.[250] The Court could hold that with respect to legislation combating discrimination that receives heightened scrutiny, the burden-shifting analysis alleviates the need to review the legislative record with exacting scrutiny. Thus, the Court could base its holding entirely on whether the FMLA combats gender discrimination. If it does, there would be limited review of the legislative record; if it does not, the Court will follow the precedent established by *Kimel* and *Garrett.* Either way, the congruence and proportionality test would remain unaltered. This would permit Congress to retain Section 5 power under both strict and heightened scrutiny, while still allowing the states their sovereign immunity from laws combating discrimination that receive only rational basis review.

If the Court holds, however, that gender discrimination is subject to heightened scrutiny and that the legislative record review must be performed, the holding is on broad grounds, and Congress will not receive added protection to legislate under Section 5. A broad holding of this type completely tilts the balance in favor of states' rights and the Eleventh Amendment. Congress would lose power to legislate in both rational basis and heightened scrutiny situations, and Section 5 would be limited to combat discrimination based on race.

## IV. CONCLUSION

As is not uncommon, because of the complicated, esoteric nature of this case, the decision, regardless of its outcome, will go largely unnoticed by the vast majority of the American people. The success or failure of the FMLA as it relates to state employees is not a headline-making Supreme Court decision. Nevertheless, the implications, when fully

---

249. *See supra* notes 189-203 and accompanying text. The Court had another opportunity during the October 2002 term to refine its Eleventh Amendment jurisprudence with the case of *Medical Board of California v. Hanson.* Charles Lane, *Justices Agree To Review Disabilities Act Protections: States Rights at Issue in Calif. Case of Mentally Ill Doctor*, WASH. POST, Nov. 19, 2002, at A12. The case was to address a question left unanswered in *Garrett*: whether states could be sued in federal courts for money damages for discrimination with respect to public services. *Id.* Oral argument, however, was cancelled at the State of California's request, and the case is currently in limbo. Bob Egelko, *High Court Tables Disability Case*, S.F. CHRON., Mar. 8, 2003, at A3.

250. *See* Hibbs v. Dep't of Human Res., 273 F.3d 844, 856-57 (9th Cir. 2001), *cert. granted sub nom.* Nev. Dep't of Human Res. v. Hibbs, 536 U.S. 938 (2002) (mem.).

analyzed, will affect the rights and duties of both state governments and individual government employees.

State sovereign immunity is a powerful weapon that should be wielded carefully and only in cases where absolutely necessary. To continue to allow states to assert sovereign immunity against federal statutes providing money damage remedies represents a dangerous precedent that provides states with a sharp sword that can be used to slice out popular federal legislation with no regard for the individual citizen who is harmed and without remedy. The balance between state and federal power, between Section 5 and the Eleventh Amendment, is a delicate one whose advantages should never favor one group over the other.