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FAMILY LEAVE POLICIES TRUMP STATES' RIGHTS: *NEVADA DEPARTMENT OF HUMAN RESOURCES v. HIBBS* AND ITS IMPACT ON SOVEREIGN IMMUNITY JURISPRUDENCE

JANA L. TIBBEN*

I. INTRODUCTION

In late May 2003, the top headline of the *Chicago Tribune* proclaimed, "Court bolsters family leave: Justices reject stereotypes; say states not exempt from U.S. law."¹ The headline referred to the United States Supreme Court case *Nevada Department of Human Resources v. Hibbs*,² which held that states could be sued in federal court for money damages for violating the Family Medical Leave Act (FMLA).³ While *Hibbs* likely failed to cause the average reader pause, for legal scholars it was a surprising deviation from the pro-states' rights path of the Rehnquist Court over the last seven years.⁴

The Eleventh Amendment denies federal courts jurisdiction

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1. Jan Crawford Greenburg, *Court Bolsters Family Leave*, CHI. TRIB., May 28, 2003, § 1, at 1. The more recent headlines in sovereign immunity describe the case currently pending before the Supreme Court: *Tennessee v. Lane*, No. 02-1667. The issue in *Lane* is whether Congress has the power to abrogate the states' immunity for violations of Title II of the Americans with Disabilities Act. American Association of People with Disabilities News, *Advocates Call for "Access to Justice" in Tennessee v. Lane and Jones* (Jan. 12, 2004) at www.aapd.com/docs/laneadvocall.html (last visited Feb. 25, 2004). Though this Comment does not fully analyze *Lane*, the author predicts that the *Lane* Court will create a distinction between congressional abrogation of states' immunity under the Due Process Clause and the Equal Protection and rule against Tennessee.

2. 538 U.S. 721 (2003).

3. *Id.*; Greenburg, *supra* note 1, at 1.

4. See J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-End Relationships*, 36 U.C. DAVIS L. REV. 407, 408 (2003) (citing the Court's invalidation of six federal statutes since 1997).

over claims against a state.⁵ This Amendment is central to an understanding of *Hibbs*, because plaintiff Hibbs named the state of Nevada a defendant in a federal court, which the Eleventh Amendment seems to expressly prohibit, yet he prevailed before the Supreme Court.⁶ This Comment will evaluate the significance of *Hibbs*, given the history of the Eleventh Amendment, and attempt to determine the policies underlying the Rehnquist Court's recent Eleventh Amendment decisions.

Part I of this Comment will briefly explain relevant provisions of the Eleventh and Fourteenth Amendments, while analyzing underlying public policy. Part II will examine *Hibbs*, and the problems with the Court's earlier sovereign immunity decisions, which *Hibbs* avoids. Part III evaluates a constitutional amendment, conditional spending measures, and working within the current framework as potential remedies for these problems. Part III also argues that *Hibbs* is a well-grounded decision because it imposes minimal costs on employers, and entitles 4.8 million state employees to legal remedies nearly equal to those of their private sector counter-parts. Part IV then presents several recommendations intended to balance states' rights with federal protection of the rights of individual citizens.

I. BACKGROUND

A. *The Eleventh Amendment: The Lawyer's Amendment*⁷

The phrase "sovereign immunity" is noticeably absent from the plain text of the Eleventh Amendment.⁸ The notion of sovereign immunity derives from the English common law belief that "the king can do no wrong."⁹ Given the American belief that only the People are sovereign, this notion has suffered an awkward translation into American democracy.¹⁰

5. U.S. CONST. amend. XI.

6. *Hibbs*, 123 S. Ct. 1972.

7. Ronald D. Rotunda, *The New States' Rights, the New Federalism, the New Commerce Clause, and the Proposed New Abdication*, 25 OLGA. CITY U.L. REV. 869, 909 (2000). Rotunda suggests that this label comes from the ability of a skilled lawyer to conquer Eleventh Amendment objections with "form" over "substance." *Id.* at 909 n.203. See also *infra* note 18 and accompanying text (discussing ways around the Eleventh Amendment).

8. The Eleventh Amendment reads, "The judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

9. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 95 (1996) (Stevens, J., dissenting) (critiquing the English underpinnings of sovereign immunity).

10. Congress approved the Eleventh Amendment within three weeks of the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. 419 (1793), which

Technically, the Eleventh Amendment operates as a jurisdictional bar on federal courts' ability to entertain suits when the state is a named defendant.¹¹ The Court's principle-based sovereign immunity, in contrast, is a more encompassing doctrine that a defending state may invoke to free itself from prospective monetary judgments in both state and federal courts.¹²

held that an action of assumpsit could lie against Georgia. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION*, 395 (3d ed. 1999). Scholars and current Supreme Court Justices have debated at length whether the Eleventh Amendment applies only to diversity jurisdiction, or whether it extends to federal question jurisdiction as well. *Id.* at 396. The Rehnquist majority applies the Eleventh Amendment to both cases. *Id.* The dissenters, in contrast, believe it only applies to diversity jurisdiction, because it was passed to undo the *Chisholm* decision, which was founded on diversity jurisdiction. *Id.*; see also *infra* notes 16-20 and accompanying text (discussing the proper interpretation of the Eleventh Amendment).

11. Defining the "state" is itself an issue in sovereign immunity cases. See *Ramirez v. P.R. Fire Serv.*, 715 F.2d 694, 696 (1st Cir. 1983) (finding the Commonwealth of Puerto Rico a state for statutory purposes). Courts broadly construe "states" to include the "arm[s] of the states." See *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 536 (2002) (noting that a state university can be construed to be an "arm of the State"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 630 (1999) (finding a state-chartered savings bank entitled to sovereign immunity protection); *Lake County Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 393, 406 (1979) (finding an agency created by two states to coordinate land development, and the individual members of that agency, immune from suit); *Fed. Mar. Comm'n v. S. C. State Ports Auth.*, 122 S. Ct. 1864, 1867 (2002) (finding a state-run port immune from administrative proceedings). John T. Noonan, Jr., a senior Judge on the Ninth Circuit Court of Appeals, points out that a wide range of activities are immune from review under such a broad definition of "state." JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES*, 167-68 (2002). For instance, California state agencies immune under the Eleventh Amendment include: the Barbering and Cosmetology Program; the California School for the Blind; the California School for the Deaf; the Horse Racing Board; and the lottery. *Id.* But see *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (finding an Ohio public school board not an arm of the state, based on Ohio law defining "state" to exclude "political subdivisions," despite its dependence on state funds and its power to issue bonds and levy taxes). Immunity does not extend to municipalities, *Alden v. Maine*, 527 U.S. 706, 756 (1999), or counties, *Lincoln Co. v. Luning*, 133 U.S. 529, 530 (1890).

12. Justice Rehnquist refers to it as "the Eleventh Amendment, and principle of state sovereignty which it embodies." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976); see *Seminole Tribe*, 517 U.S. at 95 (referring to sovereign immunity as "judge-made law," as opposed to a constitutional mandate). The majority in *Alden* reasoned that, "[t]o rest on the words of the Amendment alone would be to engage in the type of ahistorical literalism we have rejected." *Alden*, 527 U.S. at 730 (1999). Justice Kennedy further concluded that the Constitution was silent on the issue of sovereign immunity in state court because "no one, not even the Constitution's most ardent opponents" believed the Constitution would require states to defend themselves in their own courts. *Id.* at 741.

The Justices in the Rehnquist Court who typically dissent in sovereign immunity decisions (Stevens, Souter, Ginsburg, and Breyer) generally argue for a strict constructionist's interpretation of the Eleventh Amendment.¹³ They argue the Eleventh Amendment only deprives federal courts of subject matter jurisdiction when a state is a defendant sued by a citizen of a different state.¹⁴ Only recently have these Justices accepted the *stare decisis* of the Court's equation of principle-based sovereign immunity with the Eleventh Amendment.¹⁵

The tug-of-war over the "proper" interpretation of the Eleventh Amendment began as early as 1890 in *Hans v. Louisiana*.¹⁶ The *Hans* Court understood the Eleventh Amendment to bar federal courts from hearing suits against a state by its own citizens, reasoning that it would be "anomalous" to treat citizens who sue their own state differently than citizens of one state who sue another state.¹⁷ In the last one hundred years, the Supreme Court has carved out some significant exceptions to the general immunity principle.¹⁸ Still wrestling with the text of the Eleventh Amendment a century after *Hans*, the Supreme Court held in *Alden v. Maine*¹⁹ that this Amendment bars suits brought by a citizen against her state in state court, despite the Amendment's silence on this matter.²⁰

13. See generally dissents in cases discussed *infra* note 22.

14. See generally dissents in cases discussed *infra* note 22.

15. See dissents in cases discussed *infra* note 22, in contrast with dissent in *Hibbs*, 123 S. Ct. 1986-94 (displaying a break with earlier discussions as to the proper interpretation of the Eleventh Amendment).

16. 134 U.S. 1 (1890).

17. *Id.* at 10.

18. There are several ways around the Eleventh Amendment. A state can consent to be sued or be found to have waived its immunity, though courts are reluctant to find such a waiver. *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 274 (1997). The federal government can sue an unconsenting state in federal court. *Seminole Tribe*, 517 U.S. at 71. In 2000, the federal government brought suit under the Americans with Disability Act and the ADEA in about two percent of cases filed. Brent W. Landau, *State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws*, 39 HARV. J. ON LEGIS. 169, 194-95 (2002). Also, though the state is the real party in interest, a citizen can get an injunction against a state officer, in his or her individual capacity, "even when the remedy will enjoy the implementation of an official state policy." CHEMERINSKY, *supra* note 10, at 412. Finally, when a private citizen names a state official as a defendant, a federal court can award prospective, though not retroactive, relief. *Edelman v. Jordan*, 415 U.S. 651, 656-59 (1974).

19. 527 U.S. at 706.

20. *Id.* at 712. The *Alden* Court began its analysis by reviewing the Eleventh Amendment's history and Congress' outrage over *Chisholm*. *Id.* at 719-25. In response to Congress' fierce reaction to *Chisholm*, the Court wrote, "we have looked to 'history and experience, and the established order of things' . . . rather than 'adhering to the mere letter' of the Eleventh Amendment." *Id.*

B. *The New Federalism: A Streak of 5-4 Decisions*

The Court's recent sovereign immunity decisions are part of "the new federalism": a trend toward increasing states' rights, while minimizing Congress' power to regulate the states.²¹ Recent sovereign immunity decisions,²² most of which were decided 5-4, are similar in that the Supreme Court, pursuant to *Marbury v. Madison*,²³ has continually asserted itself as the final voice in constitutional interpretation of Congress' ability to subject the states to monetary civil judgments.²⁴ In the past seven years, the Court has held that the Eleventh Amendment bars suits against states under the following statutes: the Religious Freedom Restoration Act,²⁵ the Indian Gaming Regulatory Act,²⁶ the Age Discrimination in Employment Act of 1967,²⁷ the Trademark Act of 1946,²⁸ the Violence Against Women Act,²⁹ the Gun Free School

at 727 (citations omitted).

21. President Richard Nixon proposed a "new federalism" in 1969 by saying: "It is time for a New Federalism in which power, funds, and responsibility will flow from Washington to the states and to the people." Harry N. Scheiber, *Redesigning the Architecture of Federalism – An American Tradition: Modern Devolution Policies in Perspective*, 14 YALE J. ON REG. 227, 288 (1996). The two most significant themes of the new federalism are a "reverence toward state sovereignty and protectiveness toward traditional state functions." Daniel A. Farber, *Symposium: Reflections on United States v. Lopez: The Constitution's Forgotten Cover Letter: An Essay on New Federalism and the Original Understanding*, 94 MICH. L. REV. 615, 618 (1995). New federalism appears to have evolved gradually from Rehnquist's majority opinion in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which held that the federal government intruded upon the states' sovereignty when it entitled state employees to a federal minimum wage. *Id.* at 852. See Farber, *supra*, at 618.

22. See generally *Marine Comm'n*, 122 S. Ct. at 1864; *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *Alden*, 527 U.S. at 706; *Florida Prepaid*, 527 U.S. at 627; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Seminole Tribe*, 517 U.S. at 44.

23. 5 U.S. at 137 (1803).

24. See cases cited *supra* note 22. The Court's consistent 5-4 opinions reflect the dissent's hesitancy to apply *stare decisis* in sovereign immunity cases. At one point a dissenting Justice seemed to suggest that if given the opportunity, he would overrule *Seminole Tribe*. See *Kimel*, 528 U.S. at 98-99 (Stevens, J., dissenting) (writing, "The kind of judicial activism manifested in cases like *Seminole Tribe* . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises").

25. *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

26. *Seminole Tribe*, 517 U.S. at 47.

27. *Kimel*, 528 U.S. at 66.

28. *College Savings Bank*, 527 U.S. at 668.

29. *Morrison*, 529 U.S. at 605.

Zones Act,³⁰ the Patent and Plant Variety Protection Remedy Clarification Act,³¹ the Trademark Remedy Clarification Act,³² the Fair Labor Standards Act of 1938,³³ the Age Discrimination in Employment Act,³⁴ and the Americans with Disabilities Act.³⁵

Justices Rehnquist, Scalia, Kennedy, O'Connor, and Thomas broadly construe the Eleventh and Tenth Amendments, and narrowly construe Congress' power to regulate the states under the Commerce Clause and the Fourteenth Amendment.³⁶ These Justices reason that the states' sovereign immunity is grounded in the states' dignity as co-equal players in our federal system.³⁷ They envision the states functioning as laboratories of democracy, able to conduct unique social experiments that fit with the culture of their constituencies.³⁸ These Justices fear the tyranny of the federal government, and insist that the states retained certain traits of sovereignty upon the ratification of the Constitution.³⁹

30. *United States v. Lopez*, 514 U.S. 549, 551 (1995).

31. *Florida Prepaid*, 527 U.S. at 631.

32. *College Savings Bank*, 527 U.S. at 666.

33. *Alden*, 527 U.S. at 711-12.

34. *Kimel*, 528 U.S. at 66.

35. *Garrett*, 531 U.S. at 360.

36. *See id.* (holding that employees of the state of Alabama may not sue the State for the State's failure to comply with Title I of the Americans with Disabilities Act).

37. Justice Rehnquist wrote, "[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden*, 527 U.S. at 748.

38. This idea originates with Justice Brandeis, who wrote:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens chose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

39. The *Alden* Court noted that the states would not have ratified the Constitution if it meant jeopardizing their status as sovereigns. *Alden*, 527 U.S. at 727. The states were heavily indebted from the Revolutionary War and feared being haled into court on those debts. CHEMERINSKY, *supra* note 10, at 391. The belief in states' immunity was also present among the Founding Fathers, as Alexander Hamilton wrote, "It is inherent in the nature of sovereignty not to be amendable to the suit of an individual without its

They see similarities between the English and American historical legal traditions of upholding state-based immunity.⁴⁰ Though it is rarely explored in their published opinions, these Justices' position avoids placing excessive financial strain on the states, as an immune state does not sacrifice its time and administrative resources to lawsuits, and its treasuries are protected from hefty civil judgments.⁴¹

Justices Stevens, Souter, Ginsburg, and Breyer, on the other hand, typically in dissent, acknowledge the pervasiveness of the social ills that prompted congressional action, and emphasize that Congress should not be on a short leash in remedying these socio-economic problems.⁴² These dissenters assert that states sometimes fail to protect their citizens' civil liberties, and that Congress is entitled to require state compliance with federal law.⁴³

C. Whittling Away at Congressional Power: The Court Ends Congress' Ability to Abrogate States' Immunity through the Commerce Clause, and Narrows the Scope of Congress' Power to Abrogate Immunity Pursuant to Section 5 of the Fourteenth Amendment

One cannot understand the Court's sovereign immunity jurisprudence without understanding Congress' role in determining when a state can be sued.

1. Congress Cannot Act Through the Commerce Clause to Abrogate the States' Sovereign Immunity

In the 1996 decision *Seminole Tribe of Florida v. Florida*,⁴⁴

consent." THE FEDERALIST NO. 81, at 2 (Alexander Hamilton).

40. In England the King could not be subject to suit in his own court. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 142 (1984). Immunity in England was extended to the King's subjects since the King, it was believed, would never sanction unlawful behavior. *Id.*

41. Framed in terms of competing fiscal policies, the question in a sovereign immunity case becomes this: who will pay, the injured party or the taxpayers? The Court fully acknowledged the policy of protecting state treasuries in *Edelman v. Jordan*, when it reasoned that an award of retroactive employee benefits violated the Eleventh Amendment due to its unexpected impact on the general revenue of the State of Illinois. 415 U.S. 651, 667-69 (1974). Justice Kennedy's dissent in *Hibbs* also mentions the states' interest in their "fiscal integrity." *Hibbs*, 123 S. Ct. at 1986.

42. See *Garrett*, 531 U.S. at 381-88 (outlining such an argument). Justice Breyer writes, "it is difficult to understand why the Court, which applies a '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 citations omitted).

43. See cases cited *supra* note 22 (making this argument in dissent).

44. 517 U.S. 44 (1996). *Seminole Tribe* expressly overruled the plurality opinion of *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), in which the Court

the Court held that the Indian Commerce Clause, or other Article I powers, are not valid means of abrogating state sovereign immunity.⁴⁵ The *Seminole Tribe* Court believed that the courts' Article III power to decide "cases or controversies" was limited by the Eleventh Amendment, and that Congress could not use Article I to change this relationship.⁴⁶ The Fourteenth Amendment, however, was adopted after the Constitution was in place, and must be read as altering the pre-existing balance of power.⁴⁷ The Court's sovereign immunity decisions since *Seminole Tribe* consistently reaffirm this reasoning.⁴⁸

2. An Increasingly Narrow Reading of Congress' Section 5 Powers

Section 5 incorporates by reference Section 1, the substantive provision of the Fourteenth Amendment.⁴⁹ One of the first cases to clarify Section 5 powers in relation to state sovereign immunity was *Fitzpatrick v. Bitzer*.⁵⁰ The plaintiffs in *Fitzpatrick*, employees of the state of Connecticut, argued that Connecticut's discriminatory retirement policies violated Title VII of the Civil

just six years earlier held that Congress' use of Article I was a valid means of abrogating state sovereign immunity. *Seminole Tribe*, 517 U.S. at 66. *Seminole Tribe* left open the question of how Congress can require states' compliance with federal law outside abrogating their immunity. CHEMERINSKY, *supra* note 10, at 444. It also left open the question of how to determine when Congress is acting under its Commerce Clause powers, as opposed to its Section 5 powers. *Id.* Thus, attorneys asking the Supreme Court to uphold congressional abrogation of a state's immunity now argue a statute was passed under Section 5, even if it has substantial effects on commerce. *Contrast Morrison*, 529 U.S. at 598 (discussing Congress' power to pass the Violence Against Women Act under both the Commerce Clause and Section 5 of the Fourteenth Amendment, and ultimately invalidating provisions of the Act on Section 5 grounds) *with* *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (invalidating an Atlanta motel's racially discriminatory renting policy solely on Commerce Clause grounds, avoiding an analysis of Congress' Section 5 powers to enact the same legislation).

45. *Seminole Tribe*, 517 U.S. at 47.

46. *Id.* at 72-73.

47. *Id.* at 59.

48. *See, e.g., Garrett*, 531 U.S. at 364; *Kimel*, 528 U.S. at 80 (affirming *Seminole Tribe's* reasoning).

49. The text reads, "Congress shall have the power to enforce by appropriate legislation the substantive provisions of this article." U.S. CONST. amend. XIV, § 5. Section 1 reads, in part,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. § 1.

50. 427 U.S. 445 (1976).

Rights Act of 1964.⁵¹ Justice Rehnquist interpreted the Fourteenth Amendment as transferring power from the states to Congress,⁵² labeled Congress' Section 5 powers "plenary,"⁵³ and held that Congress had the power under Section 5 to authorize suits against a state.⁵⁴

Though not an Eleventh Amendment case, the 1966 case of *Katzenbach v. Morgan*⁵⁵ also contributed significantly to an understanding of "appropriate" Section 5 legislation. The issue in *Morgan* was whether Congress could use its Section 5 powers to enact section 4(e) of the Voting Rights Act of 1965, which prohibited the enforcement of New York's discriminatory voting laws.⁵⁶ The Voting Rights Act (VRA) declared that anyone who had finished the sixth grade could not be denied the right to vote, regardless of his or her competency in the English language.⁵⁷ Prior to the VRA, New York had conditioned the right to vote on a basic understanding of English, which precluded many Puerto Rican immigrants living in New York from voting.⁵⁸

In upholding the Voting Rights Act, the Court took a very broad, deferential view of Congress' Section 5 powers,⁵⁹ characterizing Section 5 as a "positive grant of legislative power,"⁶⁰ which permitted Congress to use discretion in ascertaining the types of legislation necessary "to secure the guarantees of the Fourteenth Amendment."⁶¹ Exemplifying judicial restraint, Justice Brennan wrote, "It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations."⁶²

51. *Id.* at 448.

52. *Id.* at 454.

53. *Id.* at 456.

54. *Id.*

55. 384 U.S. 641 (1966).

56. *Id.* at 646-47.

57. *Id.* at 643-44.

58. *Id.* at 644.

59. *Id.* at 650. Echoing *McCulloch v. Maryland*, Justice Brennan wrote, "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

Id.

60. *Id.* at 651.

61. *Id.*

62. *Katzenbach*, 384 U.S. at 653. The considerations were: the breadth of the discrimination at issue, the effectiveness of state law to combat that discrimination, the presence of alternate means to remedy the discrimination, and the state's interests in requiring English literacy. *Id.* The Court also looked to the *McCulloch v. Maryland* standard to determine what constitutes

The *Morgan* Court's Section 5 dictum was later restricted by the 1970 plurality opinion in *Oregon v. Mitchell*.⁶³ In *Mitchell*, the Court struck down those parts of the Voting Rights Act Amendments of 1970 that created state and local voting requirements, while affirming Congress' authority to set age and residency requirements for national elections.⁶⁴ Seven Justices in *Mitchell* concluded that Congress does not have an unchecked license to determine the substantive provisions of the Equal Protection Clause, thereby restricting Congress' Section 5 power more than *Morgan* did four years earlier.⁶⁵

The Court's deferential interpretation of Congress' Section 5 powers in *Morgan* ended in the 1996 case of *City of Boerne v. Flores*.⁶⁶ The plaintiff in *Boerne* was the Catholic archbishop of San Antonio, who sued the City of Boerne for denying him a building permit.⁶⁷ The archbishop and his parish had determined that it was necessary to expand their church facilities to meet their congregation's growing population.⁶⁸ Earlier, however, the City of Boerne had passed an ordinance that allowed the church to be declared an historic landmark.⁶⁹ The archbishop sued, alleging that the Religious Freedom Restoration Act (RFRA) provided him relief.⁷⁰ The Court disagreed.⁷¹ Finding the RFRA inappropriate

"appropriate" legislation under Section 5. *Id.* at 650. This three-part standard asked: whether the legislation enforces the Equal Protection Clause, whether it is "plainly adapted to that end," and whether it is true to the letter and spirit of the Constitution. *Id.*

63. 400 U.S. 112 (1970); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 19.3 (3d ed. 1999).

64. *Mitchell*, 400 U.S. at 117-18.

65. ROTUNDA & NOWAK, *supra* note 63, at 10.

66. 521 U.S. 507 (1997). *Boerne* does not mention the Eleventh Amendment because plaintiff Manuel Flores sued the City of Boerne, yet it is significant, like *Morgan*, for its definition of Congress' Section 5 powers. *Id.* at 532.

67. *Id.* at 512.

68. *Id.*

69. *Id.*

70. *Id.* Congress passed the RFRA to make laws truly neutral to religion, after finding that some supposedly "neutral" laws burdened religious minorities by making them conform to the majority culture. *Id.* at 515. The RFRA required the government to demonstrate a "compelling justification" for burdening religious minorities. *Id.* Congress passed the RFRA in response to the Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). *Id.* at 512. The plaintiffs in *Smith* were Native Americans who were denied unemployment benefits after being fired for ingesting peyote as part of a Native American ritual. *Smith*, 494 U.S. at 874. The *Smith* court ruled that a democratic government is not required to accommodate all religious practices, even if some religious minorities suffer. *Id.* at 890. The *Boerne* Court also referenced its 1963 opinion, *Sherbert v. Verner*, "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his

Section 5 legislation, the Court concluded that Section 5 legislation must be remedial in nature, and cannot be used to enlarge citizens' rights.⁷² Justice Kennedy eschewed Congress' reliance upon "anecdotal evidence" as a basis for creating the RFRA's broad, substantive right for all persons to be free from the laws of the social majority that may be burdensome to religious minorities.⁷³ He conceded that preventative measures could be appropriate remedial measures, but added famously, "there must be a congruence between the means used and the ends to be achieved."⁷⁴ Justice Kennedy then declared, "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."⁷⁵ *Boerne* thus answered the question of whether Congress has the power under Section 5 to determine the substance of constitutional amendments with a resounding "no."⁷⁶

The Court narrowly defined Congress' Section 5 powers again in *United States v. Morrison*,⁷⁷ when it held that neither the Commerce Clause nor Section 5 granted Congress the power to create a federal civil remedy for victims of gender-based violence.⁷⁸ Under its Section 5 reasoning, the Court found that the Violence Against Women Act (VAWA) attempted to regulate private

religious beliefs, except where the State's interest is 'compelling'... contradicts both constitutional tradition and common sense." *Boerne*, 521 U.S. at 513.

71. *Id.* at 511.

72. *Id.* at 522-29. Though *Boerne* first articulated the "congruence and proportionality" test, it never expressly overruled *Morgan*. See generally *Boerne*, 521 U.S. 507. Rather, *Boerne* distinguished the pervasiveness of racial discrimination in the 1960s, with the limited religious discrimination on the congressional record. *Id.* at 526-27, 530.

73. The Court noted that Jewish and Hmong persons are subject to autopsies, which are against their religious beliefs. *Id.* at 531.

74. *Id.* at 530. The Fifth Circuit has rephrased this test as: the Court must determine what type of constitutional violation the statute was passed to prevent, and then the congressional record must demonstrate actual violations large enough to justify the depth and breadth of the statute. *Kazmier v. Widmann*, 225 F.3d 519, 524 (5th Cir. 2000).

75. *Boerne*, 521 U.S. at 532.

76. See ROTUNDA & NOWAK, *supra* note 63, at 11 (answering this question in the First Amendment context of *Boerne*).

77. 529 U.S. 598 (2000).

78. *Morrison*, 529 U.S. at 602. Christy Brzonkala argued she was raped by two Virginia Tech football players, including the defendant Morrison. *Id.* She sued under the Violence Against Women Act, 42 U.S.C. § 13981, which created a private cause of action for crimes of violence motivated by gender. *Id.* at 604. Congress expressly declared that §13981 was enacted pursuant to its Section 5 and Section 8 powers. *Id.* at 607. The Court recognized that Congress had thoroughly documented the societal costs of gender-motivated violence. *Id.* at 620.

conduct, while the Fourteenth Amendment only authorized Congress to regulate state action.⁷⁹ Morrison argued that since several states were derelict in their duties to protect sexual assault victims, the Violence Against Women Act was “appropriate” federal protection; the Court rejected this argument.⁸⁰ It concluded that because the VAWA’s remedy was directed at private actors, it was not “corrective in its character, adapted to counteract and redress the operation of such prohibited state laws or proceedings of state officers.”⁸¹

D. The Complex, Evolving Relationship Between Section 5 and the Eleventh Amendment in Two Recent Anti-Discrimination Cases

The Supreme Court has established a two-part test for evaluating Congress’ authority to abrogate sovereign immunity: (1) did Congress intend to abrogate the states’ immunity,⁸² and (2) did Congress validly exercise its power in doing so?⁸³ In 2000, the Court applied this framework in *Kimel v. Florida Board of Regents*.⁸⁴ Justice O’Connor’s opinion found that the Age Discrimination in Employment Act (ADEA)⁸⁵ proscribed little

79. *Id.* at 626. Brzonkala tried to argue, based on dictum in the earlier case of *United States v. Guest*, 383 U.S. 745 (1966), that the Fourteenth Amendment could reach private actors, but the Court explicitly rejected this argument. *Id.* at 623-24.

80. The argument in *Morrison* was not that the black letter laws of the states were discriminatory, but that some states were discriminatorily administering their laws. *Morrison*, 529 U.S. at 619-20.

81. *Id.* at 625.

82. Intent can be express or implied. CHEMERINSKY, *supra* note 10, at 438-40. The Court, however, is reluctant to find implied intent to abrogate. *Id.* at 438. Congress’ intent must usually be “an unequivocal expression of congressional intent to ‘overturn the constitutionally guaranteed immunity of the several States.’” *Atascadero State Hosp. v. Scalon*, 473 U.S. 234, 240 (1985).

A state can waive its immunity, even though in theory, immunity is a bar on subject matter jurisdiction. *Id.* at 239-40. A waiver must be “stated ‘by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.’” *Id.* A state may consent to being sued in its own courts, yet not waive its immunity in federal court. CHEMERINSKY, *supra* note 10, at 432. When acting pursuant to its Section 5 authority, Congress abrogates the states’ right of immunity in either court system. *Scanlon*, 473 U.S. at 238.

83. *Seminole Tribe*, 517 U.S. at 55. The *Boerne* congruence and proportionality test falls under this power analysis. See *Boerne*, 521 U.S. at 530 (explaining the two prongs of this test).

84. 528 U.S. 62 (2000). This Comment focuses on understanding *Hibbs* in relation to *Garrett* and *Kimel* because all three opinions involve federal anti-discrimination laws.

85. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000). This Act prohibits an employer from refusing to hire, terminating, or otherwise discriminating against, a person in terms of pay or employment on

unconstitutional conduct and failed the “congruence and proportionality” test of *Boerne*.⁸⁶ The Court found that Congress’ intent to abrogate was clear,⁸⁷ but it put the burden on Congress to justify, with evidence, its conclusion that states were unconstitutionally discriminating on the basis of age, so as to prove that the ADEA was truly remedial.⁸⁸ The Court ruled that Congress’ showing was subject to rational basis review, and it found the provision of the ADEA subjecting the states to suit “so unrelated to the achievement of any combination of legitimate purposes that [the Court] can only conclude that the [government’s] actions were irrational.”⁸⁹ Remarkably, O’Connor labeled the ADEA an “unwarranted response to a perhaps inconsequential problem.”⁹⁰

The following year, the Court again sided with the states in *Board of Trustees of the University of Alabama v. Garrett*.⁹¹ Patricia Garrett worked as the Director of Nursing at the University of Alabama’s Birmingham Hospital when doctors diagnosed her with breast cancer in 1994.⁹² After leaving the Hospital for a year to battle the disease, she returned to work only to find that she had been demoted from her position as Director of Nursing to “nurse manager,” a lower paying position.⁹³ Garrett sued the University, seeking money damages under Title I of the Americans with Disabilities Act (ADA).⁹⁴ Though, again, congressional intent to abrogate the states’ immunity was clear, the Supreme Court held that the states could not be haled into court for violating the ADA because Title I failed the Court’s “congruence and proportionality” test.⁹⁵ Thus, despite a plethora

the basis of age. *Id.* § 623. Most of the provisions in this Act protect only individuals who are at least forty years old. *Id.* § 631. See *Kimel*, 528 U.S. at 66 (referencing 29 U.S.C. § 623(a)(1)). In its definition of “employer,” Congress included states, state agencies, or subdivisions of the State. 29 U.S.C. § 630(b) (2000). One caveat to this statute is that an employer may discriminate on the basis of age, if age is a “bona fide occupational qualification reasonably necessary to the normal operation of the particular business.” *Id.* § 623(f)(1).

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

87. *Id.* at 75-78.

88. In its analysis, the Court examined the ADEA’s legislative history. *Id.* at 89-91. It found Congress’ reliance upon newspaper articles, letters from the states, and a 1966 report on age discrimination in California an inadequate basis to on which subject the states to suit for violations of the ADEA. *Id.*

89. See *Kimel*, 528 U.S. at 84 (applying the rational basis test, which § 623(a)(1) of the ADEA failed).

90. *Id.* at 89.

91. 531 U.S. 356 (2001).

92. *Id.* at 362.

93. *Id.*

94. *Id.*

95. *Id.* at 374. Attorneys for the State of Alabama argued the ADA was unnecessary because “all 50 states have their own anti-discrimination laws.”

of evidence to the contrary, the Court concluded that the evil of state-sponsored discrimination against persons with disabilities was not so pervasive as to permit Congress to remedy its effects by subjecting states to suit.⁹⁶

III. ANALYSIS

A. A New Quirk in Sovereign Immunity Jurisprudence: Hibbs

The most recent sovereign immunity decision is *Nevada Department of Human Resources v. Hibbs*.⁹⁷ At issue in *Hibbs* was whether Congress' enactment of the Family and Medical Leave Act of 1993,⁹⁸ which allows employees to take up to twelve weeks paid leave to care for a sick family member or a newborn, was enforceable against a state should it fail to honor the Act.⁹⁹ In

Geraldine Sealey, *Court Hears Disability Case: Justices Weigh States' Rights vs. Civil Rights* (Oct. 11, 2001) available at abcnews.go.com/sections/us/DailyNews/scouts_ada001011.html (last visited Nov. 1, 2002).

96. See *infra* note 107 (discussing congressional findings in *Garrett*). In reaching this conclusion, the *Garrett* court arguably applied a strict scrutiny review under the guise of a rational basis test. See Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court's "Strict Scrutiny" of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091, 1105 (2001) (writing "by restraining Congress' authority, the Court has given itself an unrestrained role, in which legislation whose subject would receive limited judicial review were it passed by a state, will receive the strictest scrutiny when passed by the federal government"). Compare *Garrett*, 531 U.S. 356 with *Boerne*, 521 U.S. at 519-20 (writing in *Boerne*, "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed.").

97. 123 S. Ct. 1972 (2003). Hibbs was an employee of the State of Nevada when he requested leave, under the FMLA, to care for his wife as she recovered from a car accident and resulting surgery. *Id.* at 1976. The Nevada Department of Human Resources granted Hibbs' request for twelve weeks of leave, but later informed Hibbs that he had exhausted his leave and must return to work. *Id.* Hibbs did not return to work, was fired, and sued Nevada under the FMLA. *Id.* The State argued that it was immune from suit under a broad interpretation of the Eleventh Amendment and under a narrow construction of Congress' power under Section 5 of the Fourteenth Amendment. See Brief for the Petitioner, *Nev. Dept. of Human Res. v. Hibbs*, 123 S. Ct. 1972 (2003) (No. 01-1368). Hibbs argued not with the Court's century-long interpretation of the Eleventh Amendment, but rather, that the FMLA was a "carefully crafted . . . remedy" which met the Court's rigorous congruent and proportional test. Brief for Respondent William Hibbs at *11-15, *Nev. Dept. of Human Res. v. Hibbs*, 123 S. Ct. 1972 (2003) (No. 01-1368).

98. 29 U.S.C. §§ 2601-2654 (2000).

99. *Id.* § 2612(a)(1). Under the FMLA, an annual twelve weeks of leave are permitted:

1993 Congress enacted the FMLA, with an express intent to remedy the gender discrimination in the workplace that results from the expectation that women bear a disproportionate share of caring for their families.¹⁰⁰ The family leave provisions of the FMLA applied equally to qualified male and female employees.¹⁰¹

The Supreme Court granted certiorari to resolve a split in the circuits regarding Congress' power to open the states to suits for violation of the FMLA.¹⁰² In evaluating *Hibbs*' case, the Supreme Court found that because the FMLA involved gender discrimination, it warranted heightened scrutiny.¹⁰³ The Court then accepted Congress' findings of state-based discriminatory policies, found that the states could not overcome their burden of justifying these policies, and concluded that the FMLA was valid Section 5 legislation.¹⁰⁴

B. Public Policies Underlying the Court's Decision in Hibbs

The most perplexing question *Hibbs* raises is how the Court can reconcile its opinion with *Garrett* and *Kimel*, given the similarities in the legislative records among these cases. The *Hibbs* Court's answer is that state policies evidencing gender discrimination are subject to intermediate scrutiny.¹⁰⁵ However,

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

(B) Because of the placement of a son or daughter with the employee for adoption or foster care;

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition;

(D) Because of a serious health condition that makes the employee unable to perform functions of the position of such employee.

Id.

100. 29 U.S.C. § 2601 (2000). Congress' reasoning was that employers are sometimes reluctant to hire women for fear that they will become pregnant and want to stay home with their children. *See Kazmier*, 225 F.3d at 528 (noting that this legislation may have the unintended effect of reinforcing such fears).

101. *See* 28 U.S.C. § 2601(a)(2) (2000) (indicating that both fathers and mothers should be available to "participate in early childrearing").

102. *Hibbs*, 123 S. Ct. at 1976.

103. *Id.* at 1978.

104. *Id.* at 1978-81. The Ninth Circuit had previously held the FMLA was valid section 5 legislation. *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 870 (9th Cir. 2001). The Fifth Circuit in *Kazmier*, reached the opposite conclusion. *Kamizer*, 225 F.3d at 528. The *Kazmier* court applied *Kimel* and found that Congress intended to abrogate the states' immunity, but that it lacked this power. *Id.* at 528. The *Kazmier* Court considered 29 U.S.C. §§ 2612(a)(1)(C) under a congruent and proportional analysis, then evaluated U.S.C. §§ 2612(a)(1)(D) under the same test. *Id.* at 525.

105. *Hibbs*, 123 S. Ct. at 1978. Intermediate scrutiny review asks whether the statute addresses "important governmental objectives" and whether the

Hibbs' case concerned care for his wife, not gender discrimination; the Court could therefore have applied its traditional rational basis review.¹⁰⁶ Instead of taking a hostile look at congressionally assembled evidence of gender discrimination, the Court showed more deference to Congress than its earlier sovereign immunity decisions.¹⁰⁷ It is puzzling that the Court, given its trend toward states' rights, suddenly deviated from its states' rights opinions. This Comment suggests that Justices Rehnquist and O'Connor, the only Justices who made an unpredictable shift in this case, were persuaded to allow Congress to abrogate the states' immunity under the FMLA on public policy grounds.¹⁰⁸

Justice Rehnquist has long discussed the enhancement of states' rights as an important and desirable goal.¹⁰⁹ Some may argue that Justice Rehnquist's and O'Connor's positions softened in response to scholarly criticism that the Court's sovereign immunity decisions were harming Congress' ability to enact meaningful equal protection laws.¹¹⁰ Others may argue that the

means employed are "substantially related to the achievement of those objectives." *Id.*

106. *Id.* at 1981. Hibbs claim was brought under 29 U.S.C. § 2612(a)(1)(C). *Id.* at 1976. The Court could have followed *Kazmier's* approach and considered separately the congruent and proportional basis for § 2612(a)(1)(A) and § 2612(a)(1)(B). See *supra* note 104 (explaining that the *Kazmier* court took such an approach).

107. *Hibbs'* analysis rests on the pervasiveness of state-sponsored gender discrimination in the workplace. *Hibbs*, 123 S. Ct. at 1978-80. Yet the evidence in *Hibbs* does not differ significantly from that in *Garrett*. Congress' findings of facts indicated that, "37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies." *Id.* at 1979. From this fact the *Hibbs* Court quickly accepted the congressional conclusion that "the proportion and construction of leave policies available to the public sector employees differs little from those offered private sector employees." *Id.* at n.3. In contrast, in *Garrett*, Justice Breyer's dissent observed, "There are roughly 300 examples of discrimination by state governments themselves in the legislative record." *Garrett*, 531 U.S. at 379 (emphasis added). Yet, despite these facts, the *Garrett* Court reasoned that if the states employ over 4.5 million people, then with only 300 examples, Congress "assembled only . . . minimal evidence of unconstitutional state discrimination in employment against the disabled." *Id.* at 370. Thus, *Hibbs* embraced congressional fact-finding in a way that *Garrett* rejected the previous year.

108. See *supra* notes 36-38 and accompanying text (explaining that Justice Rehnquist typically supports state sovereignty).

109. See, e.g., *William H. Rehnquist 1972-1986, 1986*, at www.supremecourt.gov/history/justice/rehnquist.htm (giving a biography of Chief Justice Rehnquist) (last visited Jan. 3, 2004). One of his earliest discussions on states' rights appeared forty-six years ago in a 1957 publication of *U.S. News & World Report*, which critiqued the Warren Court. *Id.*

110. See Hart, *supra* note 96, at 1110 (arguing that the Court's interpretation of the Equal Protection Clause will result in more arbitrary

opposite conclusion is true: the Justices are not as committed to pushing a states' rights agenda as some commentators have suggested.¹¹¹ Some would likely take *Hibbs* at face value: that the decision was truly an application of intermediate scrutiny to a case involving gender discrimination, despite the fact that Hibbs was a man attempting to care for his ill wife.¹¹²

This Comment argues that the Court generally considers public policy in determining the outcome of sovereign immunity cases. One factor that the Court likely considered in *Hibbs* was the ease of administration of the FMLA's remedy. The FMLA's

discrimination); Sylvia A. Law, *William Howard Taft Lecture: In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 432 (2002) (arguing that the Court's federalism cases from 1996 until 2002 "reflect skepticism or even hostility to protection of workers and civil rights"); Evan H. Caminker, *Symposium: Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: "Appropriate" Means-End Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1199 (2001) (concluding that the Court's analysis of Section 5 powers fails to explain why Congress cannot be the proper branch to determine reasonable legislation, and that the Court's decision ties the hands of courts presented with state misconduct); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 526 (2000) (concluding that the congruence and proportionality test is too strong a critique of anti-discrimination law, and that the Court's use of this test demeans Congress' participation in developing Equal Protection laws); Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique, Morrison and the Future of Federal Antidiscrimination Law*, 2000 SUP. CT. REV. 109, 173 (2000) (concluding that the Court's congruence and proportionality test is unnecessary scrutiny of congressional means chosen to pursue a constitutional end); Michael W. McConnell, *The Supreme Court, 1996 Term: Comment: Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 194-95 (1997) (concluding that the Court erred in disregarding Congress' robust interpretation of the Free Exercise Clause in *Boerne*, and suggesting the Court should instead provide a "presumption of constitutionality – to the interpretive judgments of Congress").

111. See Colker & Brudney's critique discussed *infra* note 141 (regarding the Court's "crystal ball" analysis).

112. At least one scholar has suggested that there is a marked distinction between the standard of review the Court claims to apply and the one it actually applies. See Hart, *supra* note 96 and accompanying text (arguing that the Court has given itself an unrestrained role in evaluating legislation).

It is interesting to note, as does Justice Kennedy's dissent in *Hibbs*, that the Court fails to apply its own tests of asking whether there is a specific pattern of unconstitutional state action, as opposed to private conduct, and then whether the congressional act is "congruent and proportional" to the alleged constitutional violation. *Hibbs*, 123 S. Ct. at 1991-92 (Kennedy, J., dissenting). One likely explanation for the absence of this test is that it is too rigorous for Hibbs' case to survive, because twelve weeks of paid family leave appears to create a substantive right. See *id.* at 1992 (characterizing the FMLA as creating a "substantive entitlement program") (Kennedy, J., dissenting).

remedy of twelve weeks of leave annually is merely temporary,¹¹³ in contrast with *Kimel*, whose remedy, indefinite employment, was likely more cumbersome for an employer to accommodate.¹¹⁴

Another factor that the *Hibbs* Court likely considered was whether subjecting the states to suit for violating the FMLA would create an unmanageable amount of litigation. This theory would reconcile *Garrett* with *Hibbs*. *Hibbs* directly affects over 4.8 million state employees and their families.¹¹⁵ Though it is hard to state precisely how many disabled persons are affected by *Garrett*, a whopping 43 to 160 million persons are classified as disabled, depending on the definition of “disability.”¹¹⁶ It is hard to state what percentage of persons with disabilities are employed by the state or have been discriminated against in seeking state-based employment, but the potential for overwhelming the federal courts seems real.¹¹⁷ Additionally, claims of gender discrimination may take aim at written policies regarding family leave, some of which are incorporated into employee handbooks.¹¹⁸ Discrimination based on age or disability, in contrast, may be more subtle and subjective, and suits to determine its existence may require an attempt to get into the mind of the employer, a difficult and unpopular task.¹¹⁹

C. The Big Picture: A Suggested Direction for Future Sovereign Immunity Cases

The Court’s recent sovereign immunity decisions raise fundamental questions about the scope of the Court’s “new federalism” and whether it embodies desirable policy. This

113. *Id.* at 1976.

114. See *Kimel*, 528 U.S. at 67 (indicating that equitable relief is available under 29 U.S.C. § 626(c)(1) (2000)).

115. See Landau, *supra* note 18, at 171 (noting that “[s]tate governments employ over 4.8 million people”).

116. Warren Richey, A Narrower Definition of “Disabled,” available at <http://csmweb2.emcweb.com/durable/1999/06/23/p4s2.htm> (June 23, 1999) (last visited Jan. 3, 2004).

117. See *id.* (discussing fear of frivolous lawsuits, such as plaintiffs who wear glasses suing for disability discrimination). See also Census Brief *infra* note 126 (noting that as many as one in five Americans have some sort of disability).

118. See *Hibbs*, 123 S. Ct. at 1980 (discussing facially valid leave policies being applied in a discriminatory manner).

119. See David A. Rutter, *Title VII Retaliation, A Unique Breed*, 36 J. MARSHALL L. REV. 925 (2003) (reviewing Seventh Circuit employment discrimination cases in 2002 and discussing the subtleties therein). The Court in *Tennessee v. Lane*, discussed *infra* note 1, will likely base its opinion on underlying public policy. However, because *Lane* is arguing that Tennessee violated his Due Process rights, the Court will give less weight to the factors discussed in this analysis, and will base its opinions on a bigger picture of society, democracy, and federalism.

Comment argues that *Hibbs* was correctly decided and should be extended to future sovereign immunity cases. It also argues there are four problems with the Court's congruence and proportionality limitation of Congress' Section 5 powers, which *Hibbs* avoids. First, this test prevents Congress from enforcing the Equal Protection mandate of the Fourteenth Amendment.¹²⁰ Second, the Court puts states' dignity above the fundamental rights of citizens.¹²¹ Third, the test, as Justice Breyer argued, so critically reviews the legislative history of the act in question that it reduces Congress to a lesser governmental body.¹²² Fourth, it purports to encourage state action, while diminishing the extent of the social evil at issue, thereby encouraging certain states not to prevent, deter, or remedy discrimination within their own borders.¹²³

1. Congress Cannot Provide Equal Protection Without Creating Adequate Remedies

Several scholars argue the Court's recent sovereign immunity decisions severely hinder Congress' ability to enforce the Equal Protection Clause of the Fourteenth Amendment.¹²⁴ Some scholars believe the Equal Protection Clause, "perhaps more than most constitutional guarantees, is tied in complex ways to evolving and contested social norms,"¹²⁵ thereby making it more appropriate for an elected body like Congress, not the Court, to represent the current voice of the people.¹²⁶ Justice Stevens argued in *Kimel* that

120. See *infra* notes 124-137 and accompanying text (arguing that if Congress cannot create adequate remedies for social problems, there can be no equal protection under the law).

121. See *infra* notes 138-140 and accompanying text (arguing that the fundamental rights of citizens are more important than states' rights).

122. See *infra* notes 141-149 and accompanying text (arguing that the level of judicial scrutiny applied to Acts of Congress diminishes Congress' importance).

123. See *infra* notes 150-151 and accompanying text (arguing that the Court's decisions discourage states from attempting to solve social problems).

124. See Hart, *supra* note 96, at 1105 (writing, "federalism does not supply a logical, principled justification for the Court's approach in these cases"); Law, *supra* note 110, at 396 (writing "A core purpose of the Fourteenth Amendment is to promote equality. The new federalism, as a radical attempt to undermine this constitutional commitment to fairness and basic dignity, is disturbing as a matter of principle and doctrine.").

125. Post & Siegel, *supra* note 110, at 513. The Court frequently relates equal protections to the interpretation of social norms. *Id.* at 514. One example of this is asking whether classifications based on gender are "outdated misconceptions concerning the role of females." *Id.*

126. State employees, about five million in number, are the most affected by the FLSA, ADA, ADEA, and the FMLA. Landau, *supra* note 18, at 169. Persons with disabilities are also strongly affected by these decisions. The Census believes that 9 million individuals have disabilities so severe that they depend on special attention to complete everyday functions. Census Brief 97-

Congress' right to remedy violations under the Fourteenth Amendment flows naturally from Congress' right to create substantive legislation.¹²⁷

The public sector, like the private sector, engages in unlawful age, gender, and disability discrimination.¹²⁸ As such, Congress should be able to set certain minimum standards for the public sector, and the states should be able to provide stronger protections if they so desire.¹²⁹ Under this approach Congress and the Court could work together to enforce the Equal Protection Clause, instead of following the Court's position, which pits the states against Congress in terms of authority to abrogate immunity.¹³⁰ Then the relationship between Congress and the Supreme Court could, once again, be considered "fluid and dynamic."¹³¹

In contrast, the Court's pre-*Hibbs* analysis of sovereign immunity cases required such detailed evidence of unconstitutional state conduct that even popular, bipartisan-

5, *Disabilities Affect One Fifth of All Americans: Proportion Could Increase in Coming Decades* (Dec. 1997), available at www.census.gov/prod/3/97pubs/cenbr975.pdf (last visited Jan. 3, 2004). Unemployment rates for persons with disabilities have been estimated to be as high as 70 percent. Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 655 (2000).

127. *Kimel*, 528 U.S. at 97.

128. The Congress that enacted the ADA wanted to learn why the states employed so few persons with disabilities, and ordered the Advisory Committee on Intergovernmental Relations (ACIR) to conduct an investigation. Brief for Respondents Patricia Garrett and Milton Ash at *20, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (No. 99-1240). The agency found that over 80% of state officials believed negative attitudes about persons with disabilities explained why so few individuals with disabilities worked as state employees. *Id.* When asked to explain in their own words, state officials noted: "feelings of discomfort" in socializing with individuals with disabilities, "inaccurate assessments of their productivity," and the "prominence of these attitudes and the difficulty in changing them." *Id.* at 21.

129. The ADA generally defines an "employer" as "a person engaged in an industry affecting commerce who has 15 or more employees." 42 U.S.C. § 12111(5)(A) (2000). Some states offer greater protection by broadening their definitions of "employer." California, for example, defines "employer" as any person employing five or more people. CAL. GOV'T CODE § 12926(d) (West 2004). Another example of broader protection offered by a state is California's definition of "medical condition," which encompasses persons with certain genetic traits or with a history of cancer, while the ADA does not expressly protect these persons without a showing of an impairment that "substantially limits one or more major life activities." Compare CAL. GOV'T CODE § 12926(h) (West 2004) with 42 U.S.C. § 12102(2) (2000).

130. See NOONAN, *supra* note 11, at 134 (noting that there is "no general doctrine" that the power of Congress and of the states could not overlap).

131. See Post & Siegel *supra* note 110, at 446 (characterizing the relationship between Congress and in the Court in the 1950s).

supported legislation must be tediously redrafted to comply with the Court's high standards.¹³² It is hard to tell how much redrafting must be done to the ADA to comply with the Court's standards,¹³³ but *Morgan* and *Hibbs* provide two cases of valid Section 5 legislation.¹³⁴ The ultimate question for future sovereign immunity decisions, however, is whether Congress can achieve the *Morgan* or *Hibbs* result outside of legislation designed to remedy race or gender discrimination. One may argue that Congress can address less pervasive social problems by simply enacting more narrow legislation, but there is nothing outside of *Hibbs* to suggest that the Court will not revert to its hostile analysis of congressional fact-finding. *Kimel* recognizes Congress' Section 5 power as permission to prevent violation of civil rights "by prohibiting a somewhat broader swath of conduct,"¹³⁵ and *Hibbs* adds that Congress may sometimes enact prophylactic legislation, but gives little guidance as to when this prophylactic legislation will pass constitutional scrutiny.¹³⁶ At least one scholar believes that with strong enough fact finding, Congress may overcome the Section 5 test further defined in *Kimel*.¹³⁷

132. *But see* Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 85-86 (2001) (writing that the Court "applies a legal standard for review that even a detailed legislative record could not possibly satisfy").

133. One scholar argues that congressional findings are merely "boilerplate" language. Rotunda, *supra* note 7, at 885 n.77. This argument, however, fails to explain what prompted congressional legislation. As Justice Stevens wrote, "Whenever Congress passes a statute, it does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of the existing state norms that Congress seeks to supplement or supplant." *Kimel*, 528 U.S. at 94. For example, when Congress amended the ADEA to apply to public employers, twenty-four states' discrimination laws did not afford this protection. *Id.* at 94 n.2.

134. *See* Rotunda, *supra* note 7, at 871 n.4 (finding *Morgan* still good law). One may argue that it is unrealistic to think that Congress may change the Supreme Court's stance in, for example, *Garrett*, by redrafting its legislative findings. However, if at the heart of the Court's sovereign immunity jurisprudence is the belief that Congress has gone too far in legislating for the general public without express constitutional authority, then congressional compliance with the Court's tests may provide a "goodwill gesture" (for lack of a better term) that may win an additional vote, perhaps by Justice Rehnquist or Justice O'Connor. *See* Caminker, *supra* note 110, at 1198 (suggesting that the Supreme Court's decisions are motivated by this belief).

135. *Kimel*, 528 U.S. at 81.

136. *See Hibbs*, 123 S. Ct. at 1981 (indicating that the circumstances presented by this case justified prophylactic § 5 legislation). *But see supra* note 96 and accompanying text (indicating that the circumstances presented by *Garrett* did not justify prophylactic legislation).

137. Colker, *supra* note 126, at 669.

2. Courts Should Value Citizens' Fundamental Rights Above the States' Dignity

Typically, Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor justify the congruence and proportionality test as protective of the states' "dignity."¹³⁸ This rationale has been criticized as a tautology: since the states have immunity, they have dignity, and since they have dignity, they ought to be immune from suit.¹³⁹ The Court's "dignity" analysis focuses solely on the states' dignity while failing to expressly consider the dignity of the citizens who are most affected by the Court's decisions. An analysis of dignity may be warranted in the debate over congressional abrogation of sovereign immunity, but it must give adequate consideration to the dignity of all the parties involved.¹⁴⁰

138. See *Alden*, 527 U.S. at 748-49 (discussing the dignity of states as sovereign bodies). One would suspect that if the states' dignity were truly at issue, the states themselves would be the first to voice their opinions in sovereign immunity cases. In *Garrett*, however, fourteen states supported Patricia Garrett. Brief of the States of Minnesota, Arizona, Connecticut, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Missouri, New Mexico, New York, North Dakota, Vermont, and Washington as Amici Curiae in Support of Respondents, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240). On the other hand, only seven states sided with the University of Alabama. Brief of Amici Curiae States of Hawaii, Arkansas, Idaho, Nebraska, Nevada, Ohio, and Tennessee in Support of Petitioners, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240). Similarly, regarding the VAWA, thirty-eight state attorneys general expressed concern that violence against women had become an issue requiring federal attention and urged Congress to pass the VAWA, even though the states traditionally regulated such conduct. Post & Siegel, *supra* note 110, at 479. In drafting the VAWA, Congress was aware of constitutional violations in at least twenty-one states regarding gender-targeted crime. *Id.*

In *Hibbs*, thirteen states filed an amicus brief in support of Nevada, but only six states supported Hibbs. Compare Brief for the States of Alabama, Alaska, Delaware, Hawaii, Indiana, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Virginia, as Amici Curiae in Support of Petitioners, Nev. Dep't. of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003) (No. 01-1368) with Brief of the States of New York, Connecticut, Illinois, Minnesota, New Mexico, and Washington as Amici Curiae in Support of Respondents, Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003) (No. 01-1368). Interestingly, in both *Garrett* and *Hibbs*, the Supreme Court ruled against the position taken almost 2:1 by the states.

139. NOONAN, *supra* note 11, at 53.

140. Dignity is particularly an issue for people with disabilities. See Colker, *supra* note 126, at 655-56 (discussing *Olmstead v. L.C.*, 527 U.S. 581 (1999), as protecting the dignity of people with disabilities).

As for other philosophical or emotional undertones, one scholar suggests that the real issue is the Court's dissatisfaction with Congress' understanding of the limitations of its power. See Caminker, *supra* note 110, at 1198.

3. *The Court Has Reduced Congress to an Administrative Agency*

Justice Breyer's dissent in *Garrett* argues that the majority is "reviewing the congressional record as if it were an administrative agency record."¹⁴¹ Justice Breyer also criticizes the majority for requiring Congress to justify its findings detail by detail,¹⁴² which impermissibly shifts the burden of proof to Congress when exercising its Section 5 power.¹⁴³ Justice Breyer and certain scholars find that the text of Section 5 delegates exclusive power to Congress to enact legislation and therefore, Section 5's "appropriate" standard is a minimal standard, not a restriction.¹⁴⁴ Yet one may argue that the Court is not even treating Congress as respectfully as an administrative agency, since the Court questions Congress' basic fact-finding.¹⁴⁵

Columbia law professor Herbert Wechsler argues that

141. *Garrett*, 531 U.S. at 376. Other scholars have made this observation. See Colker & Brudney, *supra* note 132, at 83 (writing, "the Court has undermined Congress's ability to decide for itself how and whether to create a record in support of pending legislation"). Colker and Brudney criticize the Court's "crystal ball" approach, which invalidates any statutory provisions subjecting states to suit if Congress failed to document state-based rights violations in a detailed legislative record, even though Congress had no notice that the Court would require as much. *Id.* at 85. They also criticize the Court's "phantom legislative history" approach, which refers to the Court's focus on the legislative history and its application of a harsh standard of review. *Id.* at 85-86.

142. *Garrett*, 531 U.S. at 380.

143. *Id.* at 383.

144. *Id.* at 377. Colker contrasts the beginning of § 1 of the Fourteenth Amendment, "No state shall" with the beginning language of § 5, "The Congress shall have power" and concludes that the framer's intent was to broaden Congress' powers through § 5. Colker, *supra* note 126, at 662. Similarly, Justice Breyer views Section 5 as allowing Congress greater control, which is desirable because "[u]nlike courts, Congress directly reflects public attitudes and beliefs." *Garrett*, 531 U.S. at 384. This reading would allow Congress' power and the states' power to overlap. Congress could create minimal standards, while the states could choose to offer more protection.

145. The Court's congruence and proportionality test for valid Section 5 legislation requires the Court to make judgments about the frequency and severity of unlawful discrimination, which it is in no position to do. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-43 (1985) (acknowledging that the legislature is better able to address discrimination against persons with disabilities than the judiciary); Post & Siegel, *supra* note 110, at 515 (writing, "The Court's authority to interpret the Equal Protection Clause . . . rests on a special kind of socially situated judgment, a capacity to discern shifts in the ways Americans understand the practices and institutions that organize American life"). See also *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (noting that when determining whether a statute is constitutional, "courts must accord substantial deference to the predictive judgments of Congress' . . . We owe Congress' findings deference in part because the institution is 'far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon' legislation questions.'").

Congress, though acting in a national capacity, also acts to protect local interests with its votes.¹⁴⁶ Wechsler believes “the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process.”¹⁴⁷ According to Wechsler, due to the makeup of the House and Senate, Congress will protect state interests more than state legislatures will protect national interests.¹⁴⁸ Thus federal intervention into state affairs is a matter best left to Congress.¹⁴⁹

4. *The Court’s Decisions Do Not Encourage State Action Because They Disregard the Pervasiveness of Social Problems*

The Court’s sovereign immunity rulings do not logically compel the Court to minimize the extent to which state actors and officials struggle with the same social ills found in the private sector. It was unnecessary for Justice O’Connor in *Kimel* to refer to age discrimination as a “perhaps inconsequential problem.”¹⁵⁰ *Garrett*, as a whole, leads the reader to believe that despite the evidence petitioners raised to the contrary, society provides relatively the same opportunities for persons with disabilities as for able-bodied employees. These opinions could have honestly evaluated the shortcomings of state governments and challeagned the states to hold themselves to higher standards. However, other than *Hibbs*, the Court’s sovereign immunity opinions never truly pause to explain why Congress expressly considered state-sponsored discrimination in drafting its laws.¹⁵¹

146. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 548 (1954).

147. *Id.* at 559.

148. *Id.* at 547. Though Congress’ goal is to discern the nation’s voice, it is cognizant of local sensitivities. *Id.* Wechsler writes, “A local spirit will infallibly prevail much more in the members of Congress than a national spirit will prevail in the legislatures of the particular States.” *Id.* Other scholars support Wechsler’s view, believing that an aggressive judicial branch risks becoming a “super legislature.” Post & Siegel, *supra* note 110, at 464. Justice Breyer expresses similar concern in his dissent in *Garrett*, 531 U.S. at 384.

149. Wechsler, *supra* note 146, at 559. In making this argument, Wechsler distinguishes between the judiciary’s role as interpreting the Constitution vis-à-vis federalism. *Id.* at 560 n.59. He also believes that the burden of persuasion ought to fall on those advocating national action. *Id.* at 545.

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

151. See Post & Siegel, *supra* note 110, at 522 (writing, “Neither *Kimel* nor *Morrison* endeavors sympathetically to reconstruct and address the equality-based concerns that led Congress to enact the invalidating provisions of the ADEA and VAWA.”). In contrast, the Ninth Circuit’s opinion in *Hibbs* did not question Congress’ underlying conclusion that workplace discrimination based on gender violates the Equal Protection Clause. See *Hibbs v. Dep’t of Human*

IV. PROPOSAL

Congress can pursue three different means¹⁵² to diminish the impact of the new federalism cases prior to *Hibbs*: amend the Constitution to give Congress the express authority to abrogate the states' sovereign immunity in civil rights cases,¹⁵³ use conditional spending to give the federal government more control,¹⁵⁴ or continue to attempt abrogation through Section 5 of the Fourteenth Amendment by working within the current analytical framework.¹⁵⁵ This Comment proposes working within the current analytical framework, and a modest reliance on Congress' granting of federal funds to the states, conditioned upon their waiver of immunity, in order to restore a proper balance between states' rights and the protection of individual liberties.

A. Constitutional Amendment

The primary objections to the idea of a constitutional amendment have been its difficulty,¹⁵⁶ and the reluctance of the

Res., 273 F.3d 844, 854-55 (2001) (discussing gender discrimination and leave policy in the workplace). It also did not second-guess Congress' goal in attempting to remedy gender discrimination in the workplace. *Id.* at 854. It concluded that the "statute aims to remedy all these forms of discrimination by setting a gender-neutral minimum standard for the granting of care-taking leave." *Id.* at 855. The Court also found that gender differences are rarely related to any legitimate state interest and that their use often times shows "prejudice and antipathy." *Id.* at 856.

152. The three mentioned options would provide the most comprehensive means to counteract the new federalism rulings, but this is not an exclusive list. Parties may try to rely on state remedies; however, these remedies often provide inferior protection. Landau, *supra* note 18, at 189. Union members, as another option, may want to work waivers of immunity into their collective bargaining agreements. *Id.* at 205.

Plaintiffs may also try to utilize *Ex Parte Young*, so long as the statute a plaintiff wants to bring suit under expressly provides for injunctive relief. *Id.* at 198. Plaintiffs must convince the Court that the statute avoids the *Seminole Tribe* exception to *Ex Parte Young*: that when Congress includes in a statute a detailed, remedial scheme, the omission of injunctive relief means Congress did not intend for such relief to be available, and therefore it will not be granted by the Court. *Id.*

153. See *infra* notes 156-159 and accompanying text (discussing the viability of the Constitutional amendment option).

154. U.S. CONST. art. I, § 8, cl. 1. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." *Id.*

155. Noonan identifies other possible congressional responses as impeachment or reducing the salaries of the Justices, but concludes that these options are "too heavy or too petty or too awkward." NOONAN, *supra* note 11, at 140-41.

156. *Id.* at 143. *Contra* Casey L. Westover, *The Twenty-Eighth Amendment: Why the Constitution Should be Amended to Grant Congress the Power to Legislate in Furtherance of the General Welfare*, 36 J. MARSHALL L. REV. 327,

states to put their fate in the hands of Congress.¹⁵⁷ Any amendment would have to be passed by two-thirds of the House and Senate, and then ratified by three-fourths of the states.¹⁵⁸ If the number of states filing amicus briefs is any indication of the states' position on this issue, a constitutional amendment is clearly lacking the requisite support.¹⁵⁹

B. Conditional Spending

The second proposal, conditional spending, is a promising option because courts recognize that Congress' taxing and spending power is a broader, more exclusive grant of authority than the Commerce Clause or the Fourteenth Amendment.¹⁶⁰ The seminal case on conditional spending, *South Dakota v. Dole*,¹⁶¹ ruled that Congress could condition receipt of federal highway funds on states setting their minimum drinking ages at twenty-one.¹⁶² The Court gave four factors to test the validity of conditional spending measures.¹⁶³ First, while giving deference to congressional judgment, the Court must determine if the condition was imposed for "the general welfare."¹⁶⁴ Second, the condition must be unambiguous, clearly indicating to the states the consequences of their compliance or noncompliance with the condition.¹⁶⁵ Third, the condition must be related to Congress' interest in the nation-wide programs at issue.¹⁶⁶ Fourth, the provisions must be consistent with other constitutional provisions.¹⁶⁷ The regulation also cannot be overly coercive.¹⁶⁸

327 (2003) (proposing a Twenty-Seventh Amendment to the Constitution that reads, "Congress shall have the power to legislate in furtherance of the general welfare.").

157. See *supra* note 138 and accompanying text (discussing states' positions in amicus briefs).

158. U.S. CONST. art. V, § 1. The Constitution authorizes amendment by a convention by two-thirds of the state legislatures, then ratification by three-fourths of the states. *Id.*

159. See *supra* note 138 and accompanying text (discussing states' amicus briefs).

160. Courts allow these conditions because states are not required to accept the funds. *E.g.*, *Westside Mothers v. Haveman*, 289 F.3d 852, 857 (6th Cir. 2002) (noting that states choose to participate in Medicaid, and that Congress may place conditions on the disbursement of Medicaid funds to those states). It should be noted, however, that receipt of federal funds alone does not automatically operate as a constructive waiver of a state's sovereign immunity. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

161. 483 U.S. 203 (1987).

162. *Id.* at 212.

163. *Id.* at 207-08.

164. *Id.* at 207.

165. *Id.*

166. *Id.*

167. *Id.* at 208.

There are two objections to reliance solely on conditional spending measures. First, they are expensive.¹⁶⁹ The amount of money that the federal government is willing to offer the states must be large enough to persuade the states to implement a policy to which they are adverse.¹⁷⁰ The second problem is that the Court may limit Congress' ability to use federal funds to accomplish indirectly what it was unable to accomplish directly.¹⁷¹ To accomplish this end, the Court may narrowly construe the phrase "related to Congress' interest" under the fourth factor. The Court could also easily dub the condition overly coercive.¹⁷²

C. Working Within the Current Framework

Similar to the constitutional amendment option, working with the current analytical framework has been given little consideration. This Comment suggests, and *Hibbs* demonstrates, that the current framework is not as impossible to work with as some scholars have suggested.¹⁷³ The Court's sovereign immunity decisions, taken as a whole, tell us the Court is not persuaded that state violations of equal protection rights are truly egregious enough to require abrogating states' immunity.¹⁷⁴ Although it can

168. *Id.*

169. The federal government spent over \$195 billion in 1993 on federal grants. Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1918 n.24 (1995). None of these grants were offered without conditions attached. *Id.* at 1918. In 1991, federal grants were approximately twenty percent of state and local revenue. *Id.* at 1918 n.24.

170. *See id.* at 1917 (noting federal statutes that gives states financial incentives to comply with radioactive waste disposal regulations and to raise the legal drinking age to twenty-one).

171. *Id.* at 1919-20.

172. Noonan suggests the Court may attempt to limit conditions attached to federal funds by "distinguishing the germane from the ungermane conditions, and voiding the latter." NOONAN, *supra* note 11, at 142. However, this is mere speculation, and the *Dole* Court was unable to provide a case in which it found a conditional federal grant of money to the states to be unconstitutional. Baker, *supra* note 169, at 1930.

173. Colker and Brudney, for example, interpret *Garrett* as requiring the following:

Congress would presumably have to gather all the information itself through its own committee hearings, without reliance on state or local-level organizations or people who live in the respective States to gather the information themselves. Congress also would have to insist that the testimony was so stark that the published hearings could be tantamount to evidence usable in future constitutional litigation against the States.

Colker & Brudney, *supra* note 132, at 142. However, the only citation given for this reference is the requirement in *Garrett* that the Court document patterns of discrimination. *Id.* at 142 n.261. *Garrett* does not have to be read as a requirement that Congress act without help from other agencies. *See generally Garrett*, 531 U.S. at 356.

174. Justice Rehnquist terms the number of congressionally-assembled,

be argued, as Justice Breyer did, that Congress should not bear the burden of having to rewrite legislation to conform to the majority's analysis,¹⁷⁵ there is nothing in *Garrett* to indicate that such rewriting could not meet the congruence and proportionality test. Practicing attorneys, however, would be well-advised not to rely solely on the Court's tests when drafting their arguments, but also to appeal to the policies underlying *Hibbs*: ease of administration of the remedy and the desire to limit the jurisdiction of the federal courts.

It is premature to argue that all legislation that attempts to abrogate states' immunity is doomed to fail under this framework. Congress is now aware of the tests the Court will apply to such legislation. Congress ought to at least attempt to cooperate with the Court's new framework. Congress should realize that the Court has made it clear that it will not be persuaded by anecdotal evidence, generalities, questionable methods of research, or manipulated statistics.¹⁷⁶ *Garrett* simply demanded that Congress more thoroughly document the facts of actual state-sponsored violations of civil rights.¹⁷⁷ This need not be the impossible task that some scholars have made it out to be.¹⁷⁸

This Comment suggests that Congress may be more effective, dollar per dollar, by sending the task force at work in *Garrett* back to research and more fully document abuses than to, in essence, bribe the states with conditional funding grants.¹⁷⁹ Because attempted compliance has not yet been fully explored, this Comment further suggests that it is too early to abandon the

state-sponsored violations of the rights of persons with disabilities to be "half a dozen." *Garrett*, 531 U.S. at 369.

175. See *id.* at 380 (noting that the Court now seems to require Congress to make very detailed findings of fact, and to categorize evidence very carefully).

176. Justice Rehnquist finds the laundry list at the end of the *Garrett* opinion to be "so general and brief that no firm conclusions can be drawn." *Id.* at 372 n.7.

177. The *Garrett* Court concluded that the numerous examples of discrimination constituted only "minimal evidence of unconstitutional *state* discrimination." *Id.* at 370 (emphasis added). In his dissent, however, Justice Breyer found that Congress assembled evidence of "massive, society-wide discrimination against persons with disabilities." *Id.* at 377. Justice Breyer points out that Congress relied upon "census data, national polls, and other studies." *Id.* at 378. Neither argument presents a model of clarity to Congress. These two perspectives demonstrate how different Justices looking at the same evidence can come to dramatically different conclusions, and it reminds the reader once again of the Court's boldness in invalidating a slough of federal statutes that attempted to create uniform levels of responsibility in the private and public sector. See note 22 (noting cases in which the Court struck down these statutes).

178. See *supra* note 173 and accompanying text (interpreting the requirements of the congruence and proportionality test).

179. *Garrett*, 531 U.S. at 379.

possibility that the congruent and proportionality framework would invalidate all attempts at congressional abrogation of states' immunity, and it is too early to deviate from the conditional spending means which have proven fruitful.

V. CONCLUSION

This Comment has shown that the text of the Eleventh Amendment, on its face a jurisdictional bar on federal courts in a limited situation, has led the Court to a series of opinions that have narrowly interpreted congressional power to enforce the Equal Protection Clause. The FMLA, at issue in *Hibbs*, is a rare example of "appropriate" Section 5 legislation. *Hibbs* demonstrates that the Court is willing to abrogate the states' sovereign immunity because it believed that gender discrimination in the workplace was pervasive, because suits against state employers would not create an unmanageable amount of litigation, and because gender discrimination laws can be administered with ease to an employer.

This Comment, in seeking to strike a balance between states' rights and federal enforcement of the Equal Protection Clause, makes the following recommendations: the Court should consider applying *Hibbs*' deference to Congress in other sovereign immunity cases. In addition to discussing the states' dignity, the Court should give adequate consideration in its opinions to the dignity of the victims of discrimination. The Court should draft its opinions to encourage states to enact legislation that remedies social ills. Congress should better document state violations and amend statutes to meet the Court's standards. Finally, Congress should utilize its conditional spending power to fill some of the protective gaps left from the Courts' recent anti-discrimination cases.

