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CONGRESSIONAL POWER TO REGULATE SEX DISCRIMINATION: THE EFFECT OF THE SUPREME COURT'S "NEW FEDERALISM"

Calvin Massey

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CONGRESSIONAL POWER TO REGULATE SEX DISCRIMINATION: THE EFFECT OF THE SUPREME COURT’S “NEW FEDERALISM”

Calvin Massey*

I. INTRODUCTION

Congressional power to prevent and remedy sex discrimination in employment has been founded almost entirely upon the commerce power and Section 5 of the Fourteenth Amendment, which gives Congress power “to enforce, by appropriate legislation” the equal protection guarantee.¹ The commerce power has enabled Congress to prohibit private sex discrimination in employment, and the combination of the commerce and enforcement powers has enabled Congress to prohibit such sex discrimination by public employers. From the late 1930s until the early 1990s the doctrinal architecture of these powers was relatively stable, even if statutory action to realize the promise of a nondiscriminatory workplace was deferred until enactment of Title VII of the Civil Rights Act of 1964 (Title VII).² Under that doctrinal scheme the Court reviewed legislation enacted pursuant to the commerce power only to determine if Congress had made a rational determination that an activity it sought to regulate was either in interstate commerce, an instrumentality of interstate commerce, or affected interstate commerce.³ With respect to the Fourteenth Amendment’s enforcement power, the combination of *South Carolina v. Katzenbach*⁴ and *Katzenbach v. Morgan*⁵ established that Congress could enact startlingly broad measures to remedy or prevent unconstitutional actions of the states. Indeed, the alternative holding of *Morgan* was that Congress could redefine the scope of the guarantees afforded by the Fourteenth Amendment.⁶ The result was extremely deferential review of federal legislation addressing issues of equal protection, including sex discrimination, whether founded on the commerce or the enforcement power.

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¹. U.S. Const. amend. XIV, § 5.
³. “[W]hen Congress has determined that an activity affects interstate commerce, the courts need inquire only whether the finding is rational.” *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 277 (1981). In *Perez v. United States*, 402 U.S. 146 (1971), the Court referred to congressional findings documenting the relationship of prohibited extortionate local loans to interstate commerce, but promptly added, “We do so not to infer that Congress need make particularized findings in order to legislate.” *Id.* at 156.
⁶. *Id.* at 648-50. *Morgan* upheld Section 4 (e) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(e) (1994), which prohibited states from using English literacy as a voter eligibility requirement with respect to voters educated through the sixth grade in Puerto Rico. The Act had its principal impact upon New York, which imposed a general voter eligibility requirement of
That scheme has been altered considerably by the Supreme Court’s “New Federalism,” a series of cases that have extended the scope of state sovereign immunity and increased the level of scrutiny the courts will apply to federal legislation enacted under the commerce or enforcement powers. The result is heightened uncertainty about the ability of Congress to address perceived problems of sex discrimination in the workplace, most particularly with respect to the ability of Congress to provide a damages remedy for public employees when their government employers violate the provisions of federal laws designed to ensure a sexually nondiscriminatory workplace. This Article first briefly describes the doctrinal alterations worked by the Court’s “New Federalism,” then discusses its application to the provisions of the Family Medical Leave Act (FMLA)\(^7\) that are at issue in *Nevada Department of Human Resources v. Hibbs*,\(^8\) perhaps the most important federalism case on the Court’s docket this coming Term, offers a few observations about the implications of these developments and some thoughts on legislative strategies for the future, and closes with a brief summary that places in perspective the New Federalism and its significance to the problem of sex discrimination in employment.

There are three essential pieces to the New Federalism, and two other doctrines that, while germane, are as yet peripheral to the problem upon which I focus here—sex discrimination in the workplace. The essential pieces are the commerce power, the enforcement power, and the ever more robust constitutional doctrine of state sovereign immunity. The peripheral doctrines—but, I hasten to add, as yet peripheral doctrines—are the state autonomy exception to the commerce power and the spending power.

A. Commerce

When the Supreme Court, in 1995, struck down the Gun Free School Zones Act of 1990,\(^9\) it marked the first time in nearly sixty years that the Court had invalidated an act of Congress regulating private behavior on the ground that Congress lacked power under the Commerce Clause to enact the legislation. Whatever the long run impact of *United States v. Lopez*\(^10\)—be it earthquake or thunderclap—*Lopez* and its progeny, particularly *United States v. Morrison*,\(^11\) have increased the

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8. 122 S. Ct. 2618 (2002) (granting cert. sub nom. to Hibbs v. Department of Human Resources, 273 F.3d 844 (9th Cir. 2001)).
level of judicial scrutiny applicable to legislation that regulates activities that are claimed to affect interstate commerce but are neither activities in interstate commerce nor instrumentalities of interstate commerce. Such activities may be regulated only if they have a substantial effect on interstate commerce. More specifically, Lopez required Congress, whenever it seeks to regulate an intrastate non-commercial activity, to demonstrate that the regulated activity substantially affects interstate commerce. In Morrison, the Court invalidated the civil remedy provision of the Violence Against Women Act (VAWA), despite elaborate congressional findings of fact that sex-motivated violence affected interstate commerce quite substantially. Any doubt left after Lopez that the Court would defer to congressional findings of fact concerning the effect of a regulated activity upon interstate commerce was thus removed by Morrison. No longer will the Court defer to congressional findings of fact on this point, but will examine de novo the substantiality of the effect.

However, it is not clear that Morrison and Lopez actually warrant the Court to apply de novo review universally. Because in Morrison the regulated activity—"[g]ender-motivated crimes of violence"—was "not, in any sense of the phrase, economic activity," Morrison raised the possibility that the scope of the Court's de novo review of "substantial effect" is limited to instances when Congress regulates intrastate noncommercial activities. That, at least, is a reading of Morrison that is consistent with its facts, and leads to the tentative conclusion that the Court may, after Morrison, defer to congressional findings of fact when its regulation is of intrastate commercial activities. To the extent that the Court will so defer to Congress, Lopez and Morrison may not herald much change in congressional ability to prohibit sex discrimination by private or public employers, because such activity is surely a commercial activity, whether or not the activity is intrastate.

But if the Court's de novo review is now globally applicable to any exercise of the commerce power over activities that substantially affect interstate commerce but which are neither in interstate commerce nor constitute an instrumentality of interstate commerce, the Court will presumably ignore documented congressional findings of the substantial effect on interstate commerce exerted by the regulated activity. Suppose, to take a somewhat trivial yet symbolic example, that Congress prohibited employers from discriminating by sex, either intentionally or in effect, in demanding office secretaries to make and fetch coffee for their supervisors. It might be difficult for Congress or lawyers to convince the Court, on de novo review, of the substantial effect on interstate commerce of sexual discrimination in office coffee preparation and service by secretaries. This latter view, however, seems unsupported by the actual holdings in Lopez and Morrison.

In short, it is probable that Morrison and Lopez only authorize de novo review when Congress regulates an intrastate, noncommercial activity, and thus have little impact on congressional power to regulate workplace sex discrimination.

That conclusion, however, is subject to some important reservations with respect to public employers, which may in the end be more important than the initial

15. Id. at 613.
16. See generally id. at 607-10.
NEW FEDERALISM

To grasp the reservations, we must examine the other two essential pieces of the New Federalism: state sovereign immunity and the enforcement power. The two are very much related.

B. State Sovereign Immunity

The Constitution that emerged from Independence Hall in September of 1787 does not mention state sovereign immunity. Thus, when in *Chisholm v. Georgia* the Court confronted the question of whether states could be sued in federal court for damages, it examined the sources of federal jurisdiction in Article III and found no jurisdictional exception favoring states. That decision, it has been asserted, worked such a "shock of surprise" that it was speedily overturned by the Eleventh Amendment. A century later, after the advent of general federal question jurisdiction in the federal courts, the Supreme Court read the rather specific party-based jurisdictional language of the Eleventh Amendment as a placeholder for a general principle of state sovereign immunity. As a later Court put it, "Behind the words of the constitutional provisions are postulates which limit and control." As is well known, the current shape of those postulates is expanding. Via the officer-suit fiction of *Ex Parte Young*, states remain subject to injunctions barring them from prospective violation of constitutional rights and federal statutory rights, but whether in suits against state officials or the state itself, damages may not be obtained from the state treasury unless the state has either consented to the suit or Congress has validly abrogated state sovereign immunity. However, since *Seminole Tribe of Florida v. Florida*, Congress may abrogate state sovereign immunity only by use of its enforcement power. Moreover, state sovereign immunity is not merely limited to suits in federal court. *Alden v. Maine* held that Congress lacks authority to compel states to entertain in their own courts private damages suits against the state based on federal law, reasoning that the principle of state immunity from suit without its consent was a pre-constitutional attribute of sovereignty that was not waived by the states in the Constitution, either explicitly or by any implication from the grant to the federal government of its enumerated powers. The *Alden* rationale was applied this past Term, in *Federal Maritime Commission v. South Carolina State Ports Authority*, in which the Court extended state sovereign immunity to bar federal administrative agencies from adjudicating a private party’s complaint against a nonconsenting state. There are several implications that flow from these events, but for the moment let us focus

17. 2 U.S. (2 Dall.) 419 (1793).
18. Id.
20. U.S. Const. amend. XI. “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” Id.
24. Id. at 672.
26. Id. at 61.
28. Id. at 754.
30. Id. at 1878-79.
on the interaction of state sovereign immunity and the Fourteenth Amendment’s enforcement power. Most significantly, to the extent that federal law imposes damages liability upon state governments for unlawful sex discrimination, the efficacy of that remedy is entirely dependent on establishing that the federal law is an appropriate exercise of the enforcement power. Thus, because the enforcement power is the only power available to Congress by which it may abrogate state sovereign immunity, the scope of the enforcement power becomes exceedingly important.

C. Enforcement Power

Section 5 of the Fourteenth Amendment vests Congress with power to enforce the substantive guarantees of the Amendment by “appropriate legislation.” The broadest statement of the scope of that power was the Court’s position, taken in Morgan, that Section 5 “is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.” That discretion, however, has been sharply bounded by City of Boerne v. Flores. In Flores, the Court ruled that the enforcement power is confined to “measures that remedy or prevent unconstitutional actions,” and fashioned the “congruence and proportionality” test to evaluate whether any given exercise of the power was such a measure. Although “Congress must have wide latitude[,]... there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” But what does “congruence and proportionality” mean? According to the Court in Board of Trustees of the University of Alabama v. Garrett, the first step in applying these... principles is to identify with some precision the scope of the constitutional right at issue. Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional [behavior] by the States. That suggests that the enforcement power is limited to little more than legislation that prohibits conduct that is already unconstitutional, or very close to it. But in Flores the Court described the enforcement power as both preventive and remedial of unconstitutional wrongs, and acknowledged that the “appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” In Kimel v. Florida Board of Regents, even as it ruled that Congress could not use its enforcement power to prohibit all age discrimination in employment by states, the Court noted that “[d]ifficult and intractable problems [of unconstitutional behavior by states] often require powerful remedies, [including] rea-

34. Id. at 519.
35. Id. at 520.
37. Id. at 365, 368.
38. City of Boerne v. Flores, 521 U.S. at 530 (citation omitted).
sonably prophylactic legislation." \(^{40}\) Thus, surely Congress may do more than simply outlaw what the Constitution already forbids. Just as surely Congress may not "substantively redefine the States' legal obligations" under the Fourteenth Amendment. \(^{41}\) The amorphous twins, congruence and proportionality, purport to chart this boundary.

Linguistically, congruence and proportionality describe different qualities. Congruence means "agree[ing]; correspond[ing]; harmonious;" \(^{42}\) in geometry, "congruent" describes two figures which, "if placed one upon another, coincide exactly in all their parts." \(^{43}\) Proportional, on the other hand, describes a relative relationship; in mathematics it means a constant ratio. \(^{44}\) Transposed to the legal idiom, congruence could describe either or both of two qualities: an enforcement power exactly identical to (or at least harmonious with) the constitutional guarantee, or a legislative remedy that is exactly identical to (or at least harmonious with) the problem. Legislation that does no more than prohibit conduct that is already prohibited by the Constitution is not problematic; such legislation is congruent under the former definition and is surely proportional. But such legislation is rare; when Congress invokes its enforcement power it is usually in the business of prohibiting more conduct than the Constitution prohibits, in order to create a sort of buffer zone around constitutional rights, as a way of ensuring the vindication of those rights. When Congress so acts the issues of congruence, latterly defined, and of proportionality become critical to resolution of the question of whether Congress has validly exercised its enforcement power.

While proportionality would appear to admit an enforcement power broader than the constitutional guarantees of the Fourteenth Amendment, but in a fixed and constant ratio to those guarantees, the Court's notion of proportionality seems narrower. If proportionality means a constant ratio between constitutional violation and legislative remedy, the Court's idea of the outer limits of that ratio is little more than 1:1. Of course, that sense of proportionality makes the concept no different from congruence, defined as an enforcement power exactly identical to the constitutional guarantee. Such an understanding of proportionality effectively renders moot the alternative meaning of congruence—a legislative remedy identical to or harmonious with the problem located by Congress—because it will not matter how carefully Congress shapes its remedy to fit the identified problem if the scope of the problem that Congress may address by its enforcement power may not be any broader than the underlying constitutional guarantee.

Perhaps it is best to assess the Court's understanding of congruence and proportionality by illustration from the Court's decisions. In Flores, the Court ruled that the Religious Freedom Restoration Act (RFRA) \(^{45}\) was beyond the enforcement power because it was a legislative attempt to redefine the meaning of the free exercise clause and there was no proof in the legislative history that states were trampling upon the citizenry's right freely to exercise religious faith or practice. \(^{46}\) The remedy, thought the Court, went well beyond any identified problem and also far beyond the constitutional guarantee of free exercise of religion, secured through

\(^{40}\) Id. at 88.
\(^{41}\) Id.
\(^{42}\) WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 309 (College ed., 1968).
\(^{43}\) Id. at 309-10.
\(^{44}\) Id. at 1168.
the Due Process Clause.\textsuperscript{47} RFRA's failing was either a lack of congruence, defined as a remedy that precisely fits an identified problem, or a lack of proportionality, defined as a ratio precisely or nearly equal to the constitutional guarantee, in which latter case proportionality was doing the same work as congruence, when congruence is defined as a remedy identical to the constitutional guarantee.

\textit{Flores}, of course, merely introduced congruence and proportionality into the constitutional lexicon and, in doing so, left many questions unanswered. Foremost among these is the method of determining whether a constitutional problem even exists. At first glance, one might think that an actual constitutional violation is unnecessary to support exercise of the enforcement power—a reasonable possibility of a constitutional violation might be enough.\textsuperscript{48} Although the Court in \textit{Flores} acknowledged that the enforcement power could extend to prevention, it also faulted RFRA because it was not a response to a documented history of "widespread and persisting deprivation of constitutional rights."\textsuperscript{49} To appreciate the significance of this suggestion, it is helpful to conceive of proportionality as a fraction, the numerator of which is the congressionally selected remedy and the denominator of which is the constitutional problem. The \textit{Flores} suggestion implies that the denominator can never be zero, and might be insufficient to support the enforcement power unless it is significantly greater than zero, a position, which if true, belies the concession that the enforcement power extends to prevention of constitutional violations before they occur. Later cases seemingly confirm this reading.

In \textit{Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank}\textsuperscript{50} the Court concluded that the Patent Remedy Act,\textsuperscript{51} which amended the patent laws expressly to abrogate the States' sovereign immunity, was not within Congress's power to enforce the Fourteenth Amendment's Due Process Clause because there was no proof in the legislative record that states were denying patent holders due process by infringing on their patents and denying them a remedy in the state court system.\textsuperscript{52} Here, the apparent flaw was that the remedy went well beyond the contours of an identified problem. The Court, however, was maddeningly equivocal on the question of whether the flaw was the complete absence of identified constitutional violations or merely an insufficient number of violations:

Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement \textit{that do not necessarily violate the Constitution}. Though the lack of support in the legislative record is not determinative, identifying the targeted constitutional wrong or evil is still a critical part of our § 5 calculus because "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one." Here, the record at best offers scant support for Congress' conclusion that States were depriving patent owners of property without due process of law by pleading sovereign immunity in federal-court patent actions.\textsuperscript{53}

If there were \textit{any} instances of such constitutional wrongs, the Patent Remedy Act would seemingly have been perfectly proportional to the wrong, inasmuch as it

\textsuperscript{47} \textit{Id.} at 536.
\textsuperscript{48} \textit{See, e.g., supra} text accompanying notes 36-41.
\textsuperscript{49} City of Boerne v. Flores, 521 U.S. at 526.
\textsuperscript{50} 527 U.S. 627 (1999).
\textsuperscript{53} \textit{Id.} at 645-46 (quoting City of Boerne v. Flores, 521 U.S. at 530) (internal citations omitted) (emphasis added).
merely provided an individual damage remedy to specific victims of constitutional wrongdoing, rather than prohibiting a whole host of activities that may be constitutionally valid. The Court's concession that the legislative record offered "scant" evidence of constitutional violations suggests that there was some such evidence, but the pattern of wrongdoing identified by Congress was not sufficiently widespread and persistent to support even a narrowly tailored remedy.

In *United States v. Morrison*, the civil remedy provisions of VAWA were invalidated even though there was an adequate demonstration in the legislative record that states were systematically depriving the victims of sex-motivated violence of a remedy in their own judicial systems. The failings in *Morrison* were twofold. First, the legislation was directed at individuals (the perpetrators of sex-motivated violence) by subjecting those individuals to civil liability, rather than prohibiting official misconduct, as required by the state action doctrine. Second, the legislation was uniformly applicable even though the problem was not uniform; Congress had identified a constitutional problem only in some states. The Court noted that prior exercises of the enforcement power, such as in *Katzenbach v. Morgan* or *South Carolina v. Katzenbach*, had involved legislation targeted at and effective in only the offending states. This latter point reinforced either or both of two conclusions: the constitutional evil addressed by Congress must be widespread and persistent in order to invoke the enforcement power at all; or an additional measure of proportionality is a remedy that is precisely tailored to the geographic scope of the identified problem.

In *Kimel v. Florida Board of Regents*, the Court voided the provisions of the Age Discrimination in Employment Act (ADEA) that prohibited the states from age discrimination in employment because the prohibition was much broader than the constitutional infirmity addressed. The Act prohibited the states from rational age discrimination in employment, and rational age discrimination is, of course, constitutionally permissible. The remedy failed the proportionality test because it prohibited "substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." But the ADEA provisions at issue in *Kimel* may also have failed the Court's version of congruence as well, because "Congress failed to identify [in the legislative record] a widespread pattern of age discrimination by the States."

Finally, in *Board of Trustees of the University of Alabama v. Garrett*, the Court struck down the provisions of the Americans with Disabilities Act (ADA)

54. *529 U.S. 598 (2000).*
55. *Id. at 619-20. "[A]n assertion that there is pervasive bias in various state justice systems against victims of gender-motivated violence . . . is supported by a voluminous congressional record." Id.*
56. *384 U.S. 641 (1966).*
57. *383 U.S. 301 (1966).*
58. *528 U.S. 62 (2000).*
59. *29 U.S.C. §§ 621-634 (1994 & Supp. III 1999).* *29 U.S.C. § 623(a)(1) makes it unlawful for an employer, including public employers such as states, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age."
60. *Kimel v. Fla. Bd. of Regents, 528 U.S. at 82.*
61. *Id. at 86.*
62. *Id. at 90-91.*
63. *531 U.S. 356 (2001).*
that subjected states to damages suits for violation of the Act’s prohibition of employment discrimination against people with covered disabilities, reasoning that Congress had failed to document a pattern of irrational discrimination against disabled people by states and that the breadth of the prohibition, extending well beyond irrational discrimination against the disabled, indicated that Congress was essentially rewriting the Equal Protection Clause. Congress’s enforcement power, said the Court, may be “appropriately exercised only in response to state transgressions” and then only if Congress has identified in the legislative history “a history and pattern of unconstitutional” state behavior that Congress seeks to remedy or prevent prospectively. The flaw in the ADA provisions at issue in Garrett was that “[t]he legislative record of the ADA... fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”

II. Hibbs and the Family Medical Leave Act

The FMLA, which applies to public employers such as states, provides, in part, that eligible employees may take unpaid leave totaling twelve weeks per calendar year “[i]n order to care for the spouse, [child], or parent, of the employee, if such spouse, [child], or parent has a serious health condition.” Other portions of the FMLA require employers, including public employers, to provide twelve weeks of annual unpaid leave “[b]ecause of the birth of a [child] and in order to care for such [child],” because of the acquisition of an adoptive or foster child, and “[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee.”

Each of these provisions raise different issues concerning congressional authority to use its enforcement power to abrogate state sovereign immunity and subject state employers to private damages suits for violation of the FMLA. The first three provisions, governing leave for the birth or care of one’s child, the arrival of an adoptive or foster child, and to care for an ill family member, are all premised on congressional findings that, prior to the FMLA, employers discriminated by sex in granting of such leave by granting leave to women far more often than to men. The last provision, providing for personal leave for illness, has a much less credible grounding in sex discrimination and, accordingly, will be considered first.

65. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 374.
66. Id. at 368.
67. Id.
70. Id. § 2612(a)(1)(A).
71. Id. § 2612(a)(1)(B).
72. Id. § 2612(a)(1)(D).
Although a number of litigants have made the argument that the personal medical leave provision of the FMLA is a prophylactic measure to combat sex discrimination, the argument has been a universal failure in the federal courts of appeals. Seven circuits—the First, Second, Third, Fifth, Sixth, Eighth, and Eleventh—have concluded that the personal medical leave provision of the FMLA was not validly enacted under the enforcement power. In so doing, they have rejected the argument that the personal medical leave provision is but an undifferentiated part of a general prohibition upon sex discrimination in employment leave. As the First Circuit put it in Laro v. New Hampshire, the provision “must be linked . . . not just to such gender-based problems in society at large, but specifically to unconstitutional gender discrimination by states in their capacity as employers.” The rationale that the FMLA serves to counteract sex stereotyping in family roles has bite with respect to the parental and family leave provisions but not with respect to the personal medical leave provision. No more efficacious is the rationale that the personal medical leave provision serves to remedy sex discrimination in granting leave that responds to the temporary disabilities resulting from pregnancy. First, such disabilities are addressed by the parental leave provisions. Second, the existence of the Pregnancy Discrimination Act, which forbids employers from discriminating on the basis of pregnancy and requires employers offering benefit programs (including leave) to include pregnancy within such programs, substantially obviates the claim that the personal medical leave provision is really a prophylactic device to combat pregnancy discrimination in leaves. Third, to the extent that the personal medical leave provision is so grounded, the Supreme Court has held that discrimination on the basis of pregnancy is not, at least when cost-justified, a violation of equal protection. Finally, the legislative history reveals that the personal medical leave provision was motivated primarily by the desire “to protect families from the economic dislocation caused by a family member losing his or her job due to a serious medical problem,” and secondarily by “a concern to protect workers who were temporarily disabled by serious health problems from discrimination on account of their medical condition.” Of course, as the First Circuit noted, Garrett has “disposed of [the] disability rationale as sufficient basis to overcome Eleventh Amendment immunity” and, thus, 

73. See, e.g., 29 U.S.C. § 2601(b)(4) (2000), which states the primary purpose of the FMLA to be “minimiz[ing] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for . . . compelling family reasons, on a gender-neutral basis.” Various testimony before Congress during the evolution of the FMLA also indicate congressional concern for sex-discriminatory leave policies. See, e.g., Kazmier v. Widmann, 225 F.3d 519, 525-26 nn.23 & 24 (5th Cir. 2000).

74. Laro v. New Hampshire, 259 F.3d 1, 16 (1st Cir. 2001); Hale v. Mann, 219 F.3d 519, 68-69 (2d Cir. 2000); Chittister v. Dep’t of Cnty. & Econ. Dev., 226 F.3d 223, 229 (3d Cir. 2000); Kazmier v. Widmann, 225 F.3d 529; Sims v. Univ. of Cincinnati, 219 F.3d 559, 566 (6th Cir. 2000); Townsel v. Missouri, 233 F.3d 1094, 1096 (8th Cir. 2000); Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 193 F.3d 1214, 1220 (11th Cir. 1999), rev’d on other grounds, 531 U.S. 356 (2001).

75. 259 F.3d 1 (1st Cir. 2001).
76. Id. at 12.
79. Laro v. New Hampshire, 259 F.3d at 12 (citing Senate and House reports).
80. Id. (citing Senate and House reports).
81. Id. at 13.
there is little reason to think that the protection of families from economic dislocation produced by serious illness is sufficiently connected to the constitutional guarantees that Congress is empowered to enforce. In the Court’s jargon, such an exercise, even if congruent (in the sense of fitting the problem precisely) would surely be disproportionate. And that is the universal judgment of the federal courts of appeals that have considered the personal medical leave provisions as applied to state employers.

However, the parental and family leave provisions stand on a different footing. The circuits have split on the validity of the family leave provision as applied to state employers for the purpose of abrogating state sovereign immunity and subjecting states to damages suits in federal court. In Kazmier v. Widmann, the Fifth Circuit held that Congress lacked authority to enact the provision under its enforcement power; in Hibbs v. Department of Human Resources, the Ninth Circuit reached the opposite conclusion, declaring Kazmier’s analysis to be “unpersuasive.”

When Congress enacted the FMLA it declared its principal purpose to be to “minimize[] the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for . . . compelling family reasons, on a gender-neutral basis.” To that end, the FMLA established a sex-blind minimum standard of leave for family caretaking purposes. More precisely, the family leave provision of the FMLA responds to sex discrimination in employment by banning the allegedly common practice of employers granting such leave to women but not men. This 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. When such discrimination is practiced by public employers the Equal Protection Clause is implicated. None of this, however, answers with certainty the question of whether the family leave provision of the FMLA is sufficiently congruent and proportional to constitute a valid exercise of the enforcement power.

In concluding that the family leave provision (at least as applied to the states to abrogate state sovereign immunity) was an invalid exercise of the enforcement power, the Fifth Circuit in Kazmier relied on two key factors. First, the family leave provision was “broad, prophylactic legislation . . . purporting to prohibit the States from engaging in a broad swath of conduct that is not per se violative of the Equal Protection Clause.” The court noted that “[t]here is nothing in the Constitution that even closely approximates either a duty to give all employees up to twelve weeks of leave per year to care for ailing family members or a right of an employee to take such leave.” The second factor was related to the first.

Broad, prophylactic legislation must be congruent with and proportional to actual, identified constitutional violations by the States. Yet in enacting the FMLA,

82. 225 F.3d 519 (5th Cir. 2000).
83. Id. at 529.
85. Id. at 858.
88. Id.
Congress identified no [such] pattern of discrimination by the States. . . . Congress did make findings of such discrimination in the private sector, but such evidence is not imputable to the public sector to validate abrogation.  

The Kazmier court relied on Kimel for the proposition that Congress must make specific findings of unconstitutional state conduct in order to enact broad legislation designed to prevent that conduct.  

In concluding that the family leave provision was a valid exercise of the enforcement power, and thus abrogated state sovereign immunity, the Ninth Circuit in Hibbs took a very different approach. First, it read Garrett, Kimel, and Florida Prepaid to hold that "[e]xamination of legislative history is merely one means by which a court can determine whether the broad prophylactic legislation under consideration is justified by the existence of sufficiently difficult and intractable problems." According to the Ninth Circuit, the absence of congressional findings of specific state unconstitutional conduct in connection with employment leave was not of great consequence to resolution of the larger issue of whether the family leave provision "'can appropriately be characterized as legitimate remedial legislation.'" Second, the court in Hibbs noted that sex discrimination by states is presumptively unconstitutional and may be justified only by overcoming the burden of proving that such discrimination is substantially related to the achievement of an actual compelling state interest. By contrast, the age and disability discrimination addressed by Congress in the ADEA and ADA that was held by the Court to be outside the enforcement power in Kimel and Garrett was presumptively valid and unconstitutional only upon proof that such discrimination was not rationally related to a legitimate state objective. Thus, the Ninth Circuit thought that "[b]ecause state-sponsored gender discrimination is presumptively unconstitutional, section 5 legislation that is intended to remedy or prevent gender discrimination is presumptively constitutional." The importance of this conclusion is that "the burden is on the challenger of [section 5] legislation [addressing sex discrimination by states] to prove that states have not engaged in a pattern of unconstitutional conduct." Because Nevada was unable "to show that there is not a widespread pattern of gender discrimination by states regarding the granting of leave to employees to care for sick family members or a historical record of state enforcement of stereotypical family roles" the court concluded that the family leave provision was validly enacted pursuant to the enforcement power.  

There is an immediate problem with the majority's analysis in Hibbs: it is not obvious why an exercise of the enforcement power that is purportedly directed at presumptively unconstitutional behavior should be presumed to be valid. Whether or not congruence and proportionality are workable and desirable parameters, it would seem that at least some plausible connection between the legislative remedy

89. Id. (emphasis added) (second and third emphasis omitted).
90. Id. The Court in Kimel stated that the "argument that Congress found substantial age discrimination in the private sector . . . is beside the point. Congress made no such findings with respect to the States." Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 90 (2000) (citation omitted).
91. Hibbs v. Dep't of Human Res., 273 F.3d at 857.
92. Id. (quoting Kilcullen v. N.Y. State Dep't of Labor, 205 F.3d 77, 81 (2d Cir. 2000), overruled on other grounds, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001)).
93. Id.
94. Id. at 857-58.
95. Id. at 858.
and the purported violation must be present in order for the legislation to be "appropriate" enforcement. An example may clarify the point. Race-based classifications are presumptively unconstitutional. Suppose Congress bars the states from using race at all in admissions to public universities. Under the majority view in *Hibbs*, this bar would be a presumptively valid exercise of the enforcement power and would be void only if the challenger could prove a complete absence of any pattern of unconstitutional use of race in admission to public universities. Of course, this burden would be insuperable as to any state of the old Confederacy, and probably most others as well, but it is not at all clear that any use of race as a factor in admission to public universities is unconstitutional.

A different approach was taken by Judge Berzon in a portion of the opinion that was originally a concurrence, but adopted by the majority in *Hibbs* as an alternative holding. Judge Berzon argued that in the family care leave provisions of the FMLA "Congress was acting against a background of state-imposed systemic barriers to women's equality in the workplace that, under recent constitutional doctrine, were undoubtedly unconstitutional." To protect women from perceived ills, states enacted a long train of sex-specific laws that specified women's wages and limited women's working hours, working conditions, or even occupations, and these laws were justified and usually upheld on the basis of stereotyped notions of sex roles. In enacting the family care leave provision of the FMLA, Congress was seeking to dismantle several sexual stereotypes rooted in past state laws: (1) that men do not need such leave because there exist some women in their lives who will assume family care responsibility; (2) that women need such leave because they are the family care-givers; (3) that women are risky employees because they may need to seek such leave; and (4) that people—men and women—will never apportion family care responsibilities among themselves as they alone see fit. The family care leave provision, asserted Judge Berzon, was congruent and proportional because it was "reasonably prophylactic legislation [addressed to a] difficult and intractable" problem, and when "judged with reference to the historical experience it reflects," was a narrowly tailored response to the "interaction between workplace and domestic duties at the core of the unconstitutional state legislation [that] sought to police a gender-specific division of labor, separating the domestic, female sphere from the workplace, male realm." Proof of this narrow tailoring, said Judge Berzon, was to be found in the fact that the provision "protects job security, not wage continuation," and thus is not about economic benefits but is about "assuring the ability of women to participate in the workforce despite their still-greater role in caring for ill relatives, and of men to take on domestic responsibilities without foregoing their employment."

Sometime in the October 2002 Term of the Court we shall know whether the *Hibbs* or *Kazmier* analysis will prevail. I do not propose to predict the outcome, for as my Berkeley colleague Jesse Choper has quipped, "He who lives by the crystal ball must be prepared to eat ground glass." I will, however, offer some thoughts on the analytical process that is about to unfold in the coming Term.

96. Id. at 860.
97. Id. at 861-64.
98. Id. at 869 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000)).
99. Id. (quoting *City of Boerne v. Flores*, 521 U.S. 507, 525 (1997)).
100. Id. at 870.
101. Id.
102. Id.
A. The Relevance of Specific Congressional Findings

If the Court is intent on using congruence and proportionality as devices to tie the enforcement power very closely to the underlying constitutional guarantees, it is quite possible that the Court will insist upon a legislative record that identifies specific unconstitutional conduct by the states that Congress seeks to remedy or prevent. Indeed, in Garrett the Court laid out the analytical framework for enforcement power cases by noting that “[o]nce we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled.”103 Of course, the “metes and bounds” of the constitutional right at issue in Garrett—disability discrimination—was far narrower than that at issue in Hibbs—sex discrimination—but there is no indication in Garrett that the Court’s insistence on a legislative record that identifies a “history and pattern” of unconstitutional conduct by the states is limited merely to cases where the metes and bounds of the constitutional right is described by minimal judicial scrutiny under the rational-basis test. Indeed, the fact that the Court in Garrett took pains to contrast the legislative record supporting the applicability of the ADA to the states with that supporting the Voting Rights Act of 1965 suggests that the requirement of specific findings of state wrongdoing documented in the legislative record applies even when the constitutional right at issue is described by strict scrutiny.104 The Court in Garrett noted that when Congress enacted the Voting Rights Act it documented a marked pattern of unconstitutional action by the States. State officials, Congress found, routinely applied voting tests in order to exclude African-American citizens from registering to vote[,] determined that litigation had proved ineffective[,] and that there persisted an otherwise inexplicable 50-percentage-point gap in the registration of white and African-American voters in some States.105

Perhaps Congress is not required to identify specific unconstitutional practices by states, but if so, what purpose was to be served by pointing out the contrast between the legislative record underlying the Voting Rights Act and that underlying the ADA?

To be sure, some commentators make the argument that a judicially imposed requirement that Congress make specific findings of fact in order to invoke its enforcement power “raises substantial separation-of-powers questions,”106 concerns embraced by the Ninth Circuit in Hibbs as a factor in leading it to reject the notion that Congress make such specific findings.107 The essence of the objection is that a requirement of specific findings amounts to an impermissible judicial supervision of Congress’s deliberative process.108 That concern, however, is prob-

104. This also casts considerable doubt, as a predictive matter, on the tenability of Judge Tashima’s view, expressed in Hibbs, that presumptive validity should attach to any exercise of the enforcement power to address presumptively unconstitutional practices.
105. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 373.
108. See Bryant & Simeone, supra note 106, at 376-83.
ably misplaced. Congress may deliberate and act however it wants when it wields its enforcement power, but the scope of that power is surely within the power of the Court to review, and a fundamental issue of judicial review is, and always has been, the degree of deference the courts will give to Congress. By insisting upon "on-the-record" documentation of the unconstitutional behavior Congress is authorized to remedy, the Court is expressing the view that it will defer to Congress's judgment that more conduct than the Constitution forbids must be prohibited in order to vindicate constitutional guarantees only when Congress has clearly established the predicate of constitutional wrongdoing. The Court has not stated that in the absence of such on-the-record findings the enforcement power may not validly be exercised; it has indicated that in the absence of such findings the significant burden of proving sufficient congruence and proportionality to invoke the enforcement power validly is upon the proponents of the legislation. In effect, the Court is saying that if there is such a history and pattern of unconstitutional behavior, Congress will document it, as it did with respect to the Voting Rights Act, and if there is no such documentation, the burden is on the proponents of the law to prove clearly and specifically—not by inference from the conduct of private actors—that there is such a history and pattern. That is a far cry from judicial intervention into the legislative process to determine whether a quorum is present, or whether a congressional hearing was proper and authorized, or whether a congressional committee was properly seeking information, or whether the journals of proceedings kept by each house of Congress are the conclusive record of congressional action. Only the last case, Field v. Clark, is remotely similar and, in it, the Court held only that Congress need not document in its journals that the same text of a bill was passed by each house, but was careful to note that a bill would not become law if the bill "had not in fact been passed by Congress" even though signed by the presiding officers of the House and the Senate, and the President. Judicial review of whether a bill was in fact passed by Congress is far more intrusive into the legislative process than insisting upon documented facts as a predicate for judicial deference to congressional judgment, but the Court in Field took pains to preserve precisely such review. The Speech and Debate Clause cases provide no more support. In Eastland v. United States Servicemen's Fund, for example, even as the Court held that the judiciary could not impede Congress in its gathering of information it concluded that the courts could inquire into whether the congressional activity was a "legitimate legislative activity."

109. See United States v. Ballin, 144 U.S. 1, 6 (1892) (holding that determination of a quorum was consigned to each house for resolution, so long as the method was "reasonable"), discussed in Bryant & Simeone, supra note 106, at 377-78.

110. See Gravel v. United States, 408 U.S. 606, 616-17 (1972) (holding that the Speech and Debate Clause prevented judicial review of the propriety of a Senate subcommittee meeting), discussed in Bryant & Simeone, supra note 106, at 379-80.

111. See Eastland v. United States Servicemen's Fund, 421 U.S. 491, 506 (1975) (holding that the Speech and Debate Clause barred judicial review of the propriety of a Senate subcommittee subpoena, except for determination of whether the subpoena was a "legitimate legislative activity"), discussed in Bryant & Simeone, supra note 106, at 380-81.

112. See Field v. Clark, 143 U.S. 649, 671 (1892) (holding that the content of such journals, except for matters specified by the Constitution, is within the discretion of each house of Congress), discussed in Bryant & Simeone, supra note 106, at 376-77.

113. 143 U.S. 649 (1892).

114. Id. at 669.


116. Id. at 501.
any given nominal exercise of legislative power for legitimacy is more intrusive upon legislative process than is determining whether Congress "appropriately" exercised its enforcement power by examining the record upon which Congress acted.

B. The "Metes and Bounds" of the Constitutional Guarantee Enforced

The Court said that its inquiry into the scope of the enforcement power begins with a description of the "metes and bounds" of the constitutional guarantee that Congress seeks to enforce. Because constitutional guarantees are negative—they consist, by and large, of practices that are presumptively or per se forbidden to governments—the only way to delineate those metes and bounds is to describe what governments may not do. The Ninth Circuit, in Hibbs, said that when statutes describe practices—here, sex discrimination—that are presumptively unconstitutional, legislation directed at those practices should be presumptively valid under the enforcement power. Although a presumption of validity may be untenable, even if the burden of proving the invalidity of such exercises of the enforcement power should fall on the challenger to the legislation, there is no certainty that the burden is unlikely to be discharged. The Ninth Circuit thought that this burden meant that the challenger must prove the absence of a history and pattern of sex discrimination by public employers in granting leave for family care, but that may not be the only way that burden can be discharged. If congruence and proportionality mean in fact that the enforcement power is broader than the constitutional guarantee only when Congress has factually demonstrated a history and pattern of unconstitutional behavior, it is still possible that the Court will find that, despite such a factual demonstration, the remedy prescribed by Congress is so much broader than the unconstitutional conduct it is supposed to remedy that it is disproportionate, and thus beyond the enforcement power. Thus, even if the Court were to adopt the Ninth Circuit's burden-shifting rule, a challenger might succeed by establishing the disproportionality of the remedy rather than the absence of a history and pattern of unconstitutional conduct.

For example, suppose the Supreme Court applies the Ninth Circuit's approach and concludes that the legislative record underlying the family leave provision of the FMLA documents a sufficient history and pattern of unconstitutional sex discrimination by states in granting leave to state employees for family care purposes. This would not necessarily end the enforcement power inquiry; the Court might still conclude that a sex-neutral requirement that all workers be given up to twelve weeks leave per year for family care is disproportionate to the documented unconstitutional conduct. What, after all, is the relationship between any given number of weeks of leave and sex discrimination in granting such leave? A requirement that family care leave be sex-neutral is surely integral to curing the documented constitutional violation, but what is the connection between a prescribed amount of leave and sex discrimination in granting leave? It is not wholly outlandish to suppose that the Court might find the requirement of twelve weeks of leave disproportionate to a documented finding of sex discrimination by state employers in granting family care leave. That possibility suggests a final line of inquiry, one that is almost entirely normative.

117. See Hibbs v. Dep't of Human Res., 273 F.3d 844, 857 (9th Cir. 2001) and text following note 95.
C. The Enforcement Power and the Necessary and Proper Clause

Although the Fourteenth Amendment gives Congress power to enforce the substance of the amendment by "appropriate legislation" and the final clause of Article I, Section 8 gives Congress authority to implement federal powers by making "all Laws which shall be necessary and proper for carrying into Execution" the federal powers, there can be no doubt that the Court applies a more stringent test to the enforcement power than it does to the scope of the implementing power. Each of the provisions struck down in Flores, Florida Prepaid, Kimel, Morrison, and Garrett was a rational method of vindicating rights secured by the Fourteenth Amendment, but each was voided nonetheless. Moreover, it is hardly likely that the Court would coin a new linguistic formulation—"congruence and proportionality"—to describe what is already familiar—"rational means" or "rationally related."

Perhaps because the evidence is convincing that congruence and proportionality is a form of heightened scrutiny, some commentators and judges argue that the scope of the enforcement power should be coterminal with the implementing power of the Necessary and Proper Clause. The argument rests on one or more of three assertions. The historical assertion is that the framers of the Fourteenth Amendment intended to give Congress an enforcement power identical to its implementation power under the Necessary and Proper Clause. The semantic assertion is that the linguistic similarities between the enforcement and implementing powers argues for a parallel interpretation. The precedential assertion is that, prior to Flores, the enforcement power was understood to be identical to the implementing power and that neither Flores nor its progeny has changed that understanding. None of these assertions is persuasive.

While some members of the Thirty-ninth Congress, the body that drafted the Fourteenth Amendment, thought that Section 5 would endow Congress with an implementing power identical to its "necessary and proper" power, the entire Thirty-ninth Congress specifically rejected an enforcement power that would have given Congress "power to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States."

118. U.S. Const. amend. XIV, § 5.
121. See, e.g., Caminker, supra note 120, at 1156-58; Kazmier v. Widmann, 225 F.3d 519, 534-35 (Dennis, J., dissenting).
122. See, e.g., Caminker, supra note 120, at 1159 n.164.
secure to the citizens of each State all privileges and immunities of citizens in the
several States, and to all persons in the several States equal protection in the rights
of life, liberty, and property." 123 This would have eliminated the state action re-
quirement and given Congress authority to do whatever it might think reasonable
to secure the specified rights. Perhaps it was rejected because it eliminated the
state action requirement, or because it gave Congress a substantive power to de-
cide the meaning of constitutional liberties, or because it gave Congress broader
authority to implement the Fourteenth Amendment than Congress thought wise.
We simply do not know. But Congress’s rejection of the explicit “necessary and
proper” locution, a phrase with a settled constitutional meaning, makes it less likely
that Congress intended the enforcement power to be a clone of the implementing
power under the “necessary and proper” clause.

The linguistic similarities between the enforcement power and the implement-
ing power mask substantive differences between the two provisions, differences
that support significantly different levels of judicial review to purported exercises
of the granted powers. Broad authority by Congress to select means necessary and
proper to implement federal powers expands the power of Congress to displace
contrary exercises of state legislative power, but is constrained by the Court’s power
to determine the outer limits of the delegated federal powers. The implementing
power does not enable Congress to specify constitutional norms to which states
must adhere. But if the enforcement power were coterminous with the implement-
ing power, states would be required to conform to congressionally determined con-
stitutional norms. Of course, Congress might disclaim any intent to redefine the
substance of the Constitution, but if its “remedial” power extended to any rational
means of enforcing those guarantees it would have virtually unlimited authority to
mold the Fourteenth Amendment as it wishes, all in the name of rational
remediation. 124

There are, however, some who say that the enforcement power contemplates
an active role for Congress in establishing the substance of the constitutional rights
secured by the Fourteenth Amendment. 125 They argue that Congress, as an insti-

123. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).
124. The distinction drawn here is conceptual kin to the “autonomous state governance”
cases, New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 521 U.S. 898
(1997). The principal vice of commanding a state legislature to act in a federally prescribed
fashion is that, with enough such commands, there is no practical ability for the state legislature
act independently of the federal puppet-master. Similarly, one vice of conscripting state
executive officials to execute federal law is that, with enough federal execution duties, there is
no practical ability of the state official to execute state law. Congress may, of course, preempt
state law, and thus narrow the range of a state’s legislative or executive independence, but pre-
emption will not affect the autonomy of a state’s legislature or executive in the fields of life left
open to them.

An enforcement power that extends to anything that Congress might rationally think enforces
equal protection or due process forecloses any independent judgment on the subject by the Court,
and leaves Congress with virtually plenary power to define the ends of the Fourteenth Amend-
ment and to select the means of getting there. By contrast, the broad implementing power
possessed by Congress is limited to the means chosen to achieve the judicially monitored ends
of power. Of course, if the Court abdicates any real responsibility to specify the boundaries of
those ends, there is little real difference, and that is probably the explanation for a revival of
judicial scrutiny of the commerce power, as exemplified by Lopez and Morrison.

125. See generally Michael C. Dorf & Barry Friedman, Shared Constitutional Interpreta-
tion, 2000 SUP. CT. REV. 61; Akhil Reed Amar, Intratextualism, 112 HARV. L. REV. 747 (1999);
tution, is better suited to identify state practices that, while literally valid in terms of judicial interpretation of the Fourteenth Amendment, raise the possibility of hidden wrongful motive. Justice Brennan, for example, invoked the “institutional competence” of Congress to justify his now repudiated holding that Congress could engage in “benign” racial discrimination so long as such discrimination was substantially related to an important state objective. Justice Brennan, however, failed to detail the nature of this competence. Although Congress is capable of collecting evidence that would be inadmissible in ordinary lawsuits, which may be very useful to identify and craft solutions to public problems, that fact says nothing about the relative ability of Congress and the Court to discern when those solutions, however desirable, transcend the constitutional boundaries upon federal power. No doubt Congress is more competent than the Court to diagnose and prescribe for public ailments, but can there be any less doubt that the Court is more competent than Congress to decide the content of constitutional norms? The Fourteenth Amendment specifies the norms—equal protection and due process, for the most part—and by our long-standing tradition of judicial review it is for the Court to flesh out the content of those norms. The Fourteenth Amendment gives Congress power to enforce those norms, not to invent them. The latter power would permit Congress to amend the Constitution without resort to Article V.

Finally, some argue that Flores and its progeny made no change in a preexisting understanding that Congress could use any “rational means” to enforce the guarantees of the Fourteenth Amendment, an understanding that equates the scope of the enforcement power with that of the implementing power. The

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My rebuttal of Akhil Amar’s “intratextual” argument that the scope of the Section 5 enforcement power should be identical to the admittedly broader scope of the enforcement power under Section 2 of the Thirteenth Amendment may be found in Calvin Massey, Federalism and the Rehnquist Court, 53 HASTINGS L.J. 431, 492-94 (2002). In brief, my rebuttal is that because the Thirteenth Amendment applies to private citizens as well as governments, its substance is more akin to Congress’s Article I, Section 8 powers (which enables Congress to regulate the citizenry), and thus the scope of the enforcement power under Section 2 of the Thirteenth Amendment should be the same as Congress’s power to implement its Article I powers, but because the Fourteenth Amendment prescribes constitutional limits on state power, the substance of which is the “province and duty” of the courts to declare, Congress’s Section 5 enforcement power ought to be more carefully tethered to the rights it is empowered to “enforce,” not create.


127. Bruce Ackerman is probably the foremost exponent of the notion that the Constitution may be freely amended by “extraordinary” moments of ordinary politics. See generally 2 Bruce Ackerman, WE THE PEOPLE: TRANSFORMATIONS (1998). The best judicial rejection of this idea, in the context of the enforcement power, remains that made by the younger Justice Harlan in Oregon v. Mitchell, 400 U.S. 112, 205 (1970):

Congress is subject to none of the institutional restraints imposed on judicial decisionmaking; it is controlled only by the political process. In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. . . . To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure.

argument begins with the proposition that Congress's "power to legislatively enforce the ... Fourteenth Amendment is concurrent with the Court's judicial power to enforce the Amendment,"\textsuperscript{129} and for that reason "Congress is not required to establish an evidentiary predicate ... in order to enact legislation pursuant to [the enforcement power] to protect individuals from the denial of the equal protection of the laws based on race, gender, or other suspect classifications."\textsuperscript{130} The argument continues by asserting that the Court has never required Congress to make specific findings of fact to invoke its enforcement power validly; rather, the Court has said that such findings are "[o]ne means" by which it has determined the difference between valid and invalid exercises of the enforcement power.\textsuperscript{131} The argument ends by asserting that because \textit{Flores} and its progeny all dealt with legislation addressing conduct that was not presumptively prohibited by the Fourteenth Amendment, the \textit{Flores} line of cases left undisturbed the prior understanding that Congress could use any rational means to address conduct presumptively in violation of the Fourteenth Amendment.\textsuperscript{132}

There are several problems with this argument. First, it is manifestly clear that \textit{Flores} overruled the alternative holding of \textit{Katzenbach v. Morgan}\textsuperscript{133} recognizing a concurrent power in Congress to define the substance of the Fourteenth Amendment. Second, although the Court has never explicitly stated that specific findings by Congress of unconstitutional conduct by states is a predicate for a valid invocation of the enforcement power, the Court has uniformly voided legislation enacted without such predicate findings. To be sure, each of those cases, with the exception of \textit{Flores} and \textit{Morrison}, involved the related question of whether Congress had effectively abrogated state sovereign immunity, and it may be that for purposes of abrogation of sovereign immunity Congress must make detailed findings of fact, but perhaps not otherwise.\textsuperscript{134} Finally, not all the cases in the \textit{Flores} line involved legislation banning conduct that was presumptively valid under the Fourteenth Amendment. \textit{Morrison} is the notable exception. The civil remedy provision of the VAWA did not involve abrogation of sovereign immunity and was Congress's response to what it thought was an unconstitutional denial to victims of sex-based violence of an adequate remedy in the state courts for such injuries.\textsuperscript{135} Sex discrimination by states in the provision of civil remedies for

\begin{itemize}
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000).
\item \textsuperscript{132} Kazmier v. Widmann, 225 F.3d at 537-40 (Dennis, J., dissenting).
\item \textsuperscript{133} 384 U.S. 641 (1966).
\item \textsuperscript{134} In \textit{Garrett}, for example, the Court did not question the legitimacy of the legislative objective—prohibition of discrimination against the disabled. Instead, the Court assessed the means chosen by Congress to reach that goal. Bd. of Trs. of Univ. of Ala. v. \textit{Garrett}, 368 U.S. 356, 368-74 (2001). To do so, the Court examined the evidence before Congress that \textit{states} were in fact engaging in such discrimination and refused to consider evidence that political subdivisions of a state had discriminated against the disabled because those actors do not enjoy sovereign immunity. \textit{Id}. The implication of that selective look at the evidence before Congress is that evidence of constitutional violations by any state actor is relevant to the scope of Congress's enforcement power when Congress is invoking that power for some purpose other than abrogation of state sovereign immunity. \textit{Garrett} may suggest that a broader array of evidence will be germane to assessing the legitimacy of exercise of the enforcement power in a context other than abrogation of state sovereign immunity. Of course, \textit{Morrison} does not confirm this reading, and so the importance of specific findings of fact by Congress remains unresolved.
\item \textsuperscript{135} \textit{See United States v. Morrison}, 529 U.S. 598, 605-07 (2000).
\end{itemize}
personal injuries is surely presumptively unconstitutional, but the Court struck down the provision anyway, reasoning that Congress had failed to demonstrate that states had in fact been discriminating by sex in affording remedies for sex-based violence. Thus, the argument from precedent seems uncommonly weak, particularly in the context of the use of the enforcement power to abrogate state sovereign immunity.

III. IMPLICATIONS AND LEGISLATIVE STRATEGIES FOR THE FUTURE

What, then, are the implications of this New Federalism for federal power to prohibit sex discrimination in employment? In part, the answer depends on whether the regulated employment is public or private. In part, the answer depends on the nature of the regulatory device.

Most employment in America is in the private sphere. The ability of Congress to address the practices of private employers is mostly a function of the scope of the commerce clause. Despite *Lopez* and *Morrison* it is surely the case that almost all employment practices have a substantial effect on interstate commerce. Because federal regulation of employment practices is, by anyone’s definition, regulation of commercial activity, it may be that Congress need not make any specific findings that such regulated practices substantially affect interstate commerce. Even if Congress must make such findings, it does not seem that it should be particularly difficult for Congress to do so. Thus, there is no realistic concern that such measures as Title VII of the Civil Rights Act of 1964 (Title VII), the Equal Pay Act (EPA), or the Pregnancy Discrimination Act, are likely to founder on the rock of the commerce power.

However, if Congress seeks to regulate sex discrimination by public employers more stringently than that practiced by private employers, then the possibility exists that the state autonomy exception to the commerce power, exemplified by *New York v. United States* and *Printz v. United States*, might limit congressional power. This possibility is probably more imagined than real, however, because the Court has made it clear that the state autonomy exception applies only when Congress uses its commerce power to regulate only the states, as distinguished from an exercise of the commerce power to regulate generally private and public behavior. Moreover, the state autonomy exception probably applies only to regulations of core attributes of state sovereignty, although that conclusion is equivocal at best. In any case, it is hardly likely that Congress would choose to prohibit some aspect of sex discrimination in employment only with respect to public employees, and even less likely that such a regulation would affect only public employees discharging the core functions of state government, but if Congress did so act it might discover that it lacks authority to use its commerce power in such a fashion.

A far more realistic issue is the possibility that Congress’s ability to subject states to private damages suits for violation of federal laws prohibiting sex dis-

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136. *Id.* at 614-15.
crimination in employment will be restricted. If the Court in deciding *Hibbs* reverses the Ninth Circuit, and concludes that in order to invoke its enforcement power validly, Congress must document a history and pattern of unconstitutional sex discrimination by states in granting family care leave, then Congress will face a narrowed set of issues upon which it may bring its enforcement power to bear. Although it hardly seems necessary to say so, "our Nation has had a long and unfortunate history of sex discrimination," one that manifested itself in the workplace by "state laws [that] supported a regime in which men and women were assigned, respectively, roles as workers and homemakers." That regime has, of course, broken down, both culturally and legally, and it was in response to the changed culture of work that the FMLA was adopted. In recognition of the fact that all workers, male and female, have family as well as workplace responsibilities, and that most workplace rules continued to treat men as breadwinners and women as homemakers, Congress adopted the sex-neutral policies of the FMLA in order to accommodate the needs of all workers, men and women, to discharge duties at home and at work, and to eliminate two types of sex discrimination: against women (who supposedly need family leave because they are homemakers first and workers second, and thus are less desirable employees); and against men (who supposedly do not need family leave because they are solely workplace warriors and thus will not be granted leave no matter how dire their family situation). If the result of *Hibbs* is that Congress must make specific findings of unconstitutional discrimination concerning each measure it enacts (e.g., family leave offered by state employers) rather than more general findings of a history and pattern of unconstitutional discrimination (e.g., a legal regime treating men as workers and women as homemakers), Congress may well find it difficult to use the enforcement power to create imaginative new remedies to address old and familiar problems.

If that should be the case, one must wonder whether the Pregnancy Discrimination Act, which prohibits employment discrimination on the basis of pregnancy, might be an invalid exercise of the enforcement power. The Court has, of course, held that discrimination on the basis of pregnancy is not unconstitutional sex discrimination, reasoning that because such discrimination divides pregnant people (all of which are women) from nonpregnant people (all men and most women, at least at any given time) it does not discriminate by sex. One must wonder whether the Pregnancy Discrimination Act might be outside the enforcement power, assuming the lack of a convincing demonstration in the legislative record that states have a history and pattern of using pregnancy discrimination as a device to engage in sex discrimination. That might be hard to prove, given the Court's unconvincing idea that pregnancy discrimination is not sex discrimination.

Moreover, some implications of the Court's notion that pregnancy discrimination is not sex discrimination call into question the validity of the Equal Pay Act and Title VII insofar as they are purported exercises of the enforcement power. Title VII extends beyond the reach of the Equal Protection Clause by, among other things, prohibiting employment practices that are "fair in form, but discriminatory in operation." Sex-neutral employment practices that, in effect, impose a sig-

143. *Hibbs v. Dep't of Human Res.*, 273 F.3d 844, 861 (9th Cir. 2001).
significant adverse impact on one sex are prohibited unless the employer can prove a legitimate business reason for the practice. One reading of *Geduldig v. Aiello*[^146] is that pregnancy discrimination was not constitutionally problematic because the pregnancy discrimination at issue was not intentional discrimination on the basis of sex, but merely adventitious. In short, while pregnancy discrimination has a disparate impact on women, that fact alone is insufficient to support the claim of invidious sex discrimination. On that reading, one has to wonder whether Title VII and the Equal Pay Act, each of which plainly reach disparate impact discrimination, are similarly infirm as exercises of the enforcement power.

However, were the Court to find that outlawing discriminatory effect is beyond the scope of the enforcement power, it would call into question the continuing vitality of *South Carolina v. Katzenbach*[^147] and *City of Rome v. United States*[^148] In *South Carolina*, the Court upheld the Voting Rights Act of 1965 by concluding that Congress’s enforcement power under the Fifteenth Amendment (phrased identically to that of the Fourteenth Amendment) extended to prohibition of practices that were not themselves violations of the Fifteenth Amendment but which perpetuated the effects of past unconstitutional discrimination.[^149] In *Rome*, the Court upheld an amendment to the Voting Rights Act that barred voting practices that would have the effect of diluting the black vote.[^150] Even though the Fifteenth Amendment prohibits only intentional racial discrimination, the Court reasoned that the discriminatory effects provision was within the enforcement power because “Congress could rationally have concluded that . . . electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination,” and thus it was within the enforcement power to prohibit voting practices that have only a discriminatory impact.[^151] It is hard to believe that the Court is prepared to jettison such precedents, cornerstones of racial political equality.

The Equal Pay Act (EPA) bars covered employers (including states) from discriminating “between employees on the basis of sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”[^152] The EPA was enacted to remedy the “endemic problem” of intentional sex discrimination in pay by eliminating the “ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.”[^153] The EPA does not require an employee to prove purposeful discrimination on the part of the employer, and thus the EPA prohibits some conduct that is not presumptively unconstitutional. However, because the affirmative defenses available to employers under the EPA to justify wage differentials permit just about any reason other than

[^146]: 417 US. 484 (1974).
[^147]: 383 U.S. 301 (1966).
[^148]: 446 U.S. 156 (1980).
[^150]: City of Rome v. United States, 446 U.S. at 177-78.
[^151]: Id. at 117 (footnote omitted).
[^152]: 29 U.S.C. § 206(d)(1) (2000). Once a *prima facie* case is established, an employer may justify the wage differential by proving one of four affirmative defenses: (1) a seniority system, (2) a merit system, (3) a payment system based on quantity or quality of production, or (4) any other factor other than sex. *Id.*
sex, the EPA, as applied to the states, operates to do little more than bar intentional sex discrimination that lacks any substantial relationship to an important state objective. Thus, the EPA prohibits no more conduct than the Equal Protection Clause. Conceivably, the Court could strike down the EPA as an invalid exercise of the enforcement power because the EPA, as originally enacted in 1963, was targeted at sex discrimination by private employers and when Congress extended coverage of the EPA to the states in 1974 it failed to make adequate specific findings of fact that states had a history and pattern of such sex discrimination. However, every federal court of appeals that has considered the issue has found that the EPA is a valid exercise of the enforcement power.\footnote{1}

Should congressional power to enforce the Fourteenth Amendment continue to be restricted, Congress might consider using its spending power to induce states to consent to suit for damages for violation of provisions that may be outside the scope of the enforcement power. Congress could attach, as a condition to receipt of federal funds by states for any purpose, a requirement that the states consent to federally specified employment practices in connection with any activities funded entirely or in part by federal money. This approach is not without its own problems. First, the Court has buried the constructive waiver doctrine, under which states were deemed by certain actions to have constructively waived their sovereign immunity;\footnote{2} now, a state must consent unequivocally to waiver of its sovereign immunity. Of course, Congress could overcome this problem by attaching, as a condition to receipt of federal funds by states for any purpose, a clear and unequivocal statement that by accepting such funds the states will be deemed to have waived sovereign immunity with respect to any claims made by state employees for violation of specified employment practices. That may not solve the problem, though. Because \textit{Seminole Tribe of Florida v. Florida}\footnote{3} holds that Congress may not use its Article I powers to abrogate state sovereign immunity,\footnote{4} it is entirely possible that Congress may not do indirectly, via its Article I spending power, what it may not do directly, via its Article I commerce power. Some guidance on this point may be obtained this coming Term in an otherwise unrelated case, \textit{Pierce County v. Guillen}.\footnote{5} In \textit{Guillen}, the Court must decide whether Congress may use its spending power to attach, as a condition of receiving federal money to abate highway hazards, a bar on discovery or introduction into evidence of data compiled to facilitate state participation in the highway hazard abatement program. The Court may well conclude that the state autonomy limitation upon the commerce power, exemplified by \textit{New York and Printz}, also applies to the spending

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157. Id. at 72-73.

158. 122 S. Ct. 2325 (2002). The decision to which certiorari was granted is \textit{Guillen v. Pierce County}, 31 P.3d 628 (Wash. 2001).
}
power. Just as Congress may not interfere with autonomous state governance processes by commanding state legislatures or executives to act in a prescribed fashion, it may be that Congress lacks power to impose through its spending power federal norms that interfere with autonomous state governance.\textsuperscript{159} If so, given the energy with which the Court has expanded state sovereign immunity, it is quite possible that the Court would conclude that it is impermissible for Congress to condition receipt of federal money upon a waiver of a key aspect of state sovereignty.

A final irony may exist. To the extent that statutes such as the family medical leave provision of the FMLA, or the Pregnancy Discrimination Act, or the Equal Pay Act, may be beyond the enforcement power because Congress failed to make adequate specific findings of unconstitutional conduct by the states, it may not be so easy for Congress now to correct that failing. Partly because of the existence of those laws, and others like them that seek to reinforce the legal and cultural changes that recognize the fundamental equal humanity of men and women, much sex discrimination has been abated, though not, of course, eliminated. But because of this cultural change, effected in part through laws that the Court might find to be outside the scope of the enforcement power, it may be difficult for Congress to assemble a convincing factual demonstration of a \textit{contemporary} history and pattern of sex discrimination in state employment. The irony, of course, is that without such a current factual showing Congress may not be able to use its enforcement power.

\section*{IV. SUMMARY}

This may seem like a gloomy prognosis, but it is well to cast it in perspective. Pursuant to its commerce power, Congress continues to have robust authority to regulate sex discrimination by private employers. The limitations upon congressional power to regulate sex discrimination by public employers may not occur—the Court may affirm the Ninth Circuit’s ruling in \textit{Hibbs}—and even if the scope of the enforcement power is narrowed in \textit{Hibbs}, the effect of such a decision would be limited. While such a decision would make it impossible for state employees to recover money damages for sex discrimination in employment to the extent the states have not consented to suit, states would remain liable for injunctive relief and susceptible to suits by the United States to enforce federal laws that may lie outside the enforcement power.

Within the employment context, the glass remains more than half full, but outside of the employment context the glass may become more than half empty. If congressional ability to use the enforcement power to address presumptively unconstitutional sex discrimination is restricted in like manner to congressional ability to address presumptively constitutional conduct, Congress will have lost much freedom to address state behavior that it believes hampers a full vindication of the equal protection ideal of sex equality. That may be the more lasting legacy of what the Court may decide in \textit{Hibbs}.

\textsuperscript{159} The autonomous governance problem is more complex in \textit{Guillen} than in \textit{New York or Printz}. In the latter cases the federal norm that restricted the states’ autonomy was imposed involuntarily. In \textit{Guillen}, the federal norm is voluntarily accepted by the state’s executive (by accepting federal highway safety funds) but not by the state’s judiciary, which exclusively feels the pinch of the norm. A question to be answered by \textit{Guillen} is whether that is a constitutionally significant difference.