NEVADA DEPARTMENT OF HUMAN RESOURCES v. HIBBS: REGULATION OR SIMPLY ENCOURAGEMENT?

I. INTRODUCTION

"A Boston attorney: 'When I returned from maternity leave, I was given the work of a paralegal. I wanted to say, 'I had a baby, not a lobotomy.'"[1]

"A supervisor to a woman eight months pregnant: 'I was going to put you in charge of that office, but look at you now.'"[2]

"A secretary: 'When you work part-time or temporary, they treat you differently, they don't take you serious.'"[3]

Rebecca Webb, a television anchor from Portland, Oregon, had an agreement with her employer for a three-month leave after the birth of her child.[4] Just two months before her child was born, her employer rescinded the agreement.[5] The employer decided this agreement would set unwanted precedent within the company, which would have to be followed between the employer and the other four pregnant women within the company at that time.[6] Because Ms. Webb no longer had maternity leave available to her, she was forced to choose between her job and her newborn child, and she was ultimately forced to quit.[7]

Fathers who assume active caregiving roles are likely to face even more challenges than mothers.[8] In a survey of large employers, 63% said it was unreasonable for a man to take any parental leave whatsoever, while another 17% considered a reasonable leave to be two weeks or less.[9] Thomas Riley, an employee who had to provide for his seriously ill child is a perfect example.[10] Thomas Riley's son was diagnosed with cancer when

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1 Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 77 (2003) (citing JOAN WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT 69 (2000)).

2 *Id*. (citing Moore v. Ala. State Univ., 980 F. Supp. 426, 431 (M.D. Ala. 1997)).

3 *Id*. (citing WILLIAMS, *supra* note 1, at 72).

4 S. REP. NO. 103-3, at 8 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 10.

5 *Id*., *reprinted in* 1993 U.S.C.C.A.N. 3, 10.

6 *Id*., *reprinted in* 1993 U.S.C.C.A.N. 3, 10.

7 *Id*., *reprinted in* 1993 U.S.C.C.A.N. 3, 10.

8 Williams & Segal, *supra* note 1, at 101-02.

9 Martin H. Malin, *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 39 (1998).

10 S. REP. NO. 103-3, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 11.

he was just 4½ years old.[11] At this time, Mr. Riley was hired as a supervisor for a company with the express understanding that he needed to spend time away from work to take his son to the doctor for treatments.[12] Over the next six months, Mr. Riley worked at least fifty hours a week while he simultaneously cared for his son, whose condition was worsening.[13] Mr. Riley only took six days away from work, all of which were unpaid.[14] Just after his son died, Mr. Riley was fired for no reason.[15]

Our society in general values both men and women who surrender their personal time for their job.[16] The Family Medical and Leave Act (FMLA)[17] was enacted by Congress in 1993 to counteract gender discrimination in the workplace.[18] It gives employees confidence to take necessary leave while providing them with job security.[19] The details of the Act are provided below, but essentially, the FMLA provides eligible employees up to twelve weeks of unpaid leave per year to care for a newborn child, the placement of a child "with the employee for adoption or foster care," to care for certain family members suffering from serious health conditions, or for the employee's own serious health conditions.[20]

Under the Eleventh Amendment to the United States Constitution, states are immune from private damage actions in federal court.[21] The

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11 *Id.*, *reprinted in* 1993 U.S.C.C.A.N. 3, 11.

12 *Id.*, *reprinted in* 1993 U.S.C.C.A.N. 3, 11.

13 *Id.* , *reprinted in* 1993 U.S.C.C.A.N. 3, 11-12.

14 *Id.*, *reprinted in* 1993 U.S.C.C.A.N. 3, 12.

15 *Id.*, *reprinted in* 1993 U.S.C.C.A.N. 3, 12.

16 *See* Michael Kinsman, *Finding Balance in Family, Work Lives Is Men's Issue, Too*, COPLEY NEWS SERVICE, June 9, 2003.

17 Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2000).

18 *Id.* §2601(b)(4)-(5).

19 *Id.* § 2601(a)-(b).

20 *Id.* § 2612(a)(1).

21 U.S. CONST. amend. XI. The Eleventh Amendment provides: "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*. *Hans v. Louisiana*, 134 U.S. 1 (1890), is still considered the "cornerstone of [Eleventh] [A]mendment law." PETER W. LOW & JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 811 (1998). In *Hans*, the Court determined whether "the judicial power of the United States extend[ed] to a case arising under the Constitution or laws of the United States and originally brought against a State by one of its own citizens." *Hans*, 134 U.S. at 4. *Hans* adopted the immunity interpretation of the Eleventh Amendment. LOW & JEFFRIES, *supra*, at 813. "On this theory, the [Eleventh] immunity constitutionalized state sovereign immunity." *Id*. Notice that the Eleventh Amendment only applies to suits "commenced or prosecuted against [a United States citizen] of *another* State or [citizens of a *foreign* state]," with no

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principles of sovereign immunity are fully integrated and rooted into our nation; however, "Section 5 of the Fourteenth Amendment, along with a growing federal concern over the civil rights of all citizens, have created a tension between the principles of sovereign immunity and the power of the federal government."[22] Congress derived its power to enact the FMLA from Section 5 of the Fourteenth Amendment, the Enforcement Clause, which allows Congress to enact legislation to abrogate the States' immunity in order to enforce provisions of the Fourteenth Amendment attempting to remedy and prevent sex discrimination in the workplace.[23]

Prior to *Hibbs* coming before the Ninth Circuit Court of Appeals, seven circuits had held that it was not within Congress' Section 5 power to enact the FMLA.[24] Additionally, the district courts were "divided on the issue of Eleventh Amendment immunity under the FMLA."[25] *Nevada Department of Human Resources v. Hibbs*,[26] the subject of this Note, is the most recent in a line of cases beginning in 1996 addressing Congress' ability to abrogate the State's sovereign immunity. Significantly, *Hibbs* breaks the pattern of pro-state Supreme Court rulings protecting states' immunity from private lawsuits. Chief Justice Rehnquist's opinion in *United States v. Morrison*[27] left many to wonder if Congress even had the power under Section 5 to propose national legislation since the Court in *Morrison* held that Congress did *not* have the power under Section 5 to enact the Violence Against Women Act merely because the act applied uniformly throughout the nation, when there were findings that discrimination against victims of gender-motivated crimes did *not exist* in *all* States.[28] Specifically, *Morrison* left many to wonder whether *sex-based discrimination cases* involving states' sovereign immunity could in fact be remedied under Congress' Section 5 power. For the present, the Chief Justice's opinion in *Hibbs* has answered these questions: Congress *does* have the power under Section 5 to propose national legislation and sex-

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mention of citizens of the same state. U.S. CONST. amend. XI (emphasis added). The Court in *Hans* clarified this anomaly, stating that the Eleventh Amendment read as to not apply to suits commenced or prosecuted against a citizen of the same state would be "an absurdity on its face." *Hans*, 134 U.S. at 15.

22 Todd B. Tatelman, Nevada Department of Human Resources v. Hibbs: *The Eleventh Amendment in a States' Rights Era: Sword or Shield?*, 52 CATH. U. L. REV. 683, 684 (2003).

23 *See* Hibbs v. Dep't of Human Res., 273 F.3d 844, 850-54 (9th Cir. 2001), *aff'd*, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

24 *Id.* at 850.

25 *Id*. at 851.

26 538 U.S. 721 (2003).

27 529 U.S. 598 (2000).

28 *Id*. at 626-27.

based discrimination cases involving state's sovereign immunity *can* be remedied under Congress' Section 5 power.[29]

Part II of this Note discusses the background of the FMLA and the prior cases specifically addressing state sovereign immunity issues presented in *Hibbs* and *Morrison*, a case dealing with gender-based discrimination.[30] Part III sets forth the facts in *Hibbs*. Part IV analyzes the majority decision, specifically the surprise decision by Chief Justice Rehnquist. Part V describes the significance and importance of the holding. Although supporters of the FMLA feel victorious after the *Hibbs* decision, a closer reading of the narrow holding and a better understanding of Chief Justice Rehnquist's conservative views indicates that the benefits of the FMLA, as it currently stands, will prove to be very minimal.

II. BACKGROUND

A. *The Family and Medical Leave Act of 1993: The History; Congress' Findings; Congress' Purpose; and the FMLA Definitions*

1. *The History*

Congress enacted the Family and Medical Leave Act in response to the changing composition of families and the workforce in our society.[31] Between 1950 and 1990, economic and social changes heightened the tensions between work and families.[32] During those forty years, women in the workforce had increased by about one million workers each year.[33] In 1993, 74% of women aged 25-54 were in the labor force.[34] It was predicted that by year 2005, the *total* number of women in the labor force will equal 66.1%.[35] Additionally, the increase in divorces, separations, and illegitimate children have left a significant number of women struggling between work and raising a family.[36] Furthermore, during this time, Americans were living longer than ever before.[37] As a result, the number of working children having to care for their elderly parents was rapidly increasing.[38] Thus, Congress enacted the FMLA in response to the increased need for medical leave as a result of the increasing number of

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29 *Hibbs*, 538 U.S. 721-22.

30 *Morrison*, 529 U.S. 598.

31 29 U.S.C. § 2601(a)(1), (3), (5) (2000); S. REP. NO. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 6.

32 *See* S. REP. NO. 103-3, at 4-7, *reprinted in* 1993 U.S.C.C.A.N. 3, 6-9.

33 *Id*. at 5, *reprinted in* 1993 U.S.C.C.A.N. 3, 7.

34 *Id*. at 6, *reprinted in* 1993 U.S.C.C.A.N. 3, 8.

35 *Id*. at 5, *reprinted in* 1993 U.S.C.C.A.N. 3, 8.

36 *Id*. at 6, *reprinted in* 1993 U.S.C.C.A.N. 3, 8.

37 *Id.*, *reprinted in* 1993 U.S.C.C.A.N. 3, 8.

38 *Id*., *reprinted in* 1993 U.S.C.C.A.N. 3, 8.

women in the work force, the rise in single heads of households, and the vast number of aging Americans.[39]

2. *Congress' Findings*

In enacting the FMLA, Congress set forth findings that explain many compelling reasons for the remedial legislation.[40] Congress found that due to the "lack of employment policies to accommodate working parents," people may be forced to choose between job security and parenting.[41] Corrective actions taken by different employers had proven inadequate.[42] In fact, in 1993, the majority of employers did offer different sick and disability leaves; however, the types available were usually just vacation leaves.[43] Congress further found that due to our societal roles of men and women, women are primarily responsible for the family caretaking; thus, women in the work force are affected more than men.[44] Lastly, Congress found that "employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender."[45]

3. *Congress' Purpose*

Congress provided very specific purposes for enacting the FMLA.[46] The FMLA was Congress' attempt "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity."[47] The FMLA serves to "entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health

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39 29 U.S.C. § 2601(a)(1).

40 *Id.* § 2601(a).

41 *Id.* § 2601(a)(3).

42 S. REP. NO. 103-3, at 5, *reprinted in* 1993 U.S.C.C.A.N. 3, 7.

43 *Id*. at 15, *reprinted in* 1993 U.S.C.C.A.N. 3, 17.

44 29 U.S.C. § 2601(a)(5).

45 *Id*. § 2601(a)(6).

46 *See id*. § 2601(b).

47 *Id*. § 2601(b)(1). The FMLA is based on similar principles to those of the following: the minimum wage law, which was "enacted because of the societal interest in preventing the payment of exploitative wages"; child labor laws, which were enacted in response to children working long hours in unsafe working environments; the Social Security Act, which was enacted to ensure workers a pension upon retirement; the Occupational Safety and Health Act, which was enacted to assure safe and healthy working environments. H.R. REP. NO. 103-8, pt. 1, at 21-22 (1993).

condition."[48] The FMLA encourages the equal opportunity for both men and women in the workforce.[49] The Act is consistent with the Equal Protection Clause of the Fourteenth Amendment because it ensures that leave is available for eligible medical and family reasons on a gender-neutral basis.[50] Significantly, although the FMLA is expressed in gender-neutral terms, it is aimed to fight gender-based discrimination in employment.[51] "[The] discrimination—founded on stereotypical notions of sex roles—hurts men by not providing them equal opportunity to care for their families and hurts women by effectively forcing them into the caretaking role and thus making them less attractive as employees."[52] The family leave provision of the FMLA attempts to ban the common practice of granting unpaid leave to women but not to men.[53]

4. *The FMLA Definitions*

The FMLA provides that eligible employees are entitled to twelve weeks of unpaid leave annually for several specified reasons including to care for the birth of a child, for employees who adopted a child, in order to care for the employee's "spouse, or a son, daughter, or parent, of the employee [who suffer from] a serious health condition," or because of the employees own serious health condition.[54] Eligible employees are those who have worked for the employer from whom they are requesting leave for at least twelve months and have provided at least 1,250 hours of service during those twelve months.[55] Additionally, in order to be an eligible employee, the employer must employ at least fifty or more employees.[56] If the leave is "foreseeable," the employee must notify the employer at least 30 days in advance of the start of the leave.[57] During the period the employee is on leave, all benefits remain in tact.[58] It is unlawful for any

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[48] 29 U.S.C. § 2601(b)(2). Each law above was enacted in response to "a serious societal problem . . . . [in which] [v]oluntary corrective actions on the part of employers had proven inadequate." H. REP. NO. 103-8, pt. 1, at 22 (1993). The FMLA continues Congress' tradition to reacting to "changing economic realities." *Id*.

[49] 29 U.S.C. § 2601(b)(4)-(5).

[50] *Id*. § 2601(b)(4).

[51] Jennifer Wriggens, *Forward: Law, Labor, & Gender*, 55 ME. L. REV. 1, 4 (2003).

[52] Calvin Massey, *Congressional Power to Regulate Sex Discrimination: The Effect of the Supreme Court's "New Federalism"*, 55 ME. L. REV. 63, 74 (2003); *see also* Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003).

[53] Massey, *supra* note 52, at 74.

[54] 29 U.S.C. § 2612(a)(1)(A)-(D).

[55] 29 U.S.C. § 2611(2)(A)(i)-(ii).

[56] *Id*. § 2611(2)(B)(ii).

[57] *Id.* § 2612(e)(1).

[58] *Id.* § 2614(a)(2).

employer to interfere with an employee's right to the use of the FMLA.[59] If an employer is in violation of the FMLA, "[a]n action to recover . . . damages or equitable relief may be maintained against any employer (*including a public agency*)."[60] Relief available includes the appropriate equitable relief "including employment, reinstatement or promotion of the affected employee, and the award of reasonable attorney's and expert witness fees and costs."[61]

B. *Congress's Ability to Abrogate State Sovereign Immunity*

1. Fitzpatrick v. Bitzer

Fitzpatrick v. Bitzer[62] was the first Supreme Court case where a state used the Eleventh Amendment as a defense against a statute that Congress enacted pursuant to its power under Section 5 of the Fourteenth Amendment.[63] *Fitzpatrick* addressed Congress' amendment of Title VII of the Civil Rights Act, which allowed federal courts to grant private persons money damages in employment discrimination suits against a state government.[64] The Chief Justice wrote for the majority and held that "Congress may, in determining what is 'appropriate legislation' for the purposes of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts."[65] Accordingly, the Court held that back pay and attorney fees were not precluded by the Eleventh Amendment.[66] Significantly, the Court limited the Eleventh Amendment and the principle of state sovereignty by the enforcement provisions of Section 5 of the Fourteenth Amendment.[67] The Court did not address other possibilities allowing Congress to abrogate the states' sovereign immunity.[68]

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59 *Id.* § 2615(a)(1).

60 *Id.* § 2617(a)(2) (emphasis added).

61 S. REP. NO. 103-3, at 3 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 5-6.

62 427 U.S. 445 (1976).

63 *See* Tatelman, *supra* note 22, at 688-89; *Fitzpatrick*, 427 U.S. at 456.

64 *Fitzpatrick*, 427 U.S. at 447.

65 *Id*. at 456.

66 *See id.* at 456-57.

67 *Id*. at 456.

68 *See* Tatelman, *supra* note 22, at 690.

2. Pennsylvania v. Union Gas Co.

Thirteen years later, in *Pennsylvania v. Union Gas Co.*,[69] four Justices, in a plurality decision, held that Congress can abrogate state sovereign immunity pursuant to its Commerce Clause power under Article I.[70] The plurality first held that Congress clearly intended for states to be held liable for damages in federal court when it passed the Comprehensive Environmental Response, Compensation, and Liability Act, as amended by the Superfund Amendments and Reauthorization Act.[71] Next, the issue was whether Congress had the power under the Commerce Clause to enact such a statute in the first place.[72] The plurality stated that "[l]ike the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States."[73] The plurality further noted that the Commerce Clause "both expands federal power and contracts state power."[74] It reasoned that the power Congress had under the Commerce Clause "would be incomplete without the authority to render States liable in damages [thus] to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable."[75] Justice Scalia, dissenting, argued that if the Article I commerce power can abrogate sovereign immunity, then so can all of the Article I powers.[76] Scalia argued that interpreting the Constitution to read that "Congress [can] eliminate sovereign immunity only if it wants to render the doctrine a practical nullity [which] is therefore unreasonable."[77] Scalia believed that Congress is limited by the Fourteenth Amendment, which allows for abrogation of sovereign immunity for "limited purpose[s]."[78]

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69 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

70 *Id*. at 23.

71 *Id*. at 13.

72 *Id*.

73 *Id*. at 16.

74 *Id*. at 17.

75 *Id*. at 19-20.

76 *Id*. at 42 (Scalia, J., dissenting).

77 *Id*.

78 *Id*.

C. *Supreme Court Pro-State Rulings Leading up to* Nevada Department of Human Resources v. Hibbs

1. *March 1996:* Seminole Tribe of Florida v. Florida

The Seminole Tribe of Florida sued the State of Florida and its governor alleging that they had "'refused to enter into any negotiation for inclusion of [certain gaming activities] in a tribal-state compact,' thereby violating the 'requirement of good faith negotiation' contained in [a provision of the Indian Gaming Regulatory Act]."[79] The State and its governor argued that this action, brought in federal court, was precluded because of Florida's sovereign immunity.[80] After their motion to dismiss the complaint was denied by the District Court, the State and its governor took an interlocutory appeal.[81] The Eleventh Circuit reversed, holding the suit was barred by the Eleventh Amendment.[82] The court ruled that Congress did *not* have the power to abrogate the State's sovereign immunity under the Indian Commerce Clause.[83]

The United States Supreme Court granted certiorari and considered two questions when determining "whether Congress . . . abrogated the States' sovereign immunity": (1) "whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity;'" and (2) "whether Congress has acted 'pursuant to a valid exercise of power.'"[84] Chief Justice Rehnquist wrote for the majority and noted that "Congress' intent to abrogate the States' immunity from suit must be obvious from 'a clear legislative statement.'"[85] The Court briefly concluded that Congress did

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[79] Seminole Tribe of Fla. V. Florida, 517 U.S. 44, 51-52 (1996) (first alteration in original).

[80] *Id*. at 52.

[81] *Id*.

[82] *Id*.

[83] *Id*. at 52-53.

[84] *Id*. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)) (alteration in original).

[85] *Id.* (quoting Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 786 (1991)). The requirement of a clear statement originated in Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985). Scanlon sued a California state hospital alleging he was denied employment as a recreational therapist because he suffered from diabetes and he was blind in one eye. *Id*. at 236. Scanlon brought his action under section 504 of the Rehabilitation Act of 1973, which "prohibits employment discrimination against 'otherwise qualified' handicapped persons by 'any recipient of federal assistance.'" LOW & JEFFRIES, *supra* note 21, at 850. "California was a recipient of federal assistance." and "the legislative history seemed to indicate that Congress intended . . . that the remedies authorized by the act would be available against the state." *Id*. Regardless, the Court ruled the action was barred, stating that "[a] general authorization for suit in federal court is not the kind of unequivocal *(continued)*

unequivocally express its intent and proceeded to the second inquiry,[86] which was where the Court focused its analysis. The inquiry focused on Congress' power under the Indian Commerce Clause, not the Fourteenth Amendment.[87] The Court analogized the Indian Commerce Clause with the Interstate Commerce Clause in determining whether these provisions properly granted Congress the power to abrogate.[88] The Court overturned *Pennsylvania v. Union Gas Co.,*[89] holding that Congress did *not* have power under the Commerce Clause, thus limiting Congress' power to abrogate to Section 5 of the Fourteenth Amendment.[90]

2. *June 1997:* City of Boerne v. Flores

In *City of Boerne v. Flores*,[91] local zoning authorities denied a building permit for a church expansion, so the Archbishop brought a challenge under the Religious Freedom Restoration Act (RFRA).[92] The issue before the Court was whether the RFRA, which allows Congress to invalidate "any law which imposes a substantial burden on a religious practice unless it is justified by a compelling interest and it the least restrictive means of accomplishing that interest,"[93] exceeded the scope of Congress' enforcement power under Section 5 of the Fourteenth Amendment.[94] The Court adopted the congruence and proportionality test, which states that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[95] The Archbishop argued that the RFRA was passed to protect the free exercise of religion.[96] The Court reasoned that "[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[97] In holding the RFRA was not "appropriate" enforcement legislation, the Court emphasized that Congress' enforcement

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statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically." *Scanlon*, 473 U.S. at 246.

86 *Seminole Tribe*, 517 U.S. at 57-58.

87 *Id*. at 60.

88 *Id*. at 62-63.

89 491 U.S. 1 (1989).

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

91 521 U.S. 507 (1997).

92 *Id*. at 511.

93 *Id*. at 529.

94 *Id*. at 511, 516-17.

95 *Id*. at 520.

96 *Id*. at 517.

97 *Id*. at 519.

power is "remedial" in nature.[98] The Court held that the RFRA lacked "proportionality or congruence between the means adopted and the legitimate end to be achieved" because the test it demands, compelling governmental interest and least restrictive means, was too stringent.[99]

3. *June 1999:* Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank

College Savings sued the State of Florida for patent infringement under the Patent and Plant Variety Protection Remedy Clarification Act (Act), which "expressly abrogated the States' sovereign immunity from claims of patent infringement."[100] Because the Court held that Congress did "'unequivocally [express] its intent to abrogate [the State's] immunity,'" the only issue was whether Congress acted within its power.[101] Congress justified the Act under the Patent Clause, the Interstate Commerce Clause, and Section 5 of the Fourteenth Amendment.[102] After *Seminole Tribe*, the Court quickly discounted sustaining the Act under the Commerce Clause or the Patent Clause, thus focusing the analysis on whether the Act can be upheld pursuant to Congress' Section 5 of the Fourteenth Amendment power.[103] Looking to *Boerne* for guidance, the Court first identified an "evil" that Congress desired to remedy, and in doing so, it referred to "historical experience."[104] The Court found that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations" when it enacted the Act.[105] Additionally, "a State's infringement of a patent . . . does not by itself violate the Constitution"; rather, the remedy must be nonexistent or inadequate before there will be a "deprivation of property without due process."[106] Thus, the Act did not sustain under Section 5 of the Fourteenth Amendment.[107]

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98 *Id*. at 532.

99 *Id*. at 533.

100 Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 572 U.S. 627, 630 (1999).

101 *Id*. at 635 (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1995)).

102 *Florida Prepaid*, 527 U.S. 635-36.

103 *Id*. at 636.

104 *Id*. at 639-40 (citing City of Boerne v. Flores, 521 U.S. 507, 525 (1997)).

105 *Id.* at 640.

106 *Id*. at 643.

107 *Id*. at 647.

4. *January 2000:* Kimel v. Florida Board of Regents

In Kimmel, plaintiffs brought suit against their state employers under the Age Discrimination in Employment Act (ADEA).[108] The Court determined whether the ADEA was constitutional under Section 5 of the Fourteenth Amendment.[109] The Court first applied the "'simple but stringent test'" that Congress may abrogate only if it makes "'its intention unmistakably clear in the language of the statute'" and held that the ADEA satisfied this test.[110] Next, the Court applied the "'congruence and proportionality' test" and concluded that "the ADEA is not 'appropriate legislation' under [Section] 5 of the Fourteenth Amendment" because the requirements under the ADEA imposed on states are disproportionate to unconstitutional conduct.[111] Age is a classification that gets rational basis, thus, the classification just has to be "rationally related to a legitimate state interest" to be upheld under the Fourteenth Amendment, which is analyzed under the "congruence" prong.[112] Under the "proportionality" prong, Congress never identified patterns of age discrimination by the States, and the court held that the ADEA was "'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.'"[113] Thus, the ADEA was not a valid exercise of Congress' Section 5 of the Fourteenth Amendment power.[114]

5. *February 2001:* Board of Trustees of the University of Alabama v. Garrett

In *Garrett*, employees of the State of Alabama sued the State under the Americans with Disabilities Act (ADA).[115] The Court determined whether Congress had the power under Section 5 of the Fourteenth Amendment to enact the ADA.[116] The Chief Justice wrote for the majority and first identified "the constitutional right at issue."[117] In doing so, the Court examined "the limitations [Section] 1 of the Fourteenth Amendment places upon States' treatment of the disabled."[118] Disability classifications are

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108 Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66 (2000).

109 *Id.* at 66-67.

110 *Id*. at 73 (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).

111 *Id.* at 82-83.

112 *Id*. 83.

113 *Id*. at 86 (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

114 *Id.* at 91.

115 Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 357, 360 (2001).

116 *Id*. at 364.

117 *Id*. at 365.

118 *Id*.

analyzed under the rational basis test, and after *City of Cleburne v. Cleburne Living Center, Inc.*,[119] "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational" and if special accommodations are required, "they have to come from positive law and not through the Equal Protection Clause."[120] Next, the Court examined whether there was a "history and pattern of unconstitutional employment discrimination by the States against the disabled" and found that Congress did *not* identify a pattern of state discrimination.[121] Thus, the Court held that the ADA was not passed in reaction to a pattern of discrimination by the states and that it was not congruent and proportional to the alleged violations.[122]

D. United States v. Morrison*: A Gender-Based Discrimination Case*

United States v. Morrison[123] is a gender-based discrimination case in which Chief Justice Rehnquist delivered the majority opinion.[124] The issue was whether Congress had the authority, either from the Commerce Clause,[125] or the Enforcement Clause of the Fourteenth Amendment,[126] to enact the Violence Against Women Act of 1994 (Act).[127] Petitioner Christy Brzonkala alleged that Antonio Morrison and James Crawford assaulted and repeatedly raped her.[128] Brzonkala sued both men alleging that their attack violated the Act.[129] The District Court dismissed Brzonkala's complaint, holding that Congress did not have the authority to enact section 13981 either under the Commerce Clause or Section 5 of the Fourteenth Amendment.[130] The Court of Appeals reinstated the Brzonkala's claim under section 13981 because "her complaint alleged a crime of violence and the allegations of Morrison's crude derogatory statements regarding his treatment of women sufficiently indicated that his crime was motivated by gender animus."[131] However, the Court of Appeals affirmed the District Court's holding that Congress lacked

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119 473 U.S. 432 (1985).

120 *Garrett*, 531 U.S. at 367-68.

121 *Id*. at 368.

122 *Id*. at 374.

123 529 U.S. 598 (2000).

124 *Id.* at 601-02.

125 U.S. CONST. art. I, § 8, cl. 3.

126 U.S. CONST. amend. XIV, § 5.

127 *Morrison*, 529 U.S. at 607; *see also* 42 U.S.C. § 13981 (2000).

128 529 U.S. at 602.

129 *Id*. at 604.

130 *Id*.

131 *Id*. at 604-05.

authority to enact the civil remedy provided in section 13981(c).[132] Section 13981(b) maintains that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender."[133] Additionally, subsection (c) states:

> A *person* . . . who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section *shall be liable to the party injured*, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.[134]

Thus, section 13981 provided a private right of action.[135]

The Court struck down section 13981 under the Commerce Clause because Congress cannot regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[136] Next, the Court analyzed Brzonkala's Section 5 argument.[137] Brzonkala's argument was founded on the biases against "victims of gender-motivated violence" in different state judicial systems, which denies victims just like her the equal protection of the laws.[138] Such biases were based on evidence that stereotypes exist which may result in "insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence."[139] The Chief Justice held that the remedy in section 13981(c) was not "'corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers.'"[140] The Chief Justice held the civil remedy in section 13981(c) could not be upheld because it is aimed at *individuals*, not states or state actors who commit gender-motivated criminal acts.[141] Additionally, the Chief Justice emphasized in his holding that section 13981 applies uniformly throughout the nation, when evidence introduced by Congress showed the problem did not exist in all states, or even in

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132 *Id*. at 605.

133 42 U.S.C. § 13981(c) (2000).

134 *Id.* § 13981(b).

135 *See* 529 U.S. at 606.

136 *Id*. at 617.

137 *Id*. at 619.

138 *Id*. at 619-20.

139 *Id*. at 620.

140 *Id*. at 625 (quoting Civil Rights Cases, 109 U.S. 3, 18 (1883)) (alteration in original).

141 *Id*. at 626.

most.[142] Thus, Chief Justice Rehnquist held that Congress did not have the power under Section 5 of the Fourteenth Amendment to enact the Violence Against Women Act.[143]

III. DISCUSSION

A. *Facts*

William Hibbs (Hibbs) worked for the Nevada Department of Human Resources Welfare Division (Department).[144] Hibbs sought leave under the FMLA in both April and May of 1997 to care for his wife, who was recovering from a car accident and neck surgery.[145] His request was granted for the full twelve weeks as authorized by the FMLA and he was allowed to use the leave intermittently between May and December 1997.[146] He used his leave as needed until August 5, 1997, at which point he never returned to work.[147] In October 1997, Hibbs was informed that he had used all of his FMLA leave, thus no further leave was permissible and he was to return to work by November 12, 1997.[148] Hibbs was terminated after he did not return to work.[149]

B. *Procedural Posture*

1. *Trial Court*

Hibbs sued the Department along with two of its officers in United States District Court for damages, and injunctive and declaratory relief for violations of the FMLA and the Due Process Clause of the Fourteenth Amendment.[150] The District Court granted Defendant's summary judgment, concluding that the claim was barred under the Eleventh Amendment and that Hibbs' Due Process rights had not been violated.[151] Subsequently, Hibbs appealed the District Court's decision and the United States intervened "to defend the validity of the FMLA's application to the states."[152]

2. *On Appeal*

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142 *Id*.

143 *Id*. at 627.

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

145 *Id*.

146 *Id*.

147 *Id*.

148 *Id*.

149 *Id*.

150 *Id*.; Hibbs v. Dep't of Human Res., 273 F.3d 844, 848 (9th Cir. 2001).

151 *Hibbs*, 273 F.3d at 849.

152 *Id*.

The United States Court of Appeals for the Ninth Circuit reviewed the District Court's decision de novo.[153] The court first discussed Eleventh Amendment Immunity with regards to the FMLA.[154] Under the Eleventh Amendment, states are immune from suits brought by a private persons, *unless* the state has expressly waived its immunity or Congress validly abrogates the immunity.[155] "Congress can abrogate state sovereign immunity if it both (1) unequivocally expresses its intent to do so, and (2) acts pursuant to a valid exercise of power."[156] The court noted that although seven other circuits had held that Congress did not have the power pursuant to Section 5 of the Fourteenth Amendment to enact the FMLA, no such case had been decided in the Ninth Circuit.[157] Only one of those seven cases, however, *Kazmier v. Widmann,*[158] expressly involved the FMLA provision at issue in *Hibbs*.[159]

Next, the court focused its analysis on the issue of waiver.[160] Hibbs argued that under the FMLA, Nevada waived its immunity from private suits.[161] The court, however, affirmed the District Court's waiver holding by explaining that Nevada did *not* expressly waive its immunity and that at most it amounted to "ambiguous constructive waiver," which is not sufficient.[162] The analysis then turned toward Congress' express intent to abrogate.[163] The court held that the FMLA "includes a sufficiently clear expression of congressional intent to abrogate state sovereign immunity."[164] The enforcement provisions of FMLA contain identical language to that of the Fair Labor Standards Act (FLSA).[165] This is significant because in *Kimel v. Florida Board of Regents*, the Supreme Court held the ADEA clearly expressed Congress' intent to abrogate because the "ADEA incorporates by reference an enforcement provision of the Fair Labor Standards Act . . . that 'clearly provides for suits by

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153 *Id*.

154 *Id*. at 850.

155 *Id*.

156 *Id*. (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996)).

157 *Id*.

158 225 F.3d 519 (5th Cir. 2000).

159 *Hibbs*, 273 F.3d at 850.

160 *Id*. at 851-52.

161 *Id*. at 851.

162 *Id*. at 851-52.

163 *Id*. at 852-53.

164 *Id*. at 853.

165 *Id*. at 852.

individuals against states.'"[166] Thus, the FMLA clearly expresses Congress' intent to abrogate the State of Nevada's sovereign immunity.[167]

The remaining analysis focused on whether the FMLA was passed pursuant to Congress' valid exercise of its Section 5 power.[168] Notably, the FMLA is aimed at "remedying and preventing gender discrimination;"[169] thus, the Court compared it to and examined it under the intermediate scrutiny test, which provides that state-sponsored gender discrimination must "serve[] important governmental objectives and . . . the discriminatory means" must be "substantially related" to the ends; otherwise it violates the Equal Protection Clause.[170] In applying the congruence and proportionality test, the court noted the first step is to identify the "constitutional right at issue."[171] Here though, the "constitutional right at issue" is not the typical gender discrimination right asserted. The United States asserted that because women are typically the family caregivers, *men* suffer because employers usually offer them less caretaking leave.[172] As a result, this discrimination is harmful to men because they are not given enough leave *and* to women because they are the typical caregivers, and thus, women are given more leave, and as a result, are less attractive employees than men.[173] Thus, ultimately Congress passed the FMLA, which is couched in gender-neutral terms to allow the same amount of leave across the board and to eliminate these discriminations.

The court clarified that the question is "*not* whether Congress created a sufficient legislative record, but rather whether, given all of the information before the Court, it appears that the statute in question can

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166 *Id*. (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73-74 (2000)).

167 *Id*. at 853.

168 *Id*. at 853-73.

169 *Id.* at 854.

170 *Id*. (citing United States v. Virginia, 518 U.S. 515, 533 (1996)). In *Hibbs*, the burden was on the defendants, the challengers of the FMLA. *Id*. at 857-58. The court distinguished *Kimel* and *Garrett*, specifically distinguishing the FMLA, which requires intermediate scrutiny, from the ADEA and the ADA, which require rational basis. *Id*. at 857. The court reasoned that "[b]ecause the state-sponsored gender discrimination is presumptively unconstitutional, [S]ection 5 legislation [the FMLA] that is intended to remedy or prevent gender discrimination is presumptively constitutional." *Id*. Thus, the challengers of the FMLA carried the burden to "prove that the states have *not* engaged in a pattern of unconstitutional conduct." *Id*. at 858 (emphasis in original).

171 *Id*. at 854 (quoting Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001)).

172 *Id*. at 855.

173 *Id*.

appropriately be characterized as legitimate remedial legislation."[174] The court held that the defendants failed to show that there is not a pattern of gender discrimination by the states with respect to granting leave, therefore, Congress did have the Section 5 of the Fourteenth Amendment power to enact the FMLA.[175] This is where the court found *Kazmier v. Widmann*, which held that "Congress did *not* validly exercise its [S]ection 5 power in enacting § 2612(a)(1)(C)" unpersuasive.[176] In *Kazmier*, the court assumed that in order to prove a valid exercise of Congress' Section 5 power, "adequate evidentiary support in the legislative history is *always* a requirement."[177] Additionally, the court failed to follow *Kazmier* because that case did not correctly address who carried the burden in a heightened scrutiny gender discrimination situation.[178] Secondly, in the alternative to this initial holding, the court held that the FMLA is justified as being a preventative measure because the "legislative history of the FMLA contains substantial evidence of gender discrimination with respect to the granting of leave to state employees."[179] Lastly, the court held that Congress had the authority to enact the FMLA because it was a "congruent and proportional remedy for the continuing effects of past unconstitutional gender discrimination in employment *by the states*, readjusting workplace norms in both private and public workplaces so as to foster equal participation in both economic and domestic life by both men and women."[180] After the Ninth Circuit reversed the District Court's holding, the Supreme Court granted certiorari to resolve the split among the Fifth Circuit and the Ninth Circuit as to whether a private individual "may sue a State for money damages in federal court for violation of § 2612(a)(1)(C)"[181] of the FMLA.[182]

3. *The Supreme Court's Decision*

Chief Justice Rehnquist wrote for the majority, in which O'Connor, Souter, Ginsburg, and Breyer joined, and affirmed the judgment of the

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174 *Id*. at 857 (emphasis added).

175 *Id.* at 858.

176 *Id*. (citing Kazmier v. Widmann, 225 F.3d 519, 526-27 (5th Cir. 2000)) (emphasis added).

177 *Id*. (emphasis in original).

178 *Id*.

179 *Id*.

180 *Id*. at 861 (emphasis in original).

181 Section 2612(1)(C) provides that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [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."

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

Court of Appeals.[183] The Chief Justice quickly touched on Congress' intent to abrogate State sovereign immunity, noting that it was "not fairly debatable."[184] Because Congress' intent was clear, the only pressing issue before the Court was whether Congress had the constitutional authority under Section 5 of the Fourteenth Amendment to enact the FMLA.[185] The Court reiterated the need to apply the congruence and proportionality test to ensure the FML is "appropriate prophylactic legislation" and not a "'substantive redefinition of the Fourteenth Amendment right at issue.'"[186]

The Court mainly focused its analysis on the pattern of the states' constitutional violations of gender-based discrimination in order to determine whether Congress passed intermediate scrutiny.[187] Previously, the Supreme Court upheld laws allowing states to prohibit women from pursuing certain jobs such as practicing law or bartending.[188] Even if women were not strictly prohibited from certain jobs, states would still impose restrictions on women working those jobs such as hour limitations.[189] These restrictions were implemented as a result of states believing that a "woman is, and should remain, 'the center of home and family life.'"[190] Chief Justice Rehnquist noted that this discrimination still existed even after Congress enacted Title VII of the Civil Rights Act of 1964, which abrogated states' sovereign immunity.[191] Significantly, *Hibbs* deals with the effects of this discrimination against *men* in the workplace.[192] Notably, a survey from a 1990 Bureau of Labor Statistics held that "37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies."[193] Although that survey pertained to private-sector employees, "'[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees.'"[194] Plainly stated, it is very rare that men receive

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183 *Id*. at 723, 740.

184 *Id*. at 726.

185 *Id*. at 726-27.

186 *Id*. at 728 (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2001)).

187 *See id*. at 728-38.

188 *Id*. at 729 (citing Bradwell v. State, 83 U.S. 130 (1873); Goesaert v. Cleary, 335 U.S. 464 (1948)).

189 *Id.* at 729.

190 *Id*. (quoting Hoyt v. Florida, 368 U.S. 57, 62 (1961)).

191 *Id*. at 730.

192 *Id.* at 729-30.

193 *Id*. (citations omitted).

194 *Id*. at n.3 (quoting The Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcommittee on Labor-Management Relations, 99th Cong. 2d Sess., 33 (1986)) (alteration in original).

parental leave at all.[195] "[E]ven where state laws . . . were not facially discriminatory, they were applied in discriminatory ways."[196] Thus, the Chief Justice believed that Congress was justified in enacting the FMLA due to "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits."[197]

The Court distinguished *Kimel* and *Garrett* which dealt with age discrimination and disability discrimination respectively.[198] Notably, those cases dealt with discrimination that "passes muster if there is 'a rational basis for doing so at a class-based level, even if it is probably not true that those reasons are valid in the majority of cases.'"[199] Thus, in those two cases, Congress failed its requirement to identify "not just the existence of age- or disability-based state decisions, but a 'widespread pattern' of irrational reliance on such criteria."[200] In contrast, under the heightened level of scrutiny applied to gender-based discrimination, since the "standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than [the] rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations."[201] Historically, it is presumed by most that women are the primary caretakers.[202] Paralleled to this presumption is a stereotype that men lack the capability to assume domestic responsibilities; thus, men are often denied similar leave provisions as women.[203] Chief Justice Rehnquist was strongly influenced by the fact that Congress' prior attempts to address this discrimination through Title VII and the Pregnancy Discrimination Act had not terminated the problem.[204]

The Chief Justice especially appreciated the fact that the FMLA's terms are extremely narrow with many limitations placed on the scope of the measure.[205] He noted that the statutes in *Boerne*, *Kimel*, and *Garrett* "applied broadly to every aspect of state employers' operations, [but] the FMLA is narrowly targeted at the fault line between work and family."[206] The following are some major limitations provided within the FMLA: it

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195 *See id.* at 730-31.

196 *Id*. at 732.

197 *Id*. at 735.

198 *See id*. at 735-37.

199 *Id*. at 735 (quoting Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000) (quoting Gregory v. Ashcroft, 501 U.S. 452, 473 (1991))).

200 *Id.* (citing *Kimel*, 528 U.S. at 90).

201 *Id.* at 736 (citations omitted).

202 *Id*.

203 *Id*.

204 *Id*. at 737.

205 *Id.* at 738.

206 *Id*.

applies only to *unpaid* leave;[207] it "applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last [twelve] months;"[208] employees in "high-ranking or sensitive positions" are not eligible;[209] and "state elected officials, their staffs, and appointed policymakers" are expressly excluded.[210] Additionally, the cause of action is very restricted.[211] "The damages recoverable are [limited to] actual monetary losses"[212] and the "the accrual period for backpay is limited by the Act's 2-year statute of limitations."[213] Thus, Chief Justice Rehnquist, writing for the majority, held that the FMLA is "congruent and proportional to the targeted violation."[214]

Justice Scalia joined Kennedy's dissent, but individually criticized the Court for treating "the States" as a "collective entity which is guilty or innocent as a body."[215] Specifically, Scalia criticized the Court for not focusing on Nevada itself and whether the state of Nevada violated the Fourteenth Amendment through its history of gender discrimination in the workplace.[216]

Justice Kennedy wrote the main dissenting opinion and was joined by Scalia and Thomas.[217] Kennedy declared that the FMLA "is invalid to the extent it allows for private suits against the unconsenting States."[218] Kennedy failed to believe that the Court showed the States did in fact engage "in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits."[219] Kennedy was concerned with the accuracy of the survey from the Bureau of Labor Statistics, which the Court relied on because that survey was only conducted on private employers, and no state employers were even surveyed.[220] Thus, Kennedy criticized the Court for speculating that Nevada had engaged in unconstitutional discrimination.[221] Kennedy further believed that the

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207 *See* 29 U.S.C. § 2612(a)(1).

208 *Hibbs*, 538 U.S. at 739; 29 U.S.C. § 2611(2)(A).

209 *Hibbs*, 538 U.S. at 739; *see also* 29 U.S.C. § 2611(2)(B)(i).

210 *Hibbs*, 538 U.S. at 739; *see also* 29 U.S.C. § 2611(2)(B)(i).

211 *Hibbs*, 538 U.S. at 739-40.

212 *Id.* at 740; *see also* 29 U.S.C. § 2617(a)(1)(A)(i)-(iii).

213 *Hibbs*, 538 U.S. at 740; *see also* 29 U.S.C. § 2617(c)(1)-(2).

214 *Hibbs*, 538 U.S. at 737 (quoting Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001)).

215 *Id*. at 742 (Scalia, J., dissenting).

216 *Id*. at 742-43.

217 *Id.* at 744 (Kennedy, J., dissenting).

218 *Id*.

219 *Id*. at 745.

220 *Id*. at 746.

221 *Id*. at 748.

FMLA is not a remedy, but rather a benefit program and that the FMLA "does not respect the States' autonomous power to design their own social benefits regime."[222] Thus, for the foregoing reasons, Kennedy concluded that Congress, through the enactment of the FMLA did *not* validly abrogate state's sovereign immunity.[223]

IV. ANALYSIS

Contrary to Justice Kennedy's conclusion that the FMLA "does not respect the States' autonomous power to design their own social benefits regime,"[224] the FMLA was a highly appropriate remedy set forth by Congress, rather than a benefit program. In fact, Congress provides for an appropriate remedy which invites the states to utilize its autonomous power to later design its own provisions in line with the FMLA. Although it was a surprising departure from the pro-state supreme court rulings protecting states' immunity from private lawsuits, the Supreme Court decided this case correctly. Surprisingly, history would have predicted that Chief Justice Rehnquist would write for the dissent, not the majority. A closer look will explain.

Chief Justice Rehnquist is often described as a conservative, a strict constructionist, and an advocate of states' rights.[225] As a strict constructionist, the Chief Justice believes that judges should not depart from the text of the Constitution; otherwise, they cease being judges and become "'[a] small group of fortunately situated people with a roving commission to second-guess Congress, state legislatures, and state and federal administrative officers concerning what is best for the country.'"[226] A strict constructionist also believes that "law is logically separate from moral values that are arbitrary or subjective."[227] Historically, Chief Justice Rehnquist has been a proponent of state sovereignty.[228] Although no longer followed, scholars view *National League of Cities v. Usery*[229] as "the centerpiece of Rehnquist's federalism."[230] In *Usery*, the Chief Justice wrote for the majority and held that Congress cannot require states and

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222 *Id*. at 755.

223 *Id*. at 759.

224 *Id.* at 755.

225 *See* 2 GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA 640 (John R. Vile, ed., 2003) [hereinafter GREAT AMERICAN JUDGES].

226 *Id.* at 642 (quoting Chief Justice Rehnquist).

227 *Id*. (quoting Ronald Dworkin).

228 *Id.* at 643.

229 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

230 2 GREAT AMERICAN JUDGES, *supra* note 225, at 644.

local governments to pay its employees minimum wages.[231] Chief Justice Rehnquist felt that "[o]ne undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions."[232] Significantly, the Chief Justice stated that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner."[233] In other words, Chief Justice Rehnquist believed that "the structure of the Constitution withheld from Congress any power to regulate the operating of 'states as states.'"[234] In regards to Section 5 of the Fourteenth Amendment, the Chief Justice has said that it is "strong medicine" that "sharply altered the balance of power between the Federal and State Governments."[235]

In *Hibbs*, the Chief Justice was highly influenced by congressional findings of past discrimination and focuses his majority opinion around these findings. However, in *United States v. Morrison*, arguably the evidence was just as pervasive, if not more, yet Chief Justice Rehnquist was simply unaffected.[236] In *Morrison*, petitioner argued that the Violence Against Women Act should be upheld under Section 5 of the Fourteenth

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231 *See Usery*, 426 U.S. at 845, 855.

232 *Id*. at 845.

233 *Id.*

234 2 GREAT AMERICAN JUDGES, *supra* note 225, at 644 (quoting *Usery*, 426 U.S. at 845).

235 Trimble v. Gordon, 430 U.S. 762, 778 (1977).

236 *See* United States v. Morrison, 529 U.S. 598 (2000). The following is a part of the volume of information Congress received with respect to domestic violence: "'[t]hree out of four American women will be victims of violent crimes sometime during their life,' . . . '[v]iolence is the leading cause of injuries to women ages 15 to 44,' . . . '[b]etween 2,000 and 4,000 women die every year from [domestic] abuse,'. . . '[p]artial estimates show that violent crime against women costs this country at least 3 billion—not million, but billion—dollars a year,' . . . '[e]stimates suggest that we spend $5 to $10 billion a year on health care, criminal justice, and other social costs of domestic violence.'" *Id.* at 631-32 (citations omitted). Congress received the following information regarding rape: "'[the incidence of rape] rose four times as fast as the total national crime rate over the past 10 years,' . . . '[a]ccording to one study, close to half a million girls now in high school will be raped before they graduate,'. . . '[forty-one] percent of judges surveyed believed that juries give sexual assault victims less credibility than other crime victims,' . . . '[l]ess than 1 percent of all [rape] victims have collected damages,' . . . '[a]lmost one-quarter of convicted rapists never go to prison and another quarter received sentences in local jails where the average sentence is [eleven] months.'" *Id*. at 633-34 (citations omitted).

Amendment since "there is pervasive bias in various state justice systems against victims of gender-motivated violence."[237] Chief Justice Rehnquist acknowledged that there was a "voluminous congressional record" to support petitioner's assertion.[238] Stereotypes and assumptions towards gender-motivated crime victims were found to be present in the state judicial systems.[239] Such stereotypes resulted in severe mishandling of gender-motivated crime cases.[240] Despite such pervasive stereotypes, the Court ruled that the Congruence and Proportionality Test set forth in *Boerne* was not met because the Violence Against Women Act (Act) was "not aimed at proscribing discrimination by officials . . . it [was] directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."[241] Thus, the Chief Justice was not convinced by the "voluminous congressional record" setting forth the biases present in the state judicial systems.

Furthermore, the majority emphasized that the congressional findings failed to show there was nationwide gender-based bias.[242] By not allowing Congress' Section 5 powers to extend to the enactment of the Act, the Court after *Morrison* posed "serious questions regarding the ability of Congress to propose national legislation under [Section 5]."[243] In light of *Morrison*, it would appear that Congress must demonstrate the problem exists in every state before Section 5 remedies will be upheld.[244] Indeed, "Congress probably has a better chance of convincing the Court that the legislative means fit the ends if it can establish that it is reacting to a pervasive, nationwide problem of gender discrimination."[245] It seemed that the Court would rather states handle gender-based discrimination on their own, rather than follow Congress' nationwide legislation.[246] One legal scholar reacted to *Morrison* by stating that "[i]n essence the Court is

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237 *Id*. at 619.

238 *Id*. at 620.

239 *Id*; *see supra* note 236.

240 *See Morrison*, 529 U.S. at 620.

241 *Id.* at 626.

242 *Id*. Ironically, as acknowledged by the dissent, "[t]his Court ha[d] not previously held that Congress must document the existence of a problem in every State prior to proposing a national solution [in fact], the deference this Court gives to Congress' chosen remedy under [Section] 5, suggests that any such requirement would be inappropriate." *Id*. at 666 (Breyer, J., dissenting) (citations omitted).

243 Ambre Howard, *Current Events:* United States v. Morrison *529 U.S. 598 (2000)*, 9 AM. U.J. GENDER SOC. POL'Y & L. 461, 469 (2001).

244 *See id*; *Morrison*, 529 U.S. at 626.

245 Christopher P. Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 463 (2003).

246 Howard, *supra* note 243, at 469.

refusing to acknowledge Congress's [sic] special competence to make legislative judgments on policy issues, as well as eliminating, for litigants suffering civil rights abuse, the possibility that national courts can entertain Congress's [sic] legislative effort to provide legal remedies."[247] Chief Justice Rehnquist's opinion in *Morrison* also left open the question of whether sex-based discrimination cases involving state's sovereign immunity could ever be remedied under Congress' Section 5 power.[248]

The two questions left open after *Morrison* have, for the time being, been laid to rest by *Hibbs*. First, Congress still has the power under Section 5 to propose national legislation. Justice Scalia's dissent criticizes the majority opinion claiming there was not even an attempt to show that each state, acting under the FMLA, was in violation of the Fourteenth Amendment.[249] Scalia also criticizes the majority for treating "'the States' as some sort of collective entity which is guilty or innocent as a body."[250] Scalia strongly believes that Nevada has a right to demand the Court to prove that Nevada, as an individual state, has violated the Fourteenth Amendment.[251] Despite these criticisms, the majority was convinced that pervasive gender-discrimination is still present in the job market. The FMLA "seems to represent an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem."[252] After *Hibbs*, it may be sufficient to determine whether discrimination exists in the workplace on a national job market level, rather than on an individual state level.

Next, it appears that sex-based discrimination cases involving states' sovereign immunity *can* be remedied under Congress' Section 5 power. According to Marcia Greenberger, co-president of the National Women's Law Center, *Hibbs* is "significant because it means a majority of the Court accepts the principle that Congress has the power to decide how best to address sex discrimination and gender stereotypes."[253] Indeed, the decision in *Hibbs* reveals that the Court will more willingly defer to Congress regarding "laws combating gender discrimination than other forms of bias, such as age or disability."[254] *Hibbs* sparked hope back into gender-based discrimination cases that *Morrison* had so quickly extinguished.

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247 Banks, *supra*, note 245, at 431 n.27.

248 *Id.* at 463.

249 Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 742 (2003) (Scalia, J., dissenting).

250 *Id*.

251 *See id.*

252 United States v. Morrison, 529 U.S. 598, 662 (2000) (Breyer, J., dissenting).

253 Tony Mauro, *FMLA Suits Against States Permissible*, LEGAL TIMES, June 2, 2003, at 11.

254 *Id*.

In light of the many pro-state Supreme Court rulings protecting states' immunity from private lawsuits as discussed above, and in light of the decision in *Morrison*, it certainly is surprising that Chief Justice Rehnquist would write for the majority in *Hibbs*. In fact, this latest decision has left many wondering, why the change of heart? One likely reason for the change in heart is because in *Morrison*, the statute was much more sweeping, whereas, in *Hibbs*, the statute is very narrow and will not likely benefit many employees as it now stands. Additionally, the statute at issue in *Hibbs* is to prevent gender discrimination against both women *and men*, leaving one to wonder if this decision would have been decided the same had the FMLA only covered women. It may even be simpler: Chief Justice Rehnquist may have intended for the majority's analysis to follow *his* preferences for analyzing Eleventh Amendment issues.

V. SIGNIFICANCE

Hibbs is significant because it breaks the pattern of pro-state Supreme Court rulings protecting states' immunity from private lawsuits. Since the FMLA was enacted, more than 24 million people each year take the federally guaranteed leave to care for aging parents, new babies and serious medical conditions.[255] The FMLA simply establishes a minimum standard that employees can depend on in certain circumstances to assure job protection.[256] This federal legislation acts as a stepping stone to more extensive leave acts which will ideally be developed by each individual state. The FMLA likely benefits only middle-class employees. Lower-class employees cannot afford to take any unpaid medical leave, let alone twelve weeks worth. Three in four people who do not take leave under the act say they cannot afford to.[257] A study conducted by the Families and Work institute found that low-income women who do in fact take leave, "on average, take shorter leaves and are more likely to take fewer than [six] weeks to recuperate from childbirth than more affluent women."[258] Upper-class employees likely have other benefits allowing them to take paid leave for personal time. States can easily expand the law to require paid sick leave and shared sick leave, allowing workers to donate unused sick leave to co-workers. Additionally, states can easily expand the law to cover businesses with twenty-five to forty-nine employees, which would have a significant impact on cities primarily comprised of small businesses.

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[255] Alexandra Navarro Clifton, *Protection Here To Stay*, PALM BEACH POST (Florida), July 13, 2003, at F1.

[256] H.R. REP. NO. 103-8(I), pt. 1, at 17 (1993).

[257] Sonya Padgett, *Family and Medical Leave Act: Show of Support*, LAS VEGAS REV. J., Sept. 25, 2003, at E1.

[258] S. REP. NO. 103-3, at 16 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 18.

Congress has successfully used its power under Section 5 of the Fourteenth Amendment to establish a minimal federal leave requirement in which every state must abide. As expressly provided in the FMLA, nothing in the Act "discourage[s] employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under [the FMLA]."[259] Congress and the Supreme Court have done its part to develop a minimal leave policy; therefore, it is now up to the individual states to decide if it will be beneficial to expand the protections provided by the FMLA.

VI. CONCLUSION

Indeed, the benefits of the FMLA, as it currently stands, will prove to be very minimal. It, in fact, gives very limited benefits to very few people. The Supreme Court ruling in *Hibbs*, however, may have given the FMLA just the attention it needed. California recently "became the first state to pass a paid-leave law that allows employees to take up to six weeks' [sic] leave and get 55 percent of their salary while taking care of a newborn, adopted child or sick family member."[260] Managers may soon realize that by encouraging people to take time off to be with their families, the companies will be rewarded with far more loyalty and commitment than ever. Employees at businesses who accommodate family needs are more likely to stay at their job, and likely to be more productive while on the job.[261] Employees will more fully commit to their jobs only when they can count on employers to commit to leave policies.[262] Chief Justice Rehnquist likely wrote for the majority to keep the opinion as narrow as possible, but now the states have the opportunity to take matters into their own hands, and to provide employees with greater protections in regards to paid-leave. It appears that this is what Chief Justice Rehnquist may have envisioned, ruling on a narrowly-tailored statute, thereby encouraging states to regulate their own citizens.

ALLISON K. SLAGLE

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259 29 U.S.C. § 2653 (2000).

260 Clifton, *supra* note 255, at F1.

261 *See id.*