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Nevada Department of Human Resources v. Hibbs: Does Application of Section 5 Represent a Fundamental Change in the Immunity Abrogation Rules of "New Federalism," or Have the Burdens Simply Shifted?

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Comments

Nevada Department of Human Resources v. Hibbs: Does Application of Section 5 Represent a Fundamental Change in the Immunity Abrogation Rules of "New Federalism," or Have the Burdens Simply Shifted?

Gabriel R. MacConaill*

I. Introduction

The principle that the people are represented by two distinct sovereigns lies at the very heart of the United States Constitution.[1] The allocation of power between the states and the federal government is embodied in the doctrine of federalism, the "oldest question of

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1. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-06 (1819) (describing the federal government as a Union expressly granted powers by the people, where the states retain all power not granted).

constitutional law."[2] Fundamental disagreements over the precise operation of federalism in the Constitution[3] have not only led to the Civil War, but also created confusion and cyclical change in the majority position of the Supreme Court.[4]

Very often, the federalism battle has been fought over the abrogation of state sovereign immunity.[5] Ostensibly, state immunity from private suit is guaranteed by the Eleventh Amendment.[6] As a result, the judicial debate regarding state sovereign immunity usually centers on different interpretations of the Eleventh Amendment.[7]

Since 1995, the Supreme Court has promulgated a "new federalist" theme, under which state sovereign immunity is almost absolutely protected.[8] And yet, to the surprise of many, the Court recently held in *Nevada Department of Human Resources v. Hibbs*[9] that Congress had properly abrogated state immunity under Section Five of the Fourteenth

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2. New York v. United States, 505 U.S. 144, 149 (1992).

3. *Compare* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 820-21 (1995) (stating that the Constitution provided for a national government that received its sovereignty from the people, not the states), *with id.* at 846 (Thomas, J., dissenting) ("The ultimate source of the Constitution's authority is the consent of the people of each individual State. . . ."), *and* THE FEDERALIST NO. 51 at 291(James Madison) (Clinton Rossiter ed., 1961) (claiming that the federal structure allows the states to protect citizens from federal tyranny).

4. *See* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 763-64 (2d ed. 1998).

5. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363-64 (2001) (recognizing that Congress may abrogate state sovereign immunity pursuant to a valid exercise of constitutional power).

6. U.S. CONST. amend. XI. "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.*

7. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.3 (3d 1999) (setting out the three major competing theories on what the Eleventh Amendment means). The current Supreme Court majority has supported a theory of state sovereign immunity that views the Eleventh Amendment as a subject matter restriction upon suits against the states. *Id.* A minority of justices have advanced the theory that state immunity only exists when a private suit is brought under diversity jurisdiction. *Id.* Chemerinsky describes a third possibility: the Eleventh Amendment embodies the English Common Law notion that the King can do no wrong thus, state sovereignty may not be abrogated. *See id.*

8. *See, e.g.*, Fed. Mar. Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002) (barring administrative adjudication of private suit); United States v. Morrison, 529 U.S. 598 (2000) (severing parts of the Violence Against Women Act of 1994); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (severing parts of the Age Discrimination in Employment Act); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding parts of the Religious Freedom and Restoration Act of 1993 unconstitutional); Seminole Tribe v. Florida, 517 U.S. 44 (1986) (holding that the Indian Gaming Act could not abrogate Eleventh Amendment immunity).

9. 538 U.S. 721 (2003).

Amendment.[10] Based on the evidence before Congress, the *Hibbs* Court found that the Family and Medical Leave Act of 1993 ("FMLA")[11] was a proper remedy for state violations of the Fourteenth Amendment.[12] For the first time, the Court authorized abrogation under Section Five.[13] The *Hibbs* decision may signal a different path for "new federalism."

This comment focuses on the reasoning and decision of *Hibbs* in the context of the historic battle over state sovereign immunity. Part II analyzes the language and history of the Eleventh Amendment, dual sovereignty, and past attempts at abrogation of immunity under the Commerce Clause and Section Five of the Fourteenth Amendment. Part III examines the possibility that the "change" in Section Five jurisprudence is only one of shifting burdens. In conclusion, this comment asserts that the Court continues to exhort federalism at the possible expense of individual rights, although after *Hibbs* some cases will require the states, and not Congress, to bear the burden of proof.

II. Background

A. Etiology of Sovereign Immunity

1. The Eleventh Amendment: Pre-history and the Evolution of Almost Absolute Immunity

Prior to the adoption of the Eleventh Amendment, the federal courts clearly had jurisdiction over suits brought against a state by a citizen of another state.[14] In a famous four-to-one decision, the Supreme Court ruled that it had jurisdiction to hear a suit brought by a citizen of South Carolina against the State of Georgia to collect on Revolutionary War

10. *See id.* at 737; U.S. CONST. amend. XIV, § 5.

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

12. *See Hibbs*, 538 U.S. at 730-34 (describing evidence of the stereotypical view that women are the primary family caregivers, and the resulting discrimination against men).

13. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368-69 (2001) (rejecting Congressional attempt to use Section Five to abrogate state immunity under the Americans with Disabilities Act); *Kimel* 528 U.S. at 90-92 (holding that the Age discrimination in Employment Act was not a Constitutional exercise of Section Five). Section Five provides that: "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

14. The Constitution provides the federal judiciary with original jurisdiction over cases "between a State and Citizens of another State. . . ." U.S. CONST. art. III, § 2. *See also* CHEMERINSKY, *supra* note 7, at 394 (citing The Judiciary Act of 1789, ch. 20, 1 Stat. 73, 80, at § 13 which codified the diversity jurisdiction provided in Article III).

bonds.[15] The *Chisholm v. Georgia* decision created an uproar because the states generally could not afford to pay back their Revolutionary War debts.[16] In a particularly intense example of the reaction to *Chisholm*, Georgia passed a statute that made it a felony to attempt to enforce the Court's decision.[17]

Less than three weeks after the controversial decision, the Eleventh Amendment was approved by both houses of Congress.[18] For almost a century, the only Supreme Court case to interpret the new Amendment labeled it a narrow grant of sovereign immunity.[19] In *Cohens v. Virginia*,[20] Chief Justice John Marshall ruled that the Eleventh Amendment did not preclude federal jurisdiction over a federal question raised by a citizen against his own state.[21] In fact, the text of the Eleventh Amendment only prohibits suits against states brought in diversity.[22]

The narrow reading of the Eleventh Amendment's prohibition was abandoned by the Court when it was faced with a state war-debt controversy for the second time.[23] In *Hans v. Louisiana*,[24] the plaintiff, a citizen of Louisiana, sued the state to enforce the terms of a war bond

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15. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 479 (1793).

16. *See* FARBER ET AL., *supra* note 4, at 851. *See also* CHEMERINSKY *supra* note 7, at 395 (citing CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1922)).

17. *See* CHEMERINSKY, *supra* note 7, at 395 (citing PETER W. LOW & JOHN C. JEFFERIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 810 (4th ed. 1998)). The punishment for attempting to enforce federal jurisdiction was "death, without the benefit of clergy by being hanged." *Id.*

18. Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity under Federal Law: Legal, Historical, and Normative Reflections on a Fundamental Aspect of American Indian Sovereignty*, 37 TULSA L. REV. 661, 671 n.34 (2002).

19. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 383 (1821). "We think 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." *Id.*

20. 19 U.S. (6 Wheat.) 264 (1821).

21. *See* FARBER ET AL., *supra* note 4, at 851 (describing Marshall's *Cohens* decision). *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (Marshall's famous opinion in which he asserts the Supreme Court's power to "say what the law is," giving the Supreme Court enormous authority and final jurisdiction).

22. The Eleventh Amendment is written to exclude extending the judicial power of the United States to any suit brought against a state by "Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. Textually, the Eleventh Amendment erases the diversity jurisdiction against the states granted under Article III, however, that Article also contains a broad grant of federal question jurisdiction. U.S. CONST. art. III, § 2 (extending Supreme Court jurisdiction to all cases "arising under this Constitution [and] the Laws of the United States. . . .").

23. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

24. 134 U.S. 1.

debt.[25] Louisiana argued that the Supreme Court did not have jurisdiction to hear a suit against a state without that state's permission.[26] The plaintiff attempted to avoid the Eleventh Amendment altogether by basing his claim on an alleged state violation of the Constitution's Contract Clause found in Article I, Section 10.[27] Justice Bradley determined that the Court lacked subject matter jurisdiction to hear Hans's federal question controversy because the purpose and spirit of the Eleventh Amendment went beyond its literal language.[28]

Confusion over what the *Hans* decision actually means continues to this day.[29] Though confusion over the decision's meaning persists, it is clear that the practical effect of *Hans* was to extend Eleventh Amendment immunity to suits brought against states by their own citizens.[30] Application of *Hans* and its postulates has resulted in a judicial grant of nearly absolute state immunity.[31]

2. The Commerce Clause: A Short-Lived Threat to State Sovereign Immunity

a. Congress may Abrogate State Immunity Using the Commerce Clause: *Pennsylvania v. Union Gas Co.*[32]

The federal commerce power[33] gives positive authority to Congress,[34] and has been judicially interpreted as an implied limitation

25. *Id.* at 1.

26. *Id.* at 3.

27. *Id.* Article I, Section 10 contains a broad prohibition on state action: "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 Payments 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.

28. *See Hans*, 134 U.S. at 21. The Court's decision to construe the Eleventh Amendment as a broad grant of immunity is also the product of the chaos produced by *Chisholm*. *See id.* at 11.

29. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (the majority opinion and both dissenting opinions provided conflicting views on the meaning of *Hans*).

30. *See id.* at 54 (confirming the presupposition in *Hans* that the Eleventh Amendment reinforces individual state sovereignty and prohibits individual suits without the state's consent). *See also Hans*, 134 U.S. at 13 (quoting the Federalist No. 81 "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without [the state's] consent.").

31. *See* FARBER ET AL., *supra* note 4, at 853 (discussing the extension of *Hans* immunity to cases in admiralty and controversies with foreign nations).

32. 491 U.S. 1 (1989).

33. U.S. CONST. art. I, § 8, cl. 3.

34. The Commerce Clause states that Congress shall have the power: "To regulate

on state action.[35] A plurality of the Supreme Court decided in *Pennsylvania v. Union Gas Co.*[36] that Congress could abrogate state immunity from federal suit through Article I.[37]

Justice Brennan reasoned for the plurality[38] that the Commerce Clause gave Congress power while at the same time taking power away from the states.[39] By ratifying the Constitution, the states agreed to be sued when Congress acted under its granted plenary powers.[40] In addition, Brennan noted that Congress had a distinct power to abrogate under the Commerce Clause because of the Clause's unique dormant effect.[41]

The Court was deeply divided over the decision to allow abrogation of immunity under Article I.[42] Four justices—Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy—took the position that the Eleventh Amendment provided broad constitutional sovereign immunity.[43] Those justices would later be joined by Justice Thomas to form a majority in favor of providing state immunity from federal suit.[44]

In dissent, Justice Scalia maintained that the *Hans v. Louisiana* precedent provided for straightforward application of fundamental principles of federalism.[45] At the very foundation of federalism, according to Justice Scalia, lies the notion that the states have retained sovereign immunity.[46] After pointing out the plurality's alleged

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Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.*

35. *See* FARBER ET AL., *supra* note 4, at 858-63 (discussing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) and the origins of the Dormant Commerce Clause).

36. 491 U.S. 1 (1989).

37. *See id.* at 3-4.

38. Vote counting gets a bit confusing because Justice White separately concurred, disagreeing with Brennan's Article I abrogation reasoning, but not providing a clear alternative. *Id.* at 45 (White, J., concurring in the judgment in part, and dissenting in part).

39. *Id.* at 16. Brennan was relying on the same reasoning as had been used to abrogate state immunity under Section Five in *Fitzpatrick v. Bitzer*. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976).

40. *Union Gas*, 491 U.S. at 14.

41. *Id.* at 20; *see also* FARBER ET AL., *supra* note 4, at 858-63 (discussing Dormant Commerce Clause power).

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

43. *See id.*

44. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 46 (1996) (overruling *Union Gas* by holding that the Commerce Clause could not be used to abrogate state sovereign immunity).

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

46. *See id.* This foundational principle seems very similar to the states-rights view that Maryland proposed in its losing effort in *McCulloch v. Maryland*. 17 U.S. (4 Wheat.) 316, 327-28 (1819).

misunderstanding of federalism, Scalia found error in the way Justice Brennan analogized Commerce Clause and Section Five abrogation.[47]

Justice Scalia agreed that the Eleventh Amendment's principle of sovereign immunity is limited by the subsequent Fourteenth Amendment, which directly inhibits state action.[48] Justice Scalia sought, however, to edify the plurality as to the difference between the powers granted in Article I and the Fourteenth Amendment.[49] Scalia opined that if Congress had the ability to nullify state sovereign immunity whenever it wanted under the Commerce Clause, the result would render the entire doctrine of sovereign immunity without merit.[50] According to Justice Scalia, if state sovereign immunity is to retain the value provided in the federalist structure of the Constitution, its abrogation must only be had by constitutional provisions that expressly implicate the states.[51]

b. Congress may not Abrogate State Sovereign Immunity Using the Commerce Clause: *Union Gas*[52] Overruled

Seven years passed before the Court resolved the rift exposed by *Union Gas*[53] by overruling the plurality's holding.[54] In *Seminole Tribe v. Florida*,[55] a majority of the Court agreed that *Union Gas*[56] was wrongly

47. *Union Gas*, 491 U.S. at 42 (stating that it was a mistake to compare a substantive limitation upon the states, the Fourteenth Amendment, with a limited positive grant of federal authority, the Commerce Clause).

48. *Id.*

49. Justice Scalia notes that "state immunity from suit in federal courts is a structural component of federalism, and not merely a default position that can be altered by action of Congress pursuant to its Article I powers." *Id.* at 38 (Scalia, J., concurring in part and dissenting in part). According to Scalia, the plurality failed in relying on *Fitzpatrick v. Bitzer*, 427 U.S. 445, because that decision upheld the Civil Rights Act of 1964 as enacted pursuant to Section 5 of the Fourteenth Amendment, and not the Commerce Clause. *See id.* at 41. *Fitzpatrick*, stated Scalia, held only that the principle of state sovereignty could be limited by subsequent provisions directly aimed at the states. *See id.* at 41-42. Thus nothing in the *Fitzpatrick* reasoning supports limiting the principle of sovereign immunity found in the Eleventh Amendment by reference to "antecedent provisions of the Constitution" such as Article I. *See id.* at 42.

50. *See id.* at 42. Here, Justice Scalia has expanded the first rationale provided by Justice Brennan in the plurality opinion to a logical conclusion. *See id.* This conclusion is unacceptable to Scalia because it not only stands in derogation of sovereign immunity, but also could very well signal the end of federalism itself. *See id.* at 41-42.

51. *See id.* at 42.

52. 491 U.S. 1 (1989).

53. *Id.* The court heard a few Eleventh Amendment cases in this period, but none were based on the Union Gas holding. *See, e.g.*, Hoffman v. Conn. Dep't of Income Maintenance, 492 U.S. 96 (1989).

54. *See* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

55. 517 U.S. 44 (1996).

56. 491 U.S. 1.

decided.[57] The opinion, authored by Chief Justice Rehnquist, expressly overruled *Union Gas* and adopted much of the reasoning Justice Scalia had articulated seven years earlier.[58]

Seminole Tribe presented a conflict over the Indian Gaming Regulatory Act[59] that had been enacted under the Indian Commerce Clause,[60] a constitutionally granted power.[61] Chief Justice Rehnquist seized the opportunity to analogize the Indian Commerce power and the Commerce power, providing a foundation for review of the *Union Gas* precedent.[62] The Chief Justice divided his opinion into two parts, asking first whether Congress had intended to abrogate state immunity, and second whether this abrogation was a valid exercise of congressional power.[63]

The first question was answered in the affirmative, without detailed reasoning or analysis.[64] The Court then answered the second question by holding that the abrogation was not a valid exercise of congressional power because the Commerce Clause could not be used to diminish a state's right to immunity from suit.[65] The decision in *Seminole Tribe* effectively limits congressional attempts at abrogation of state sovereign immunity to Section Five of the Fourteenth Amendment.[66]

B. The Direct Federal Power to Abrogate: Section Five of the Fourteenth Amendment

1. Section Five of the Fourteenth Amendment is an Affirmative Grant of Federal Power Over the States

Before the rise and fall of Commerce Clause abrogation, the Court determined that Section Five provides Congress with the affirmative power to abrogate state sovereign immunity.[67] Authored by then-Justice

57. *See Seminole Tribe*, 517 U.S. at 72-73.
58. *See id.*
59. 25 U.S.C. §§ 2701-2721 (2000).
60. U.S. CONST. art. I, § 8, cl. 3.
61. *See Seminole Tribe*, 517 U.S. at 47.
62. *See id.* at 60 (the petitioners actually provided for this analogy in their brief by appealing to the plurality's Commerce Clause holding in *Union Gas*).
63. *Id.* at 55.
64. *Id.* at 57. The Chief Justice found that frequent references to the "State" in the Indian Gaming Regulatory Act were clear evidence of Congress' intent to abrogate state sovereign immunity. *Id.*
65. *Id.* at 72-73. Even though the conflict in *Seminole Tribe* actually involved the Indian Commerce Clause, the essential holding encompasses the Commerce Clause as the Chief Justice found the two indistinguishable. *See id.* at 63.
66. *See id.* at 72-73.
67. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

Rehnquist, the majority opinion in *Fitzpatrick v. Bitzer*[68] concluded that the Fourteenth Amendment was in and of itself a restriction on state authority.[69] *Fitzpatrick* was also the first case in which a state attempted to use the Eleventh Amendment to avoid abrogation of its immunity by a statute enacted under the Fourteenth Amendment.[70]

In *Fitzpatrick*, a group of Connecticut state employees brought suit against the state alleging sexual discrimination through the statutory provision of retirement benefits.[71] The Court found: "[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 [Section] 5 of the Fourteenth Amendment."[72] The ability of Congress to express its intent to abrogate under Section Five seems liberally drawn here, as it is found in legislative history, and not in the text of the statute itself.[73] Fundamentally, the *Fitzpatrick* decision provides that the Fourteenth Amendment is a tool by which Congress may inhibit and sanction state action.[74]

The majority left the door open, however, for further state claims of immunity under the Eleventh Amendment.[75] In a footnote, the Court hinted to the states that Connecticut, while claiming Eleventh Amendment protection, did "not contend that the substantive portions of Title VII as applied here are not a proper exercise of congressional authority under [Section] 5 of the Fourteenth Amendment."[76] This innocuous footnote near the end of the majority opinion foreshadowed

68. 427 U.S. 445.

69. *Id.*

70. *See id.* at 452-53.

71. *Id.* at 448. The claimants were relying on amendments to Title VII of the Civil Rights Act of 1964, passed in 1972, which provided that federal courts had the authority to issue monetary damages against any state that discriminated on the basis of "race, color, religion, sex, or national origin." *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)).

72. *Fitzpatrick*, 427 U.S. 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)).

73. *See id. See also* CHEMERINSKY, *supra* note 7 at 438-40. In a subsequent description of the standard, the Court determined that Congress must make its intent to abrogate "unmistakably clear." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (holding that Rehabilitation Act of 1973 did not authorize suits against the states). The Court has also required that Congress's intent to abrogate be very explicit. *See* CHEMERINSKY, *supra* note 7 at 438 (describing the holding in Quern v. Jordan, 440 U.S. 332 (1979)).

74. *See Fitzpatrick*, 427 U.S. at 452. "In this Title VII case the 'threshold fact of congressional authorization' to sue the state employer is clearly present." *Id.* (citing Edelman v. Jordan, 415 U.S. 651, 672 (1974)).

75. *See Fitzpatrick*, 427 U.S. at 456 n.11.

76. *Id.*

the issue that now determines the validity of congressional enactments under Section Five.[77] The Court's statement suggests that the Eleventh Amendment may be viewed as a substantive limit on congressional power to abrogate state sovereign immunity pursuant to Section Five of the Fourteenth Amendment.[78]

2. Limitation on Congressional Attempts to Abrogate Through Section Five: The Congruence and Proportionality Requirement

a. Describing the Test: *City of Boerne v. Flores*[79]

The Court set forth standards in *City of Boerne v. Flores*[80] to determine whether Congress's exercise of Section Five power is valid.[81] *City of Boerne* involved the Religious Freedom Restoration Act, passed by Congress to limit governments' ability to burden an individual's right to exercise his or her religious beliefs.[82] Before deciding the validity of Congress's use of Section 5 power, the majority sought to define the nature of this power.[83] The Court determined that Section Five provided Congress with broad authority to act in a preventative and remedial capacity.[84] Further, Congress would be permitted, in proscribing state violations, to intrude upon areas of authority not necessarily unconstitutional and "previously reserved to the states."[85]

Despite this seemingly broad grant of power, the Court established defined limitations on congressional authority.[86] After holding that

77. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-87 (2000) (holding portions of the Age Discrimination in Employment Act outside the substantive grant of Section Five authority).

78. *See Fitzpatrick*, 427 U.S. at 456 n.11.

79. 521 U.S. 507 (1997).

80. *Id.*

81. *See id.* at 536 (holding that the Religious Freedom Restoration Act could not abrogate state sovereign immunity through Section Five of the Fourteenth Amendment.)

82. *See* 42 U.S.C. §§ 2000bb-1(a),(b) (2000). The Act prohibited state law from substantially burdening the exercise of religion unless such laws could pass strict scrutiny. *See id.*

83. *See Boerne*, 521 U.S. at 519-20.

84. *Id.* at 524.

85. *Id.* at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

86. *See id.* at 519. The Court, enforcing the notion that it is the province of the judicial branch to interpret the Constitution, held that Congress could not decide what the Fourteenth Amendment means. *Id.* "The 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." *Id. See also* CHEMERINSKY, *supra* note 7, at 445 (describing *Boerne* as providing that Congress can only enact remedies for rights already recognized by the courts, that Congress may not

Congress could not decide the substance of the Fourteenth Amendment's limitations, the Court turned to the proper standard of review.[87] The *Boerne* opinion is well-known for establishing the "congruence and proportionality" test as the appropriate yardstick in Section Five cases.[88]

The test requires that Congress identify a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[89] The Court found that it was "apparent from the text of the Amendment," that a Congressional measure lacking such a connection would be substantive in nature.[90] Viewing the history of the Fourteenth Amendment, the majority found further support for its earlier holding that Congress could not act substantively, and that the Fourteenth Amendment provided only preventative or remedial power.[91]

b. Applying the *Boerne* Test: Striking Down Federal Attempts at Abrogation of Sovereign Immunity

Prior to the May 2003 *Hibbs* decision, the Court had three opportunities to apply the congruence and proportionality test set forth in *City of Boerne* to congressional attempts at abrogation of state sovereign immunity.[92] In the first case, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[93] the Court held that provisions of the Patent and Plant Variety Protection Remedy Clarification Act[94] were unconstitutional because they allowed patent holders to sue infringing states.[95] The Court dismissed claims that Congress had the

"create new rights or expand the scope of rights.").

87. *Boerne*, 521 U.S. at 519-20.

88. *See id.* at 520.

89. *Id.*

90. *Id.*

91. *Id.* at 520-25. The legislative history behind the Fourteenth Amendment shows that a more liberally phrased initial draft was tabled for two months. *Id.* at 521-22. The second attempt at wording the Fourteenth Amendment which provided that "[t]he congress shall have the power to enforce, by appropriate legislation, the provisions of this article," was a grant of remedial instead of plenary power, according to the Court. *See id.* at 522 (quoting Cong. Globe, 39th Cong., 1st Sess., at 2286).

92. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

93. 527 U.S. 627 (1999).

94. Pub. L. No. 102-560, 106 Stat. 4230. (1992). The Clarification Act was passed to clearly express congressional intent to abrogate state immunity from patent infringement claims in response to *Chew v. California*, 893 F.2d 331 (1990) and similar federal decisions finding that the previous patent laws did not contain the "requisite statement of intent to abrogate state sovereign immunity from infringement suits." *Florida Prepaid*, 527 U.S. at 631-32.

95. *Florida Prepaid*, 527 U.S. at 636, 647.

authority to abrogate under the Commerce Clause or the Patent Clause by referring to the clear rule from *Seminole Tribe* that Article I contains no abrogation authority.[96] In determining the validity of Congress's Section Five power, the Court focused on legislative history as it had done in *Boerne*.[97]

The Court found that the Patent Remedy Act did not respond to a history of constitutional rights deprivation.[98] In essence, the Court determined that Congress had identified no true constitutional violation requiring a remedy.[99] Further, from a procedural standpoint, Congress had "barely considered the availability of state remedies for patent infringement."[100] Thus, Congress failed on two fronts: by not identifying a specific constitutional wrong, and by not limiting the scope of the Act to state actions which would presumably be unconstitutional.[101]

In the second case, *Kimel v. Florida Board of Regents*,[102] individual suits were brought against Florida under the Age Discrimination in Employment Act ("ADEA").[103] Justice O'Connor, writing for the majority, ruled that the ADEA failed the congruence and proportionality test, and was not a valid congressional exercise of Section Five.[104] Again Congress had passed legislation which "prohibit[ed] very little conduct likely to be held unconstitutional."[105]

Significantly, Justice O'Conner found the ADEA incongruent because of the nature of age-based classifications as opposed to gender-

96. *Id.* at 636. "Seminole Tribe makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I Powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause." *Id.*

97. *See id.* at 643-46.

98. *Id.* at 645 (citing City of Boerne v. Flores, 521 U.S. 507 at 526 (1997)). In fact, the Court determined that "Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution." *Id.* at 645-46.

99. *See Florida Prepaid*, 527 U.S. at 646. "[I]dentifying the targeted constitutional wrong or evil is still a critical part of our [Section] 5 calculus because '[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one.'" *Id.* at 646 (quoting *City of Boerne*, 521 U.S. at 530).

100. *Florida Prepaid*, 527 U.S. at 643.

101. *See id.* at 645-47. Justice Stevens argued in dissent that the Court had never before required Congress to identify a pattern of state deprivation of constitutional rights. *Id.* at 660 (Stevens, J., dissenting). Justice Stevens admitted that Congress did not review available state remedies, however he saw this requirement as ironic since Congress had long ago preempted the entire field of patent infringement cases. *Id.* at 657-58 (Stevens, J., dissenting).

102. 528 U.S. 62 (2000).

103. 29 U.S.C. §§ 621-34 (2000).

104. *Kimel*, 528 U.S. at 82-83.

105. *Id.* at 88.

based or race-based classifications.[106] Whereas state classifications based on race must satisfy the strictest of scrutiny, and state classifications based on gender must survive heightened scrutiny, age-based discrimination is permissible as long as the state can satisfy the highly deferential rational basis test.[107] The ADEA did not fail, however, solely because it prohibited very little unconstitutional conduct; Justice O'Connor went on to examine the legislative history to determine the statute's proportionality.[108]

According to the Court, Congress had "virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age."[109] Because the proportionality test provided in *Boerne* requires that prophylactic responses be measured against the evil they seek to remedy,[110] Congress's failure to identify a constitutional violation precludes abrogation of immunity through Section Five.[111] As a result of its "indiscriminate scope" based on a lack of "evidence of widespread age discrimination," the ADEA was held to be both incongruent and disproportionate, therefore failing the *Boerne* test as an invalid exercise of Section Five power.[112]

The third, and final, pre-*Hibbs* Supreme Court case to apply the *Boerne* congruence and proportionality test analyzed Title I of the Americans with Disabilities Act ("ADA").[113] In *Board of Trustees of the University of Alabama v. Garret*,[114] the Court was faced with the question of "whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA."[115] Not in dispute, however, was the fact that Congress had unequivocally intended to abrogate the states' Eleventh Amendment immunity.[116]

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106. *Id.* at 83-84.

107. *See id.* at 83. "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'" *Id.* (quoting Clerburne v. Clerburne Living Ctr., 473 U.S. 432, 440 (1985)).

108. *Kimel*, 528 U.S. at 89.

109. *Id.* at 91.

110. *See* City of Boerne v. Flores, 521 U.S. 507 at 530 (1997).

111. *See Kimel*, 528 U.S. at 91.

112. *Id.* Justice O'Connor went on to inform the plaintiffs that in every state of the Union they retained a right under state statutory authority to sue their employers for such discrimination. *Id.* at 91-92.

113. 42 U.S.C. §§ 12111-17 (2000).

114. 531 U.S. 356 (2001).

115. *Id.* at 364.

116. *Id.* at 363-64. Chief Justice Rehnquist, writing for the majority, found

Even so, the ADA was held to be an invalid and unconstitutional abrogation of sovereign immunity.[117] Initially the Court sought to determine the scope of the constitutional right at issue.[118] Utilizing the recent *Kimel* decision, Chief Justice Rehnquist examined precedent involving the states' treatment of the disabled in the context of the Equal Protection Clause to come to a conclusion.[119] Placing primary reliance on *City of Cleburne v. Cleburne Living Center*,[120] the majority found that states need only justify discriminatory action toward the disabled with a rational state interest.[121]

After defining the constitutional right at issue, the Court moved to determine whether Congress had identified a history of state employment discrimination against the disabled.[122] Upon examination of the relevant legislative history, the majority found no evidence that Congress had based its legislation on a discernable pattern of unconstitutional behavior by the states.[123]

The majority concluded by applying the *Boerne* congruence and proportionality test.[124] In an analysis consisting of only one paragraph, the Court ruled that the ADA did not satisfy the *Boerne* test.[125] In closing, the majority stated that "to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down in *Cleburne*. Section Five does not so broadly enlarge congressional authority."[126] This language suggested that the next statute to be analyzed, the FMLA, would similarly fail in its abrogation goal.

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unequivocal intent in the statement from 42 U.S.C. § 12202 that provided: "A state shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." *Id.* at 364.

117. *Id.* at 374.

118. *Id.* at 365. Chief Justice Rehnquist began by reminding all involved of the "long-settled principle that it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees." *Id.* at 365 (citing City of Boerne v. Flores, 521 U.S. 507 at 519-24 (1997)).

119. *Garrett*, 531 U.S. at 365.

120. 473 U.S. 432 (1985).

121. *Garrett*, 531 U.S. at 367. Thus, Chief Justice Rehnquist determined that disability-based classifications, like age-based classifications, need only satisfy the deferential rational basis test to be a valid exercise of state authority. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000).

122. *See Garrett*, 531 U.S. at 368 (the Court was looking for a "history and pattern" of discrimination).

123. *Id.* at 370-72.

124. *See id.* at 374.

125. *Id.*

126. *Id.*

C. *The Family Medical Leave Act: Preventing Unconstitutional Gender Discrimination in Employment Leave*

1. The FMLA Itself: Principles and Purposes

The Family Medical Leave Act of 1993[127] is Congress's attempt to eliminate gender-based discrimination in the area of employment leave.[128] The FMLA provides eligible employees[129] a right to twelve weeks of leave in any twelve month period.[130] The language of the statute evidences Congress's specific intent to abrogate state sovereign immunity provided by the Eleventh Amendment.[131]

The legislative history of the FMLA contains abundant evidence that Congress was acting to reduce the burden on families engendered by recent economic and societal change.[132] Specifically, Congress cited numerous studies suggesting that women continued to enter the workforce at rising rates, and that many families relied on income from caregivers to survive.[133] In addition, Congress heard heart-wrenching testimony from individuals whose lives had been negatively impacted by

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127. 29 U.S.C. §§ 2601-2654 (2000).

128. *See* 29 U.S.C. § 2601(b)(4). The purpose of act is to balance needs of family with workplace in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment. *Id.*

129. An "eligible employee" is one who has been employed for at least twelve months and worked at least 1,250 hours in the previous twelve months. 29 U.S.C. § 2611(2)(A)(i)-(ii). However, federal employees and employees of smaller (less than 50 employees) employers are excluded from the Act. 29 U.S.C. § 2611(2)(B)(i)-(ii).

130. 29 U.S.C. § 2612(a)(1). Leave is provided for the following reasons: care for a newborn child, care for recently adopted child, care for child, spouse or parent of employee if they have a serious health condition, and where the employee him or herself has a serious health condition. 29 U.S.C. § 2612(a)(1)(A)-(D).

131. *See* 29 U.S.C. §§ 2611(4)(A)(iii), 2617(a)(2); *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 724-26 (2003). The Act provides that an action to recover damages "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 2617(a)(2). "Public Agency" is defined in Title 29 as "the government of a State or any political subdivision thereof . . . a State, or a political subdivision of a State." 29 U.S.C. §§ 203(x), 2611(4)(A)(iii).

132. *See, e.g.*, S. REP. NO. 103-3 at 4, *reprinted in* 1993 U.S.C.C.A.N. 3, 6. "Private sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family." *Id.*

133. *Id.* at 5-7. The General Accounting Office reported that the female labor force increased by almost 1 million workers per year over the last forty years. *Id.* at 5. Further, "The Bureau of Labor Statistics predicts that by the year 2005 the female labor force participation rate will reach 66.1[%]." *Id.* The Senate report goes on to state that "Mothers' employment is often critical in keeping their families above the poverty line." *Id.* at 6.

the lack of available leave.[134]

The FMLA is written to allow leave regardless of gender.[135] According to evidence before Congress, in child-rearing situations, men were offered leave far less frequently than women.[136] Congress specifically included both men and women under the coverage of the FMLA to avoid potentially discriminatory results.[137]

Finally, the legislative history of the FMLA shows that a congressional review found inconsistent coverage in the leave policies of several states.[138] Against the backdrop of legislative history relating to gender discrimination, the courts of appeals split in applying the "heightened scrutiny"[139] standard to the recently-decided Section Five holdings.[140]

2. Split Opinions: Can the FMLA Break the Mold?

a. The Fifth Circuit: Abrogation is Invalid Under the FMLA

Following the recent Supreme Court Section Five decisions,[141] the Fifth Circuit ruled that the FMLA was an invalid abrogation of state sovereign immunity.[142] In *Kazmier v. Widmann*,[143] the Fifth Circuit was faced with a suit brought against Louisiana by a female employee of the

134. *See id.* at 7-12. The Subcommittee on Children, Family, Drugs and Alcoholism heard evidence, for example, from an Atlanta woman who had lost her job of five years after giving birth to her first child because she took advantage of the company's vacation and maternity leave time. *Id.* at 8. Testimony was also heard from individuals who lost their jobs as a result of adopting children, caring for children with serious illnesses, caring for elder parents or spouses, and those employees who required leave to recover from their own illnesses. *Id.* at 9-12.

135. *See* 29 U.S.C. § 2612 ("eligible employees" are entitled to leave).

136. *See* S. REP. NO. 103-3 at 14-15, *reprinted in* 1993 U.S.C.C.A.N. 3, 17. A June 1990 Bureau of Labor Studies survey found that 37[%] of employees in private businesses with 100 or more workers were covered by unpaid "maternity leave," while only 18[%] were covered by unpaid "paternity leave." *Id.*

137. *Id.* at 16. "A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment." *Id.*

138. *See id.* at 20-21 (outlining the various state laws).

139. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000); *see also* United States v. Virginia, 518 U.S. 515, 533 (1996).

140. *Compare* Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000) (holding that the FMLA had invalidly abrogated state immunity), *with* Hibbs v. Dep't of Human Res., 273 F.3d 844 (9th Cir. 2001) (holding that the FMLA represented a valid federal abrogation of state immunity).

141. *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

142. *Kazmier*, 225 F.3d at 526, 529.

143. 225 F.3d 519 (5th Cir. 2000).

state department of social services who had been terminated for failure to report to work.[144] The plaintiff-employee claimed that the termination violated several provisions of the FMLA.[145]

The Fifth Circuit identified the *Kimel*[146] decision as providing the "clearest guidance" for determining the validity of the FMLA in light of Section Five.[147] After defining the applicable legal standard, the court moved on to separately view the congruence and proportionality of subsections (C) and (D) of the FMLA[148] as they "clearly authorize leave on different substantive grounds."[149]

According to the Fifth Circuit, subsection (C)[150] was intended to prevent private sector employers from discriminating against men in granting leave.[151] The court recognized that cases of gender discrimination are subject to "heightened" scrutiny, and, as such, Congress "potentially" has latitude to enact broad prophylactic legislation.[152] The court found, however, that Congress failed to identify a pattern of discrimination by the states, and, as a result, subsection (C) was not validly enacted pursuant to Section Five.[153]

Subsection (D)[154] does not at all address gender discrimination according to the Fifth Circuit.[155] Instead, the court viewed this

144. *Id.* at 522-23. Ms. Kazmier took leave in 1995 for several weeks and for several reasons: one month in May after breaking her arm, a week in October to care for an ailing parent, and the final two months of 1995 after breaking her wrist. *See id.*

145. *Id.* at 523.

146. 528 U.S. 62 (2000).

147. *Kazmier*, 225 F.3d at 524. The court went on to describe the two part test for determining congruence and proportionality that emerges from the *Kimel* decision. *See id.* The first step involves determining the constitutional right at issue. *See id.* "If legislation 'prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection . . . standard' the legislation will not be considered congruent and proportional." *Id.* (quoting v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000)). The second *Kimel* step involves reviewing the legislative history of the statute to determine if Congress identified an actual pattern of constitutional violations by the states. *See Kazmier*, 225 F.3d at 524. The Fifth Circuit viewed this step as incisive in order to prevent Congress from restraining constitutional state behavior on the basis of "perceived constitutional bogeymen." *Id.*

148. 29 U.S.C. § 2612(a)(1)(C), (D) (2000).

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

150. 29 U.S.C. § 2612(a)(1)(C). Twelve month leave is provided "[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." *Id.*

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

152. *Id.* at 526.

153. *Id.*

154. 29 U.S.C. § 2612(a)(1)(D). Twelve month leave is provided "[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." *Id.*

155. *Kazmier*, 225 F.3d at 527.

subsection as seeking "to prevent employers from discriminating on the basis of temporary disability."[156] Since disability-based discrimination is only subject to the "slightest scrutiny," FMLA subsection (D) prohibits substantial constitutional state behavior and is an invalid exercise of Section Five abrogation authority.[157] The Fifth Circuit's interpretation of the *Kimel* precedent can be described as very narrow and rigid.[158]

b. The Ninth Circuit: The FMLA is Congruent and Proportional

The Ninth Circuit, disagreeing with the Fifth Circuit, held in *Hibbs v. Department of Human Resources*,[159] that the FMLA was a valid exercise of Congress's Section Five abrogation power.[160] The Ninth Circuit agreed that the proper precedential rule was derived from *Kimel*.[161] According to the Ninth Circuit, however, *Kimel* does not always require evidence in the legislative history of an identified pattern of unconstitutional state behavior.[162]

Instead, the court took a more holistic view of the history of gender discrimination in the workplace to find that Congress's abrogation action was valid.[163] In the alternative, the court held that the legislative history of the FMLA did contain substantial evidence of gender discrimination by the states in the granting of employment leave.[164] This Ninth Circuit decision, seemingly at odds with Section Five precedent, was appealed to the Supreme Court and resulted in the May 2003 *Nevada Department of Human Resources v. Hibbs*[165] decision.

156. *Id.* The court also stated that the provision sought to prevent discrimination against women on the basis of "pregnancy-related disability as well." *Id.*

157. *Id.* at 528-29. The court also based its subsection (D) holding on its opinion that Congress had again failed to identify an actual pattern of state discrimination. *Id.* at 529.

158. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000).

159. 273 F.3d 844 (9th Cir. 2001).

160. *Id.* at 858, 873.

161. *Id.* at 856-57.

162. *Id.* "Examination of the 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." *Id.* at 857.

163. *See id.* at 858. The Ninth Circuit took the view that as the result of the history of invidious gender discrimination and the "heightened" scrutiny applied to such discrimination, the burden should be on the challenger of the statute to prove that the states had not engaged in discrimination, and not the reverse. *Id.* at 857-58.

164. *See id.* at 858-59. The court cited the 1990 Bureau of Labor Statistics study relied upon by the Congress as part of the requisite evidence. *Id.* at 859 (citing S. REP. NO. 103-3 at 14-15, *reprinted in* 1993 U.S.C.C.A.N. 3, 17).

165. 538 U.S. 721 (2003).

III. Analysis

A. Nevada Department of Human Resources v. Hibbs: State Sovereign Immunity is Validly Abrogated by the FMLA

1. The Decision Itself: Redefining the Scope of Section Five

Chief Justice Rehnquist penned the majority opinion, resolving the dispute among the circuits, and setting out a new path for legislation allowing private suits against the states.[166] In *Hibbs*, the Court was again faced with a statutory provision that attempted to abrogate state sovereign immunity.[167] The existing precedent seemed to suggest that the FMLA was doomed to fail as an invalid abrogation of immunity.[168] The *Hibbs* Court held, however, that the FMLA was congruent and proportional, and, as such, a valid congressional application of Section Five.[169]

The plaintiff in *Hibbs*, a man who worked for the department of human resources welfare division, sued Nevada under the FMLA[170] claiming that the state had improperly denied him leave and had subsequently terminated him.[171] The District Court granted the State of Nevada's summary judgment motion finding that the Eleventh Amendment barred the suit, and that the plaintiff's Fourteenth Amendment rights had not been violated.[172] On appeal, the Ninth Circuit reversed,[173] and the Supreme Court granted certiorari to decide "whether an individual may sue a state for money damages in federal court for a violation of § 2612(a)(1)(C)."[174]

Chief Justice Rehnquist began the majority opinion by citing *Garrett* and *Kimel*, to reassert the fundamental importance of

166. *See id.* at 724, 738-40.

167. *Id.* at 724-26 (describing the substantive and enforcement provisions of the FMLA).

168. *See supra* notes 92-126 and accompanying text.

169. *Hibbs*, 538 U.S. at 737-40.

170. 29 U.S.C. § 2612(a)(1)(C).

171. *Hibbs*, 538 U.S. at 724-25. William Hibbs, the plaintiff, sought leave to care for his wife who was recovering from a car accident and surgery. *Id.* at 725. The Department had granted his original request for twelve weeks of FMLA leave to be taken between May and December 1997 as needed. *Id.* Mr. Hibbs did not return to work after August 5, 1997, and, after informing him that his leave had expired, the Department terminated him in November, 1997. *Id.*

172. *Id.* at 725.

173. Hibbs v. Dep't of Human Res., 273 F.3d 844, 858 (9th Cir. 2001).

174. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 725 (2003).

federalism.[175] Congress's abrogation power was recognized next, along with the finding that Congress had made its intent to abrogate state immunity unmistakably clear in the FMLA.[176]

The majority opinion went on to identify the Section Five "enforcement" power as broader than the text of the Fourteenth Amendment itself.[177] Under Section Five, Congress may prohibit some constitutional conduct to prevent unconstitutional behavior.[178]

The majority next cited *Kimel* and *Boerne* to reiterate that the congruence and proportionality test is the proper instrument for determining the validity of a congressional enforcement action pursuant to Section Five.[179] The FMLA "aims to protect the right to be free from gender-based discrimination in the workplace."[180] State sponsored gender discrimination is subject to heightened scrutiny, and will not stand unless the discrimination serves important state interests and the means are substantially related to achieving such interests.[181] The Court then moved to determine whether Congress had adequate evidence of patterns of unconstitutional state behavior.[182]

According to the majority, Congress had sufficient evidence before it showing that states relied on discriminatory stereotypes in the administration of employment leave.[183] The Court cited two Bureau of

175. *See id.* at 726. "For over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against non-consenting states." *Id.* (also citing Coll. Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 669-70 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); Hans v. Louisiana, 134 U.S. 1, 15 (1890)).

176. *Hibbs*, 538 U.S. at 726-27. "The clarity of Congress'[s] intent here is not fairly debatable." *Id.* at 726.

177. *Id.* at 727-28.

178. *See id.* at 728-29. Chief Justice Rehnquist also took this opportunity to repeat that "Congress may not abrogate the States' sovereign immunity pursuant to its Article I power over commerce." *Id.* at 727 (citing *Seminole Tribe*, 517 U.S. at 54). The Chief Justice was responding to a congressional attempt in the FMLA to base abrogation on both Section Five and the Commerce Clause. *See id.* at 727 n.1.

179. *Hibbs*, 538 U.S. at 728. Valid Section 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

180. *Hibbs*, 538 U.S. at 728.

181. *See id.* at 728-29 (citing United States v. Virginia, 518 U.S. 515, 533 (1996)).

182. *Hibbs*, 538 U.S. at 729-33.

183. *Id.* at 730, 737. "Reliance on such stereotypes cannot justify the States' gender discrimination in this area." *Id.* at 728-29 (citing *Virginia*, 518 U.S. at 533). Interestingly, the Chief Justice began his discussion of evidence before Congress by reviewing the long history of state laws limiting women's employment history, along with the supporting Supreme Court precedents. *Hibbs*, 538 U.S. at 729-30. This introduction would seem to suggest that the Court has softened its view on where the judiciary may look to find evidence of state discrimination. *See id.* The use of historical fact and previous precedent seems to fall in line with the Ninth Circuit's interpretation of

Labor Statistics surveys and various testimonies before Congress showing that males received requested leave far less frequently than females.[184] Many pieces of the legislative history cited by the majority were not before the 103rd Congress, however, and were not part of the direct legislative history of the FMLA.[185] Chief Justice Rehnquist defended his use of this evidence as foundational, in that it provided Congress with a common understanding of the problems of gender discrimination in the workplace.[186]

Finally, according to the Court, there was evidence before Congress that even facially nondiscriminatory state laws were applied in a discriminatory manner.[187] Further, the Court reported that the few states with recently enacted leave initiatives fell far short of the necessary, nondiscriminatory standards.[188] Of course, the Court reached opposite conclusions regarding the evidence before Congress in previous cases,[189] and, as a result, the majority moved to distinguish the current analysis of the FMLA from prior precedent.[190]

The Court primarily relied on the different levels of scrutiny afforded to the different discriminatory classifications in order to draw

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Kimel allowing the court to view gender discrimination as a whole, instead of limiting itself to the legislative history. *See* Hibbs v. Dep't of Human Res., 273 F.3d 844, 857 (9th Cir. 2001).

184. *See Hibbs*, 538 U.S. at 730 (citing S. REP. NO. 103-3 at 14-15, *reprinted in* 1993 U.S.C.C.A.N. 3, 16-17). While this evidence related to the private sector, the Chief Justice connected the results to the states by citing a fifty-state survey also before Congress that provided that the leave policies available in the public sector differed little from the private sector. *Id.* at 730 n.3 (citing *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 Education and Labor*, 99th Cong., 2d Sess., 33 (1986) (statement of Meryl Frank, Director of the Yale Bush Center Infant Care Project)).

185. *See, e.g., Hibbs*, 538 U.S. at 731 n.4 (citing H.R. REP. NO. 101-28, pt. 1, p. 30 (1989)).

186. *Id.* at 731 n.5. "Evidence pertaining to parenting leave is relevant here because state discrimination in the provision of both types of benefits is based on the same gender stereotype: that women's family duties trump those of the workplace." *Id.* The Chief Justice cited to evidence before various committees considering both The Parental and Medical Leave Act of 1987 and the Pregnancy Discrimination Act. *Id.* at 731 nn.4-5.

187. *See id.* at 732.

188. *See id.* at 733-34. Seven states provided childcare leave for women only, twelve states provided no leave beyond initial childbirth, adoption, or to care for a seriously ill family member, and many of the remaining states offered no guaranteed leave at all. *See id.* In the Court's opinion Congress could find that such programs would do little to combat the discriminatory stereotypes about the roles of males and females in the workplace and family. *See id.*

189. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

190. *See Hibbs*, 538 U.S. at 735-40.

the distinction.[191] The *Garrett* and *Kimel* cases involved age-based and disability-based discrimination, meaning that a state would only have to show some rational basis to validate its actions.[192] Therefore, in such cases, Congress is forced to not only identify discrimination of the elderly or disabled, but also to find a "widespread pattern of irrational reliance on such criteria."[193] The FMLA, however, seeks to prevent gender discrimination, a classification which must survive heightened scrutiny.[194] Because discrimination based on gender must satisfy more than a rational basis test to be deemed constitutional, "it was easier for Congress to show a pattern of state constitutional violations."[195]

In addition, the Court referenced previous unsuccessful congressional attempts to remove gender discrimination from the workplace to support the holding that the FMLA is congruent and proportional.[196] The history of gender discrimination, taken as a whole, provided Congress with ample evidence of the necessity of the remedial measures contained in the FMLA.[197] The Court also found significant the narrow target and substantial limitations contained in the FMLA.[198] For the first time, the Court, using the above reasoning, held a statute abrogating state sovereign immunity under Section Five of the Fourteenth Amendment congruent and proportional.[199]

2. Viewing the *Hibbs* Decision as Inconsistent with Prior Precedent

The *Hibbs* opinion appears to be an anomaly when compared with previous Supreme Court decisions on Section Five and Commerce

191. *See id.* at 735-37

192. *See id.* at 735.

193. *See id.* (citing *Kimel*, 528 U.S. at 89). The Court did not find a showing of a widespread pattern of reliance on discrimination in the context of either the ADEA or the ADA. *See Kimel*, 528 U.S. at 89; *Garrett*, 531 U.S. at 368.

194. *See Hibbs*, 538 U.S. at 736.

195. *Id.* The Chief Justice compares this decision with previous decisions concerning racial classifications—a type of discrimination that is presumptively invalid. *See id.* (citing South Carolina v. Katzenbach, 383 U.S. 301, 308-13 (1996) (upholding the Voting Rights Act of 1965)).

196. *Id.* at 737. The majority saw Title VII and the Title VII amendment, the Pregnancy Discrimination Act, as unsuccessful attempts at resolving the "difficult and intractable problem." *Id.*

197. *See id.* at 737-38.

198. *See id.* at 738-39. According to the Court, the FMLA, unlike the ADEA or ADA, only applies to "the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship." *Id.* at 738.

199. *Id.* at 740.

Clause abrogation.[200] To reach the holding in *Hibbs*, Chief Justice Rehnquist relied on numerous pieces of evidence showing that Congress had a proper foundation for Section Five abrogation.[201] Much of the evidence relied upon by the majority, however, came from outside the legislative history of the FMLA.[202] The use of material outside of the direct legislative history of the statute seems antithetical to previous precedent.[203]

In *Kimel*, the Court limited its search for evidence before Congress to the legislative history of the ADEA.[204] Similarly, when searching for evidence before Congress in the *Garrett* case, the Court looked only to the legislative history of the ADA, and not to the general history of state discrimination against the disabled.[205] Even more striking is the fact that the *Hibbs* majority relied almost entirely on evidence garnered from the private sector.[206]

In *Hibbs*, the Court connected the evidence of private sector discrimination to the public sector in a footnote describing a fifty-state survey presented to Congress seven years before passing the FMLA, a survey that concerned a different statute.[207] Yet in both *Kimel* and *Garrett* the Court invalidated the statutes at issue because Congress

200. *See* Vikram D. Amar, *The New "New Federalism": The Supreme Court in Hibbs (and Guillen)*, 6 GREEN BAG 2d 349, 351 (2003). Professor Amar argues that the *Hibbs* decision contains at least three major methodological contradictions. *Id.* First, Amar points to the fact that the *Hibbs* court relies on evidence of private sector discrimination to make its determination. *Id.* The professor finds only one explicit reference to state behavior; a reference that, at most, implicates eleven states. *Id.* at 351-52. Second, the Court uses evidence from other statutory provisions to show that Congress had the proper foundation to legislate. *Id.* at 353. And third, Professor Amar points to the result of *Hibbs*, that innocent states will be subject to the prophylactic legislation. *Id.* at 354. The Court's Commerce Clause jurisprudence, however, expressly prohibits the regulation of innocent states. *See id.*

201. *Hibbs*, 538 U.S. at 730-32. "In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation." *Id.* at 735.

202. *See, e.g., id.* at 731 n.5 (relying on testimony before the 100th Congress related to The Parental and Medical Leave Act of 1987).

203. *See, e.g.*, Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (limiting view of evidence to direct legislative history of Title I of the ADA).

204. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88-91 (2000). "A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age." *Id.* at 91.

205. *See Garrett*, 531 U.S. at 370-74. The majority refused to consider "anecdotal accounts" of disparate treatment relied upon by the dissent. *See id.* at 370-71.

206. *See Hibbs*, 538 U.S. at 730-32.

207. *See id.* at 730 n.3. The fifty-state survey was presented to the 99th Congress considering the Parental and Medical Leave Act of 1986. *Id.* According to the survey, public practices in granting leave differed little from private practices. *See id.*

lacked direct evidence of state discrimination.[208] The right at issue may be the distinguishing factor that allows these seemingly irreconcilable decisions to be read together.[209]

B. *Reconciling the Hibbs Decision as a New Piece in the Federalism Puzzle*

Perhaps *Hibbs* is not inconsistent with prior precedent, but only represents a new branch in the tree of federalism. The *Hibbs* decision could be viewed as representing a shift in the burden of proving Section Five constitutionality.[210] Where alleged state discrimination reaches the core of the Fourteenth Amendment, when such classifications are "presumptively invalid" or generate greater than rational basis scrutiny,[211] the burden of proof rests not with Congress, but with the state claiming immunity.

This shift in the burden of proof seems to make sense in the federalist regime, based on the relative ease with which the Court allows Congress to find a pattern of discrimination.[212] When the classification at issue can be defended by a state through identification of a rational basis, Congress is required to discover a "widespread pattern" of state discrimination.[213] Where, however, the classification would be reviewed under heightened scrutiny, it will be "easier for Congress to show a pattern of state constitutional violations."[214] The Court does not specifically identify how easy it would be for Congress, but the result in *Hibbs* seems to suggest that if Congress can show some gender or race discrimination, the burden will fall upon the states to prove their actions

208. *See Kimel*, 528 U.S. at 649-50; *Garrett*, 531 U.S. at 370-71. In *Kimel*, the Court specifically stated that an "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." *Kimel*, 528 U.S. at 649. The Court refused to extrapolate the private sector findings to support a determination of public sector discrimination. *See id.*

209. *See Hibbs*, 538 U.S. at 736 (describing the heightened standard of review afforded gender discrimination).

210. *See* Hibbs v. Dep't of Human Res., 273 F.3d 844, 855-56 (9th Cir. 2001). The Ninth Circuit contrasts the *Hibbs* case with *Kimel* and *Garrett* by referencing a "rebuttable presumption of unconstitutionality for state-sponsored gender discrimination." *Id.* at 855. According to the Ninth Circuit, the burden is on the state in cases of gender discrimination to show that their actions are non-discriminatory. *Id.* at 855-56.

211. *See Hibbs*, 538 U.S. at 737-38 (discussing classifications requiring more than mere rational basis review).

212. *See id.* at 738.

213. *See id.* (describing the *Kimel* and *Garrett* decisions).

214. *Id.* The Court points to its decision upholding the Voting Rights Act of 1965 as evidence of a similar result because racial discrimination is also presumptively invalid. *See id.* (citing South Carolina v. Katzenbach, 383 U.S. 301, 308-13 (1966)).

constitutional.[215]

If this theory does reflect the future of the Court's Section Five analysis, it suggests some practical advice for all of the players involved in the federalism game. The Congress that wishes to exert its abrogation power under Section Five is well-advised to couch the legislation in terms of a classification that would be reviewed under more than a rational basis review. On the other hand, states that desire to avoid losing sovereign immunity will be better off arguing that legislation is not combating unconstitutional discrimination, rather than bickering about the evidence before Congress. Fundamentally, however, the *Hibbs* decision is likely to affect only the narrow band of cases where a suspect classification implicating the core of the Fourteenth Amendment is involved.

IV. Conclusion

The decision in *Hibbs* will not create a stir among the general public. In the end, it is likely that very few involved in the legal profession will even give the case more than a passing glance. And yet, a shift in the balance of power between the two sovereigns in our federalist system would affect the rights of each and every citizen in this Republic.

The current Supreme Court has often acted to constrain the monolithic federal government from encroaching on what is left of the states' authority. The *Hibbs* decision suggests, however, the existence of a line in the sand the Court is not willing to cross. This Court is ready to require more from a state challenging a congressional attempt to remedy discrimination that implicates the core of the Fourteenth Amendment.

Perhaps the distinction between types of discrimination is an artificial one. It is not likely to be much comfort to an individual who faces state-sponsored age discrimination that fellow citizens discriminated on the basis of gender can file actions. It seems that the fundamental principle underlying any society governed by the rule of law, that every right be afforded a proper remedy, is occasionally lost in the fight to save federalism.

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215. *But see* Amar, *supra* note 200, at 353. Professor Amar believes that distinguishing on the basis of the right at issue "cheats a bit on the key issue." *Id.* Amar, referring back to the congruence and proportionality test, states that identifying a more stringent standard of review does not tell us how often the states are violating constitutional rights. *Id.* Professor Amar sees the ultimate number of states in violation of the Constitution as the lodestar in determining the validity of a Section Five abrogation. *Id.* It is important to note that the Professor is not arguing that the Court is right or wrong, but only that it is inconsistent. *See id.* at 351-54.

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