CONSTITUTIONAL LAW—STATE EMPLOYEES HAVE PRIVATE CAUSE OF ACTION AGAINST EMPLOYERS UNDER FAMILY AND MEDICAL LEAVE ACT—*NEVADA DEPARTMENT OF HUMAN RESOURCES V. HIBBS*, 538 U.S. 721 (2003).

The Eleventh Amendment of the United States Constitution provides that non-consenting states are not subject to suit in federal court.[1] Congress may, however, abrogate the states' sovereign immunity by enacting legislation to enforce the provisions of the Fourteenth Amendment.[2] In *Nevada Department of Human Resources v. Hibbs*,[3] the Supreme Court of the

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[1] U.S. CONST. amend. XI. The plain language of the Eleventh Amendment prohibits suits against a state by citizens of another state. *Id.* However, the Court interprets the Eleventh Amendment to forbid suits by citizens against their own states. *See, e.g.* Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) (reasoning Eleventh Amendment's ultimate seeks disallowing private citizens from suing non-consenting states); Kimel v. Florida Board of Regents, 528 U.S. 62, 72-73 (2000) (clarifying need for inference to understand purpose of Eleventh Amendment); College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board 527 U.S. 666, 669-70 (1999) (tracing hundred-year history of interpreting Eleventh Amendment to disallow suits against non-consenting states).

[2] U.S. CONST. amend. XIV, § 1. Section One of the Fourteenth Amendment enumerates the substantive rights of the Fourteenth Amendment, including due process, privileges and immunities, and equal protection. *See id.* The authority for Congress to enforce those guarantees is in Section Five of the Fourteenth Amendment, which provides Congress the "power to enforce, by appropriate legislation, the provisions" found in Section One of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 5. As such, abrogation of a state's sovereign immunity can occur when Congress enacts valid legislation pursuant to Section Five of the Fourteenth Amendment to enforce the substantive rights of Section One. *See* Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 730 (2003) (setting forth valid powers vested in Congress to abrogate sovereign immunity). When enacting the FMLA, Congress also relied on its commerce power pursuant to Article I of the Constitution to abrogate state sovereign immunity. *See* Hibbs, 538 U.S. at 726-727 (2003). However, the Court has held that Congress' use of commerce power is an invalid exercise of power for abrogation of sovereign immunity.

United States considered whether Congress acted within its constitutional authority by abrogating sovereign immunity under the Family and Medical Leave Act (FMLA), which allows private causes of action against state employers to enforce the FMLA's family-leave provision.[4] The Court held abrogation was proper under the FMLA and state employees could bring private actions against their employers because Congress acted within its constitutional authority when it passed the FMLA for the purpose of remedying a history of gender-based discrimination in the workplace.[5]

In April 1997, William Hibbs worked for the Nevada Department of Human Resources (Nevada).[6] Hibbs' wife was ailing due to an accident and subsequent surgery and Hibbs sought leave from work under the FMLA's family-care provision, which allows employees to take

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See Seminole Tribe of Florida v. Florida, 517 U.S. 44, 60 (1996) (holding Constitution's Interstate Commerce Clause does not grant Congress power to abrogate sovereign immunity).

[3] 538 U.S. 721 (2003).

[4] 29 U.S.C. § 2612(a)(1)(C) (2000) (enacting family-leave provision of FMLA). The FMLA provides eligible employees with up to twelve weeks of leave in a one year period for: the birth of a child; to facilitate placement of a son or daughter with the employee for adoption or foster care; to allow the employee to care for a spouse or a son or daughter or parent suffering from a serious health condition; or to allow the employee to deal with his or her own serious health condition if that condition renders the employee unable to perform the functions of his or her position. *See* 29 U.S.C. § 2612(a)(1)(C) (2000) (listing allowable reasons for employee to take family leave). The FMLA requires employers to maintain coverage for group health benefits and also requires employers to reinstate certain eligible employees to an equivalent position on conclusion of the leave. *See* 29 U.S.C. § 2614 (2000) (providing post-FMLA leave reinstatement requirements). The FMLA empowers aggrieved employees to sue for monetary damages, double damages as a liquidated penalty and equitable relief. 29 U.S.C. § 2617 (2000) (setting forth damage scheme for aggrieved employees).

[5] *See* Hibbs, 538 U.S. at 737 (holding family-leave provision congruent and proportional to remedial objective).

[6] *See id.* at 725 (explaining Hibbs' employment status).

unpaid time to care for family members.[7] Nevada granted Hibbs twelve weeks of FMLA leave and authorized him to use it as needed between May and December 1997.[8] Hibbs used the leave intermittently until August 5, 1997, after which time he did not return to work.[9] In October 1997, Nevada informed Hibbs that they would grant no more FMLA leave and ordered him to return to work by November 12, 1997.[10] Hibbs did not return on the specified date and Nevada terminated him.[11]

Hibbs sued Nevada for violating the FMLA and sought injunctive relief and monetary damages.[12] Nevada defended the suit by asserting sovereign immunity barred the claim and by denying that Nevada violated Hibbs' Fourteenth Amendment rights.[13] The District Court awarded Nevada its request for judgment without a trial, deciding the Eleventh Amendment immunized state employers from FMLA claims brought by employees.[14] Hibbs appealed and the Ninth Circuit Court reversed the District Court.[15] Nevada appealed the Ninth Circuit's reversal and the U.S. Supreme Court granted certiorari.[16] The Supreme Court affirmed the Ninth Circuit, holding states are not immune from FMLA lawsuits and harmed employees may bring suit in federal court for a state-employer's failure to comply with the FMLA's family-leave provision.[17]

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[7] *Id.* (explaining reasons requiring Hibbs' need for leave from work)

[88] *Id.*

[9] *Id.*

[10] Hibbs, 538 U.S. at 725.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Hibbs, 538 U.S. at 725.

[15] *Id.* After Hibbs appealed the District Court's decisions, the United States intervened. *Id.* (describing intervention of U.S. government). The federal government may intervene in any suit where the "the constitutionality of any Act of Congress affecting the public interest is drawn in question." 28 U.S.C. § 2403 (2003) (listing situations when federal government can intervene).

[16] Hibbs, 538 U.S. at 725.

[17] *See* i*d.*

Although generally there is no federal jurisdiction over suits against non-consenting states, their immunity is not absolute.[18] Congress may pass legislation eliminating a state's immunity by making its intention to do so unmistakably clear in the language of the statute and by acting pursuant to a valid exercise of its power under Section Five of the Fourteenth Amendment.[19] Section Five allows for enforcement of the Fourteenth Amendment's substantive guarantees, including equal protection under the law.[20] In the exercise of the Section Five power, Congress can enact broad "prophylactic" legislation proscribing facially constitutional conduct to prevent and deter unconstitutional conduct.[21] The prophylactic legislation must respond to actual, identified constitutional violations by the state and not substitute as an attempt to redefine the states' legal obligations.[22] Ultimately, it falls to the Supreme Court, not Congress, to define the substantive rights enforceable under the Fourteenth Amendment and to

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[18] *Id.* (explaining Congress' authority to abrogate sovereign immunity pursuant to Fourteenth Amendment authority).

[19] *See id.*; *see also* Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (applying "simple but stringent" standard required for abrogation language in statute).

[20] *See* Hibbs, 538 U.S. at 726. (discussing necessary preconditions for abrogation of the Eleventh Amendment).

[21] *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (permitting Congress to enact prophylactic legislation under Fourteenth Amendment even if it intrudes on states). Congress may not, however, substantively redefine the states' legal obligations. *See* Kimel, 528 U.S. at 88 (disallowing public employee's private action for age discrimination because statute altered states' legal obligations). Congress always has authority to enact strictly remedial legislation when it narrowly targets clearly unconstitutional state conduct. *See* Kazmier v. Widmann 225 F.3d 519, 524 (5th Cir. 2000) (acknowledging plain language of Section Five authorizes Congress to pass remedial legislation). However, Congress can enact prophylactic legislation prohibiting states from engaging in constitutional conduct only when there is congruence and proportionality between the injury to be prevented and the means adopted to that end. *See* Kimel, 528 U.S. at 80 (discussing requirement of pattern of unconstitutional behavior to make prophylactic legislation congruent and proportional).

[22] *See* Kimel, 528 U.S. at 81.

distinguish those rights from unconstitutional congressional redefinition of the states' legal obligations.[23]

To be a valid exercise of Congress' abrogation power, a statute must exhibit congruence and proportionality between the injury Congress seeks to prevent or remedy and the means Congress adopts to that end.[24] When Congress passes legislation related to gender-based classifications, the Court subjects the statute to heightened scrutiny.[25] Furthermore, the means the gender-based statute uses to prevent or remedy the injury must substantially relate to the government's objective.[26]

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[23] *Id.* (defining Court's role to review validity of legislation). Although the Supreme Court has authority to review whether a right is substantively guaranteed under the Fourteenth Amendment, it is for Congress in the first instance to determine what legislation is needed to secure those guarantees. *Id.*

[24] *See* Hibbs, 538 U.S. at 737, *citing* Garrett 531 U.S. at 374. (clarifying preventive rules must exhibit congruence between means and ends in light of evil presented).

[25] *See* Craig v. Boren, 429 U.S. 190, 197-199 (1976) (holding statutory classifications distinguishing males and females subject to heightened scrutiny). The Court has considered if Congress had authority to abrogate state sovereign immunity under their Fourteenth Amendment power for age and disability-based discrimination. *See* Kimel, 521 U.S. at 536 (reiterating age-based discrimination requires only rational basis scrutiny to pass muster); Garrett, 531 U.S. at 363 (affirming disability-based discrimination needs only rational basis scrutiny to be constitutional). In both cases, the Court resolved that Congress did not have authority to abrogate state sovereign immunity because discrimination based on age and disability require only a rational basis to be constitutional. *Id.*; *see also,* Kimel, 521 U.S. at 536. By contrast, the Court approved Congress' abrogation of state sovereign immunity in the face of racial discrimination for voting rights because race-based statutes must pass the highest level of scrutiny to be constitutional and are presumptively unconstitutional. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308-313 (1966) (finding racially discriminatory laws require highest level scrutiny to pass muster).

[26] *See* United States v. Virginia, 518 U.S 515, 534 (1996) (finding necessity for important government interest to uphold gender-based statutes).

Prior to *Hibbs*, only one federal appellate case, *Kazmier v. Widmann*,[27] considered whether Congress had authority to abrogate state sovereign immunity by enacting the FMLA's family-leave provision.[28] In *Kazmier*, the Fifth Circuit held that Congress overreached by enacting the family-leave provision because they lacked evidence of a pattern of widespread gender discrimination with respect to granting family care at the time they passed the FMLA.[29] The *Kazmier* court reasoned that for prophylactic legislation to pass muster, it must be congruent with, and proportional to, "actual, identified constitutional violations by the states."[30] They held that since Congress had no evidence of "actual" or "identified" Constitutional violations, Congress overreached their authority and that the family-leave provision of the FMLA did not abrogate the states' sovereign immunity.[31]

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[27] 225 F.3d 519 (5th Cir. 2000). Notably, the majority in *Hibbs* does not cite *Kazmier*, with the exception of stating that the two cases caused a circuit split. *See* Hibbs, 538 U.S. at 725-726.

[28] *See* Hibbs, 538 U.S. at 725-726. Several circuits have held against abrogation on other provisions of the FMLA. *See, generally* Lizzi v. Alexander, 255 F.3d 128 (4th Cir. 2001), *cert. denied* 534 U.S. 1081, *rehearing denied* 535 U.S. 952 (holding FMLA invalid in abrogating states' immunity because FMLA remedies disproportionate to supposed injury); Garrett v. University of Alabama, 193 F.3d 1214 (11th Cir. 1999) (holding self-care provision of FMLA did not allow for abrogation).

[29] *See* Kazmier, 225 F.3d 519, 526 (5th Cir. 2000) (describing legislative intent of FMLA). However, the testimony before Congress indicated the effect of the reverse discrimination was to push women out of the work force because the discrimination reinforces the stereotype that women assume the traditional role of family care-giver. *See* Kazmier, 225 F.3d at 526 (quoting statement of law professor that employers give family leave only to women).

[30] *See id.* (discussing need for Congress to have evidence of actual injuries before enacting truly remedial legislation); *see also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 639 (1999) (describing need for Congress to identify specific conduct transgressing Fourteenth Amendment); Kimel 528 U.S. at 89 (holding abrogation inappropriate if Congress never identified pattern of discrimination or unconstitutional discrimination).

[31] *See* Kazmier, 225 F.3d at 524-525 (dismissing Congress' purported abrogation of FMLA because of lack of evidence of actual unconstitutional conduct).

In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court held that the FMLA family-leave provision was constitutional and enforceable against states.[32] The Court reasoned the family-leave provision is constitutional because it is congruent and proportional to the violations it remedies.[33] The Court found that Congress had enough evidence of extensive gender discrimination with respect to granting of leave benefits to justify the enactment of prophylactic legislation to deter gender-based discrimination.[34] Furthermore, Congress did not overstep its authority by passing this legislation because it enacted the FMLA in a manner narrow enough to protect employees from discrimination, without overstepping their Fourteenth Amendment authority.[35] Finally, the Supreme Court held Congress met the clarity requirement for abrogation by making clear in the statute's language that the FMLA abrogated sovereign immunity.[36]

While the family-leave provision of the FMLA might be a socially justified law, based on precedent, it is not legally justified. *Hibbs* turns on the question of whether Congress had evidence of "actual, identified constitutional violations by the States" with respect to gender discrimination.[37] The dissent properly points out that Congress had no such specific evidence

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[32] *See infra*, notes 33-36 and accompanying text (explaining Court's rationale behind *Hibbs* holding).

[33] *See* Hibbs, 538 U.S. at 739-740 (holding FMLA congruent and proportional to remedial effect).

[34] *See* Hibbs, 538 U.S. at 737-738 (quoting Congress' determination that gender discrimination significantly impacts working women). Beyond recognizing a history of widespread gender discrimination in the workplace, the Court also recounted Congress' history of unsuccessful efforts to stop gender discrimination by enacting other statutes. *See id.* at 737 (listing Congress' failed past efforts to stop gender discrimination).

[35] *See* Hibbs, 538 U.S. at 738 (claiming statutory safeguards of FMLA limiting protections to segment of population most harmed by gender-based discrimination).

[36] *See* Hibbs, 538 U.S. at 726 (recognizing clarity of Congress' intent).

[37] *See* Garrett, 531 U.S. at 372-373 (holding states engaged in pattern of intentional unconstitutional discrimination before abrogation are appropriate targets of legislation).

when it passed the FMLA.[38] The strongest evidence before Congress when considering the FMLA was the testimony of two witnesses who testified in generalities about stereotype-based beliefs leading to discrimination, but failed to cite any specific instances of discrimination.[39] Since Congress must have specific evidence of a widespread gender-based discrimination to enact such a law and the record shows no clear evidence, Congress lacked the authority to pass this legislation.[40] Furthermore, the thin evidence available to Congress chronicled only implied discrimination by private entities, while evidence of state-sponsored patterns of discrimination is necessary before abrogation is proper.[41]

Even if there was an identifiable constitutional violation by one of the states in *Hibbs*, the Supreme Court treated the states as one unit, instead of fifty separate entities, creating an unconstitutional form of "guilt by association."[42] Rather than permit what the Supreme Court termed as an appropriately narrow remedy, Congress could have crafted a narrower, equally effective remedy by avoiding the use of the prophylactic legislation altogether and simply protecting the leave of employees on the basis of gender.[43] A gender-based statute would have effectively accomplished the valuable goal of preventing workplace gender discrimination

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[38] *See* Hibbs, 538 U.S. at 745 (Kennedy, J. dissenting) (arguing evidence before court did not support claim that states engaged in pattern of discriminatory conduct).

[39] *See* Hibbs, 538 U.S. at 747-749 (Kennedy, J. dissenting) (recounting congressional testimony of two witnesses).

[40] *See supra*, note 30 and accompanying text (discussing requirements for Congress to enact prophylactic legislation)

[41] *See* Hibbs, 538 U.S. at 745-746 (Kennedy, J. dissenting) (clarifying requirement that Congress' exercise of Section Five power come in response to state transgressions).

[42] *See id.* at 741-742 (Scalia, J. dissenting) (arguing extension of prophylaxis beyond known violator unconstitutional); *see also* City of Rome v. United States, 446 U.S. 156 (1980) (holding provisions of Voting Rights Act restricted to states with demonstrable history of intentional racial discrimination).

[43] *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric of the Family and Medical Leave Act*, 112 YALE L. J. 1943, 2019-2020 (2003) (arguing enactment of FMLA was within Congress' authority, but now drawn narrowly enough).

without requiring the Court to stretch Congress' Fourteenth Amendment authority to enact legislation.[44]

The Supreme Court has historically crafted legal reasons to support positions they feel socially or morally justified.[45] The *Hibbs* case is no exception to that tradition, although there is little legal precedent to support the Court's conclusion.[46] While there is social merit in allowing state employees unpaid leave to care for ailing family members in the same way the FMLA protects privately employed workers, in a legal system based on stare decisis, significant legal precedent should outweigh social merit. Nonetheless, the majority steered this holding to the position they felt best for society, and by no mistake, the Supreme Court's imperfectly reasoned decision in *Hibbs* came to a socially just conclusion.

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[44] *See* Post & Siegel, *supra* note 44 at 2020 (claiming Court's social activism helped push them towards enforcing FMLA).

[45] *See generally* Gerard J. Clark, *An Introduction to Constitutional Interpretation*, 34 SUFFOLK U. L. REV. 485 (2001) (examining U.S. Supreme Court's modes of interpretation). Among the common interpretive schemes used by the U.S. Supreme Court uses is "solicitude for the unfortunate." *Id.* at 494-495. In recent years, the Supreme Court has been particularly responsive to remedy harms suffered by groups in society that have historically received unequal treatment. *See id.* at 495. In keeping with this interpretive scheme, the Supreme Court, at times, ignores stare decisis to craft decisions encouraging equality. *See id.*

[46] The Ninth Circuit and Supreme Court holdings in *Hibbs* are, in fact, the first time a federal appellate court has held that Congress validly abrogated the FMLA. *See* GARY PHELAN & JANET BOND ARTHERTON, DISABILITY DISCRIMINATION IN THE WORKPLACE § 16A:02: Family and Medical Leave Act (2002) (citing several federal appellate cases, each holding against abrogation of FMLA).