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# Paradise Lost? State Employees' Rights in the Wake of "New Federalism"

Christina M. Royer

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## PARADISE LOST? STATE EMPLOYEES' RIGHTS IN THE WAKE OF "NEW FEDERALISM"

*"For almost a century constitutional theory has labored under the burden of repressive and historically inaccurate interpretation of the Eleventh Amendment. The amendment has been widely viewed as the embodiment of a sweeping doctrine of state sovereign immunity from federal jurisdiction. Under this view a state can almost never be sued by name in a federal court without its consent, even when the litigant seeks to vindicate important federal rights."*<sup>1</sup>

*"The ultimate result . . . may be that state employees will continue to enjoy protection under such statutes in name only; a sad situation, given the continuing need for such laws and Congress' clear desire to protect these employees."*<sup>2</sup>

### I. INTRODUCTION

At the close of the Supreme Court's 1998-1999 term, the headlines announced that the Court had articulated a new set of rules for state and federal relations.<sup>3</sup> During that term, the Supreme Court handed down three decisions that seriously impact private citizens' rights to seek redress against a state

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<sup>1</sup> John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889, 1890-91 (1983). Gibbons' article provides an extensive historical background of the Eleventh Amendment, analyzing the application of the Eleventh Amendment in cases from the early 1980's, and concluding that the Supreme Court's expansive interpretation of the amendment is at odds with the text and history of the amendment. *See id.* at 1891-94.

<sup>2</sup> Gregg A. Rubenstein, Note, *The Eleventh Amendment, Federal Employment Laws, and State Employees: Rights Without Remedies?*, 78 B.U. L. REV. 621, 659 (1998). Rubenstein's Note provides an overview of federal-state relations in the context of federal employment statutes, and concludes that the Supreme Court's recent trend exalting states' rights may be detrimental to state employees seeking to hold their employers responsible for violations of these statutes. *See id.* at 657-58.

<sup>3</sup> *See generally* Linda Greenhouse, *The Supreme Court: Federalism; States are Given a New Legal Shield by Supreme Court*, N.Y. TIMES, June 24, 1999, at A1. In her article, Greenhouse comments on the validity of the Court's recent interpretation of the Eleventh Amendment and sovereign immunity and the net effect of this interpretation:

Thrusting the doctrine of state sovereignty well beyond existing boundaries, the Supreme Court placed sharp new curbs today on the ability of Congress to make Federal law binding on the states. . . . When the Court's work was over, two Federal laws had been declared unconstitutional, one 35-year-old precedent was explicitly overturned, and one 15-year-old precedent was effectively dead.

*Id.* *See also generally* Charles Fried, *Supreme Court Folly*, N.Y. TIMES, July 6, 1999, at A17; Anthony Lewis, *Abroad at Home; The Supreme Power*, N.Y. TIMES, June 29, 1999, at 19; Kathleen M. Sullivan, *Federal Power, Undimmed*, N.Y. TIMES, June 27, 1999, at 4-17.

or a state agency: one suit under the wage and overtime provisions of the Fair Labor Standards Act<sup>4</sup> and two patent/trademark cases.<sup>5</sup> In all three cases, the Court held – albeit by a slim five-to-four majority – that the states may successfully assert a sovereign-immunity<sup>6</sup> defense under the Eleventh Amendment,<sup>7</sup> leaving the federal courts without subject-matter jurisdiction to hear each case.<sup>8</sup>

This Comment analyzes the resurgence of sovereign immunity under the Eleventh Amendment<sup>9</sup> – what could be construed as a sort of “new federalism”<sup>10</sup> – specifically in the context of federal

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<sup>4</sup> 29 U.S.C. §§ 201-19 (1994). For a discussion of the Fair Labor Standards Act, *see infra* notes 72-90 and accompanying text.

<sup>5</sup> *See, e.g.*, *Alden v. Maine*, 527 U.S. 706 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999). *Alden* is discussed in detail *infra* notes 171-78 and accompanying text. *College Savings Bank* is discussed more in depth *infra* note 27.

<sup>6</sup> *See infra* notes 16-51 and accompanying text.

<sup>7</sup> The Eleventh Amendment provides that “[t]he 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.” U.S. CONST. amend. XI. The historical background of the Eleventh Amendment is discussed *infra* notes 16-26 and accompanying text.

<sup>8</sup> *Alden*, 527 U.S. at 759-60; *College Sav. Bank*, 527 U.S. at 691; *Florida Prepaid*, 527 U.S. at 647-48. *See also generally* *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 98-100 (1984) (holding, *inter alia*, that the Eleventh Amendment is a jurisdictional bar that deprives federal courts of subject-matter jurisdiction). Subject-matter jurisdiction is “the extent to which a court can rule on the conduct of persons or the status of things.” BLACK’S LAW DICTIONARY 857 (7th ed. 1999). In federal courts, a party may challenge subject-matter jurisdiction either in a pre-answer motion, or as part of a responsive pleading. *See* FED. R. CIV. P. 12(b)(1). Any party, or the court itself, may raise the issue of subject-matter jurisdiction at any time; if the court indeed lacks jurisdiction, it must dismiss the action. *See* FED. R. CIV. P. 12(h)(3).

<sup>9</sup> *See infra* notes 16-51 and accompanying text.

<sup>10</sup> In the 1980’s, the term “new federalism” was used to characterize President Reagan’s attempts to dismantle federal welfare programs. Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 500 (1995). Professor Chemerinsky notes that the term “federalism” traditionally applies to conservative viewpoints that disfavor progressive federal programs; however, in his article he chooses to accord the term a more politically neutral meaning. *See id.* at 501, 504 (“By ‘federalism,’ I simply mean the allocation of power between the federal and state governments. More specifically, federalism, as used throughout this Article, refers to the extent to which consideration of state government autonomy has been and should be used by the judiciary as a limit on federal power.”). *See also generally* Richard C. Reuben, *Justices Take the 11th: Obscure Amendment Becomes Federalism Fodder for Supreme Court*, 83 A.B.A. J. 44, 44 (1997) (“[T]he Supreme Court has resurrected the . . . [Eleventh] amendment in its steady, if not always consistent, march toward a *new federalism* - or what some scholars are calling the ‘anti-federalist revival.’”) (emphasis added).

employment statutes and state employees' rights thereunder. The analysis focuses on the Fair Labor Standards Act (hereinafter FLSA),<sup>11</sup> the Age Discrimination in Employment Act (hereinafter ADEA),<sup>12</sup> and the Family and Medical Leave Act (hereinafter FMLA),<sup>13</sup> because these statutes appear to be among those that are the most threatened by the Supreme Court's recent actions.<sup>14</sup> This Comment concludes that, because the scales are now tipped in favor of states' rights as sovereign entities, state employees' rights to sue state employers under federal laws are severely curtailed. Thus, as a result of "new federalism," state employees are finding themselves not only without a federal forum – or possibly any forum – in which to be heard, but also with fewer rights in the workplace than their private sector counterparts enjoy.<sup>15</sup>

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<sup>11</sup> 29 U.S.C. §§ 201-19 (1994). The wage and overtime provisions of the FLSA are discussed *infra* notes 72-90, 169-78 and accompanying text. The equal pay provisions of the FLSA are discussed *infra* notes 179-91 and accompanying text.

<sup>12</sup> 29 U.S.C. §§ 621-34 (1994). The ADEA is discussed *infra* notes 54-71, 151-68 and accompanying text.

<sup>13</sup> 29 U.S.C. §§ 2601-54 (1994). The FMLA is discussed *infra* notes 91-106, 192-212 and accompanying text.

<sup>14</sup> Joanne C. Brant, Article, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 769-70 (1998). According to Brant:

The Fair Labor Standards Act . . . can no longer be enforced by private suits in federal court. Many federal antidiscrimination laws, including the Age Discrimination in Employment Act, . . . the Americans with Disabilities Act, . . . and portions of Title VII of the Civil Rights Act of 1964 may be wholly or partially unenforceable against states in federal court.

*Id.*

<sup>15</sup> In one case, state employees suing their employer under the FLSA actually argued that denying state employees the right to sue their employer in federal court would abridge their equal protection rights under the Fourteenth Amendment because such a denial would treat state employees differently from private-sector employees. *See Rehberg v. Department of Pub. Safety*, 946 F. Supp. 741, 743 (S.D. Iowa 1996). The District Court for the Southern District of Iowa did not directly address this argument, but instead relied on other cases to dismiss the complaint pursuant to the state's motion to dismiss for lack of subject-matter jurisdiction under Federal Rules of Civil Procedure 12(b)(1). *Id.* at 742-43 ("Because the FLSA was passed pursuant to the . . . Commerce Clause, and because Congress does not have authority under the . . . Commerce Clause to abrogate a state's Eleventh Amendment immunity, the Court finds it lacks subject matter jurisdiction over this case . . ."). The court suggested that the plaintiffs re-file their suit in state court because a state court would be "obligated by the Supremacy Clause to enforce federal law." *Id.* at 743. The unfortunate consequence of filing such a suit in state court is discussed *infra* notes 171-78 and accompanying text.

## II. HISTORY OF SOVEREIGN IMMUNITY AND THE ELEVENTH AMENDMENT

The doctrine of sovereign immunity originated as a British common-law principle based on the notion that “the King can do no wrong” and thus could never be amenable to suit in his own courts.<sup>16</sup> In the early history of the United States, the issue was raised on two occasions: in 1776 when the delegates met to discuss and draft the Articles of Confederation, and again during the ratification of the United States Constitution at the Virginia Convention.<sup>17</sup> This issue was highly debated and, in the end, neither document contained a reference to sovereign immunity. The rationale for these omissions is that the Constitution provides for a federal judicial system with broad powers; powers that presumably override any notion of states being immune because of their status as sovereign entities.<sup>18</sup>

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<sup>16</sup> E.g., Eridania Pérez-Jaquez, Note, *Constitutionalizing State Sovereign Immunity: Ex Parte Young and the Conservative Wing's Attempt to Restore Federalism and Empower States*, 51 RUTGERS L. REV. 229, 233 (1998). In contrast, “state sovereignty” is “[t]he right of a state to self-government; the supreme authority exercised by every state.” BLACK’S LAW DICTIONARY 1418 (7th ed. 1999). At common law, the King’s immunity was personal to him alone, it did not extend to other government officers. See Gibbons, *supra* note 1, at 1895-96.

<sup>17</sup> E.g., Pérez-Jaquez, *supra* note 16, at 234-36. Although they grappled with the issue, the Framers’ never explicitly dealt with sovereign immunity:

The Framers did not reach a consensus on the conflict between Article III and sovereign immunity. . . . [T]he final draft of the Constitution did not contain *any* language alluding to the constitutionalization of sovereign immunity. The Constitution, instead, provided for a national government and federal judicial system with broad powers. For instance, the adoption of the Supremacy Clause . . . seem[s] to have overridden the common law sovereign immunity . . . .

*Id.* See also generally Gibbons, *supra* note 1, at 1899-1914 (discussing the status of sovereign immunity in the Constitutional debates).

<sup>18</sup> See generally Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 527-38 (1978) (discussing the questions presented at the ratification of the Constitution at the Virginia Convention and the role of sovereign immunity in the Framers’ era). Alexander Hamilton appeared to have supported the notion that the sovereign states could not be sued without their consent:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual WITHOUT ITS CONSENT. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States.

Things changed, however, in 1793, when the Supreme Court decided *Chisholm v. Georgia*.<sup>19</sup> In *Chisholm*, the Court upheld its jurisdiction over a suit against a state by the citizen of another state, reasoning that the Constitution vested jurisdiction in the federal courts and that the states engage in certain “evils” that can be corrected only by maintaining suits against them.<sup>20</sup> Further, the Court held that submitting the states to such a suit in federal court was not an affront to their status as sovereign entities.<sup>21</sup>

Congress reacted to the Supreme Court’s decision in *Chisholm* by ratifying the Eleventh Amendment to the Constitution.<sup>22</sup> Although the text of the Eleventh Amendment indicates that only suits against states by citizens of *other* states are barred, the Supreme Court, in *Hans v. Louisiana*,<sup>23</sup> initially interpreted the Eleventh Amendment to include suits against a state by its own citizens, thus

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THE FEDERALIST NO. 81 (Alexander Hamilton). For a discussion and analysis of Hamilton’s views, see Gibbons, *supra* note 1, at 1909-12.

<sup>19</sup> *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). In this case, a citizen from South Carolina brought suit against the state of Georgia for damages relating to debts arising from the Revolutionary War. *Id.* at 420.

<sup>20</sup> *See id.* at 420. Although the Court allowed the suit to go forward, it did so with a certain amount of reservation:

That such [state] suability may nevertheless not extend to all the demands, and to every kind of action; there may be exceptions. For instance, I am far from being prepared to say that an individual may sue a State on bills of credit issued before the Constitution was established, and which were issued and received on the faith of the State, and at a time when no ideas or expectations of judicial interposition were entertained or contemplated.

*Id.* at 479. *See also generally* Pérez-Jaquez, *supra* note 16, at 237-38 (discussing the significance of *Chisholm* in the ratification of the Eleventh Amendment).

<sup>21</sup> *Chisholm*, 2 U.S. (2 Dall.) at 425 (“I hold it, therefore, to be no degradation of sovereignty, in the States, to submit to the Supreme Judiciary of the United States.”).

<sup>22</sup> *E.g.*, Pérez-Jaquez, *supra* note 16, at 236-37 (“*Chisholm* is of vital significance because it stunned Congress into passing the Eleventh Amendment.”). The Eleventh Amendment provides that “[t]he 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.” U.S. CONST. amend. XI.

<sup>23</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890).

allowing the states to be generally immune from any suit brought against them by private individuals either in a diversity situation<sup>24</sup> or where there is a federal question<sup>25</sup> controlling the case.<sup>26</sup>

Since the *Hans* decision, Eleventh Amendment jurisprudence has been necessarily limited by certain recognized exceptions to state sovereign immunity: a state's consent to suit in federal court;<sup>27</sup> the *Ex Parte Young* doctrine;<sup>28</sup> and Congressional abrogation of sovereign immunity.<sup>29</sup> The primary focus

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<sup>24</sup> Generally speaking, diversity jurisdiction allows federal courts to exercise jurisdiction over cases involving parties from different states when the amount in controversy meets or exceeds \$75,000.00. *See* 28 U.S.C. § 1332 (1994 & Supp. 1998).

<sup>25</sup> Federal question jurisdiction means that the federal district courts have jurisdiction to hear any civil action arising "under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (1994).

<sup>26</sup> *See Hans*, 134 U.S. 1 (1890). In *Hans*, the Court expanded the literal text of the Eleventh Amendment to include suits against a state by any private citizen, not just citizens of other states. *See id.* at 12. The Court reasoned that the common-law concept of sovereign immunity was so ingrained in the idea of statehood and in the principles on which our nation was founded that it was presumed that the Framers intended the states to be immune from suit, absent their consent. *See id.* at 15-16. The Court reasoned:

Suppose that congress, when proposing the eleventh amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the constitution or laws of the United States, can we imagine that it would have been adopted by the states? The supposition that it would is almost an absurdity on its face.

*Id.* at 15.

<sup>27</sup> Consent was the focus of a recent case involving a suit under the Trademark Remedy Clarification Act, which subjects the states to suits brought under section 43(a) of the Trademark Act of 1946 (the Lanham Act) for false and misleading advertising. *See College Sav. Bank v. Florida Prepaid Postsecondary Educ. and Expense Bd.*, 527 U.S. 666, 668-69 (1999). In this case, the Court announced the appropriate standards for consent:

Generally, we will find a waiver either if the State voluntarily invokes our jurisdiction or else if the State makes a "clear declaration" that it intends to submit itself to our jurisdiction. Thus, a State does not consent to suit in federal court merely by consenting to suit in the courts of its own creation. Nor does it consent to suit in federal court merely by stating its intention to "sue and be sued," or even by authorizing suits against it "in any court of competent jurisdiction."

*Id.* at 675-76 (citations omitted). The Court ultimately held that Florida Prepaid, the defendant in the suit, did not expressly consent to this suit, and that it could not impliedly consent to suit. *See id.* at 680 (overruling *Parden v. Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964)).

<sup>28</sup> The *Ex Parte Young* doctrine allows a party to seek injunctive relief against a state official; the doctrine is based

of the Court's most recent decisions is abrogation, or Congress' ability to take away state sovereign immunity when it enacts certain legislation.<sup>30</sup>

The Supreme Court first addressed congressional abrogation in *Fitzpatrick v. Bitzer*,<sup>31</sup> where

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on the legal fiction that an injunctive action brought against a state official who acted outside the scope of his or her duty is not a suit against the state, but a suit against the official, and thus is not barred by the Eleventh Amendment. Laura M. Herpers, Note, *State Sovereign Immunity: Myth or Reality after Seminole Tribe of Florida v. Florida?*, 46 CATH. U. L. REV. 1005, 1012 n.13 (1997) (citing *Ex Parte Young*, 209 U.S. 123 (1908), and its progeny of cases).

Although recent Eleventh Amendment jurisprudence has also had a direct impact on *Ex Parte Young* and its application, discussing *Ex Parte Young* at length goes beyond the scope of this Comment. For a more detailed discussion of the *Ex Parte Young* doctrine in the context of sovereign immunity, see generally Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495 (1997). See also generally Brant, *supra* note 14 (discussing *Ex Parte Young* in various contexts relating to the issue of sovereign immunity); Edward P. Noonan, Note, *The ADEA in the Wake of Seminole*, 31 U. RICH. L. REV. 879, 888-92 (1997) (considering *Ex Parte Young* in the context of a state employee's options for suing his or her employer under the ADEA).

<sup>29</sup> See, e.g., James E. Pfander, Article, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments after Seminole Tribe*, 46 UCLA L. REV. 161, 168-69 (1998). In his article, Professor Pfander discusses the status of the Eleventh Amendment after *Seminole Tribe* and proposes a scheme in which federal appellate courts would have the power to review state court decisions in order to ensure compliance with federal laws. *Id.* at 165-67. Professor Pfander suggests:

[T]o the extent that the Court's decision in *Seminole Tribe* frustrates the achievement of federal purposes by denying federal trial courts the power to hear claims that Congress evidently intended them to hear, intermediate federal review may ameliorate the situation by guaranteeing individuals assured access to a federal tribunal for the determination of their claims against the states.

*Id.* at 166.

<sup>30</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 741-54 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 633 (1999). In his article, Charles Fried sharply criticizes these decisions and their premises:

It is hard to see what sense [these decisions] make, and the claim that "the Constitution made me do it" is particularly unconvincing. The Eleventh Amendment does protect states from suits in Federal courts by residents of other states – a provision almost certainly not intended to protect states from suits based on Federal law.

Fried, *supra* note 3, at 17.

<sup>31</sup> *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In this case, a group of retired male employees of the state of Connecticut sued the state, alleging that its retirement plan violated Title VII by discriminating against the employees on the basis of their gender. *Id.* at 448. The District Court for the District of Connecticut granted the plaintiffs' injunctive relief, but denied an award of backpay because awarding monetary damages and attorney fees against the state was impermissible under the Eleventh Amendment. See *Fitzpatrick v. Bitzer*, 390 F. Supp. 278, 289-90 (D. Conn. 1974). The

the Court determined that only the Enforcement Clause (section five) of the Fourteenth Amendment<sup>32</sup> empowers Congress to abrogate state sovereign immunity.<sup>33</sup> The Court reasoned that, because the Fourteenth Amendment is a direct limitation on state powers and an enlargement of Congress' powers, Congress could restrict the states' rights thereunder.<sup>34</sup> Subsequently, in *Atascadero State Hospital v. Scanlon*,<sup>35</sup> the Supreme Court fashioned a two-pronged test to determine when abrogation is appropriate: 1. Congress must clearly and unmistakably indicate, in the language of the statute itself, its

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Court of Appeals for the Second Circuit affirmed the district court's finding that the plaintiffs were not entitled to recover monetary damages; however, it reversed the district court on the issue of attorney fees, remanding the case to the district court to determine an appropriate amount. *See Fitzpatrick v. Bitzer*, 519 F.2d 559, 570-72 (2d Cir. 1975). The state employees appealed the denial of backpay; the state employers appealed the appellate court's award of attorney fees. *Fitzpatrick*, 427 U.S. at 451. The Supreme Court reversed the portion of the appellate court's holding denying monetary relief and affirmed the portion of the decision allowing the plaintiffs to recover attorney fees. *Id.* at 457.

<sup>32</sup> Section five of the Fourteenth Amendment allows Congress to enact legislation to enforce the provisions of the Fourteenth Amendment against the states: "Congress shall have the power to enforce this article [of the Fourteenth Amendment] by appropriate legislation." U.S. CONST. amend. XIV, § 5.

<sup>33</sup> *See Fitzpatrick*, 427 U.S. at 456.

<sup>34</sup> The Court reasoned as follows:

[T]he Eleventh Amendment, and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of [section] 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to [section] 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

*Id.*

<sup>35</sup> *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985). In this case, the Supreme Court addressed the question of whether the Eleventh Amendment may bar suits brought against states or state agencies under the Rehabilitation Act of 1973 *Id.* at 235. The Rehabilitation Act prohibits discrimination against handicapped individuals participating in any program or activity that receives federal funding. *Id.* at 245 (citations omitted). The Court ultimately held that the Rehabilitation Act did not abrogate sovereign immunity under the Eleventh Amendment because the language of

intent to abrogate state sovereign immunity; and 2. Congress may abrogate immunity only pursuant to a valid exercise of power, namely its power under section five of the Fourteenth Amendment.<sup>36</sup> In creating this two-part inquiry, the Court allowed for stringent judicial review of abrogation (thus adhering to the policies supporting sovereign immunity set forth in *Hans v. Louisiana*<sup>37</sup>) while still upholding the *Fitzpatrick* decision, which specifically allows Congress to take away state sovereign immunity and, in so doing, to submit the states to suit in federal court under certain limited circumstances.<sup>38</sup>

In 1989, the Supreme Court expanded Congress' power to abrogate Eleventh Amendment sovereign immunity when it decided *Pennsylvania v. Union Gas Company*.<sup>39</sup> In the District Court for the Eastern District of Pennsylvania, Pennsylvania raised a sovereign-immunity defense under the Eleventh Amendment, and the Court responded by dismissing the case, holding that the Eleventh Amendment barred the suit.<sup>40</sup> The Court of Appeals for the Third Circuit affirmed the lower court on the grounds that Congress had not clearly expressed its intent to hold states liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (hereinafter

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the Act did not unequivocally demonstrate Congress' intent to abrogate immunity. *Id.* at 247.

<sup>36</sup> *Id.* at 242-43.

<sup>37</sup> *Hans v. Louisiana*, 134 U.S. 1 (1890), is discussed *supra* notes 23-26 and accompanying text.

<sup>38</sup> See Herpers, *supra* note 28, at 1027 (“After the initial recognition of the abrogation doctrine, the Court struggled with the possibility that abrogation could eviscerate meaningful sovereign immunity protection. In reaction to this threat, the Supreme Court developed a test providing for stringent judicial review of congressional abrogation.”).

<sup>39</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). The facts of the case center around an environmental hazard created by coal tar that was seeping into a creek in Pennsylvania. See *id.* at 1. The federal and state governments consequently cleaned up the area and the United States government brought suit against Union Gas to recover the clean-up costs under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and the Superfund Amendments and Reauthorization Act of 1986 (SARA). See *id.* at 6. Union Gas then brought a third-party suit against the Commonwealth of Pennsylvania, alleging its liability as owner of the site under CERCLA. *Id.*

CERCLA), the statute underlying the suit.<sup>41</sup>

Initially, the Supreme Court granted certiorari, vacated the decision, and remanded it to the Court of Appeals for reconsideration in light of the Superfund Amendments to CERCLA (hereinafter “the SARA Amendments”).<sup>42</sup> On remand, the Court of Appeals found a clear statement of legislative intent to hold states liable under CERCLA and that doing so was a valid exercise of congressional power.<sup>43</sup>

The case made its way to the Supreme Court once more and, in a severely fragmented opinion, the Supreme Court affirmed the judgment of the Court of Appeals, holding that the suit could go

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<sup>40</sup> See *United States v. Union Gas Co.*, 575 F. Supp. 949, 950 (E.D. Pa. 1983).

<sup>41</sup> *United States v. Union Gas Co.*, 792 F.2d 372, 383 (3d Cir. 1986), *vacated sub nom. Union Gas Co. v. Pennsylvania*, 479 U.S. 1025 (1987) (mem.). The Court cites the policy behind the Supreme Court’s interpretation of the Eleventh Amendment:

The Supreme Court has noted the eleventh amendment's importance in maintaining the balance of power between state and federal interests. Because this balance is central to our system of federalism, the Court has been reluctant to infer abrogation of the eleventh amendment by a federal statute that could be otherwise interpreted.

*Id.* at 376.

<sup>42</sup> *Union Gas Co. v. Pennsylvania*, 479 U.S. 1025 (1987). The main purpose of CERCLA, which was enacted in 1980 – and the 1986 SARA Amendments to it – is to clean up hazardous waste disposal sites. See Brant, *supra* note 14, at 853.

<sup>43</sup> See *United States v. Union Gas*, 832 F.2d 1343, 1357 (3d Cir. 1987). This time, the court of appeals found the language of the SARA amendments sufficient to abrogate sovereign immunity: “Congress in SARA has now enacted clear statutory language to abrogate the states' eleventh amendment immunity . . .” *Id.* at 1349. The court then turned to the issue of whether the Commerce Clause accords Congress sufficient power to abrogate Eleventh Amendment immunity. See *id.* at 1351-56. The court rejected a “time line” approach that allows Congress to abrogate immunity under any amendment that was ratified after the enactment of the Eleventh Amendment. *Id.* at 1351. The court focused its analysis on the issue of plenary power and whether the Fourteenth Amendment and the Commerce Clause are on equal ground in terms of the breadth of congressional power under each: “we disagree with the appellant's contention that the fourteenth amendment's grant of plenary powers to Congress is unique and thus distinguishable from Congress' plenary power to regulate interstate commerce as granted in Article I.” *Id.* at 1352 (relying on *In re McVey Trucking, Inc.*, 812 F.2d 311 (7th Cir. 1987)).

forward.<sup>44</sup> Justice Brennan wrote the plurality opinion and first concluded that the language of CERCLA and of the SARA amendments meets the *Atascadero* standard<sup>45</sup> for “unmistakably clear” congressional intent.<sup>46</sup> In Part III of the opinion, Justice Brennan addressed the question of whether the Commerce Clause<sup>47</sup> confers power upon Congress to abrogate state sovereign immunity under the Eleventh Amendment.<sup>48</sup> Justice Brennan tracks language in previous decisions that focuses on the states' surrendering part of their sovereignty when they adopted the Constitution.<sup>49</sup>

To reinforce this “surrender theory,” Justice Brennan draws an analogy between the plenary powers granted to Congress under section five of the Fourteenth Amendment and under the Commerce Clause, basing this argument on the premise that, when the Constitution grants Congress such power, it concomitantly limits state authority.<sup>50</sup> According to Justice Brennan, there is no difference between

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<sup>44</sup> See *Union Gas*, 491 U.S. at 23.

<sup>45</sup> This standard is discussed *supra* notes 35-38 and accompanying text.

<sup>46</sup> See *Union Gas*, 491 U.S. at 13.

<sup>47</sup> The Commerce Clause provides that “[t]he Congress shall have the Power . . . to regulate Commerce with foreign Nations, and among the several states, and with Indian tribes . . .” U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause is regarded as an important source of broad congressional power, especially in defining federal and state relations: “[t]he commerce clause comprises, however, not only the direct source of the most important peace-time powers of the National Government; it is also, except for the due process of law clause of Amendment XIV, the most important basis for judicial review in limitation of State power.” EDWARD S. CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY* 54 (13th ed. 1973).

<sup>48</sup> See *Union Gas*, 491 U.S. at 13-23.

<sup>49</sup> See *id.* at 14-16 (citing a series of cases to support the notion that Congress’ ability to regulate the states in certain ways, including the regulation of commerce, amounts to the states’ surrendering to the federal government a certain amount of their sovereign status).

<sup>50</sup> See *id.* at 16-17. The Court reasoned that:

Like the Fourteenth Amendment, the Commerce Clause with one hand gives power to Congress while, with the other, it takes power away from the States. . . . The important point . . . is that the [Commerce Clause] both expands federal power and contracts state power; that is the meaning, in fact, of a “plenary” grant of authority, and the lower courts have rightly concluded that it makes no sense to conceive of § 5 [of the Fourteenth Amendment] as somehow being an “ultraplenary”

congressional powers under section five of the Fourteenth Amendment and those under the Commerce Clause; both constitute a valid exercise of power under which Congress may abrogate a state's Eleventh Amendment immunity.<sup>51</sup>

### III. ENFORCING EMPLOYEE RIGHTS AGAINST STATE EMPLOYERS AFTER *UNION GAS*

Under the expansive standards established in the *Union Gas* decision, state employees enjoyed essentially the same rights as their private sector counterparts because they, like private sector employees, could sue their employers in federal courts under federal employment laws without the threat of dismissal based on sovereign immunity. In the wake of *Union Gas*, state employers were essentially precluded from raising a sovereign-immunity defense to employee suits under various federal employment laws because Congress enacted most of these statutes either under the Commerce Clause or under section five of the Fourteenth Amendment, either of which would meet the “valid exercise of power” prong of the standard for appropriate abrogation of sovereign immunity.<sup>52</sup>

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grant of authority.

*Id.*

<sup>51</sup> See *id.* at 19-20. In his opinion, Justice Scalia is critical of this portion of the plurality opinion:

I think it plain that the position adopted by the Court contradicts the rationale of *Hans* [*v. Louisiana*], if not its narrow holding. *Hans* was . . . enunciating a fundamental principle of federalism, evidenced by the Eleventh Amendment, that the States retained their sovereign prerogative of immunity. . . . If private suits against States, though not permitted under Article III (by virtue of the understanding represented by the Eleventh Amendment), are nonetheless permitted under the Commerce Clause, or under some other Article I grant of federal power, then there is no reason why the other limitations of Article III cannot be similarly exceeded.

*Id.* at 37, 40 (Scalia, J. concurring in part and dissenting in part). The eventual overruling of *Union Gas* is discussed *infra* note 125-28 and accompanying text.

<sup>52</sup> The standard for appropriate abrogation of sovereign immunity is discussed *supra* notes 35-38 and accompanying text.

This section focuses on cases that were brought under the ADEA, the FLSA, and the FMLA against a state or a state agency between 1989 and 1996,<sup>53</sup> and in which the states or agencies challenged the courts' jurisdiction based on the Eleventh Amendment. Of particular interest are those cases in which the states' Eleventh Amendment challenges fail and the courts' reasons for thus allowing the federal courts to retain jurisdiction over the employees' cases.

*A. The Age Discrimination in Employment Act of 1967*<sup>54</sup>

Although Congress had started investigating instances of arbitrary age discrimination as early as the 1950s, attempts to add age discrimination to Title VII<sup>55</sup> were unsuccessful.<sup>56</sup> Thus, after a series of

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<sup>53</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), which overruled *Union Gas* and which radically changed the standards for abrogating sovereign immunity, was decided in 1996. *Seminole Tribe* is discussed in detail *infra* notes 112-29 and accompanying text.

<sup>54</sup> 29 U.S.C. §§ 621-34 (1994). The ADEA provides, in pertinent part:

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

29 U.S.C. § 623(a) (1994).

<sup>55</sup> Title VII is codified at 42 U.S.C. § 2000e (1994). Title VII provides, in pertinent part:

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or

investigations and findings, the ADEA was enacted in 1967 for the purpose of combating discrimination against people who are 40 years of age and over.<sup>57</sup> As it was originally enacted, the ADEA only applied to private sector employees; the Act was amended in 1974 to include states and state agencies in the definition of “employers.”<sup>58</sup>

To enforce the ADEA against any employer, aggrieved employees must file complaints first with the Equal Employment Opportunity Commission (hereinafter EEOC) and exhaust their administrative remedies before filing a private suit in federal court.<sup>59</sup> If preliminary attempts at settlement fail, the EEOC may choose to pursue the case itself in federal court, or it may choose to allow the complainant to file a private suit on his or her own behalf.<sup>60</sup>

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national origin.

42 U.S.C. § 2000e-2(a).

<sup>56</sup> See Brant, *supra* note 14, at 830 (“These amendments failed, largely because it was felt that Congress did not have enough information to make a considered judgment about age discrimination issues.”).

<sup>57</sup> According to the statute, its purpose is “to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.” 29 U.S.C. § 621(b) (1994). In 1978, Congress raised the age ceiling to 70, and eliminated the age ceiling completely in 1986. Brant, *supra* note 15, at 831 n.392 (citations omitted).

<sup>58</sup> E.g., Laurie A. McCann, *The ADEA and the Eleventh Amendment*, 2 EMPLOYEE RTS. & EMPLOYMENT POL’Y J. 241, 245 (1998). Currently, the statutory definition of “employer” includes “a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State . . . .” 29 U.S.C. § 630(b) (1994).

<sup>59</sup> 29 U.S.C. § 626(d) (1994). The statute provides as follows:

No civil action may be commenced by an individual under this section until *60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission . . . .* Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. § 626(d) (emphasis added).

<sup>60</sup> The enforcement provisions of the ADEA provide that:

In federal cases decided after *Union Gas*, but before *Seminole Tribe*, the majority of the courts upheld federal jurisdiction on the basis of congressional abrogation.<sup>61</sup> For example, in *Blanciak v. Allegheny Ludlum Corporation*,<sup>62</sup> the Court of Appeals for the Third Circuit found that the language of the 1974 amendments to the ADEA clearly demonstrated an intent to abrogate state sovereign immunity because the definition of “employer” includes a state or a state agency or instrumentality.<sup>63</sup>

The *Blanciak* Court's approach to the second prong of the *Atascadero* test<sup>64</sup> for proper abrogation, whether Congress acted pursuant to a valid exercise of power, is twofold: first, the Court

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Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

29 U.S.C. § 626(c)(1). *See also* Rubenstein, *supra* note 2, at 648 (“If the EEOC cannot resolve the matter by brokering a settlement between the parties, the EEOC can choose between pursuing judicial relief itself, or issuing a ‘right to sue’ letter allowing the claimant to file suit.”).

<sup>61</sup> *See infra* note 69 for a list of sample cases addressing the ADEA and sovereign immunity.

<sup>62</sup> *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690 (3d Cir. 1996). In this case, Allegheny Ludlum bought out a United States Steel Corporation facility in Pennsylvania, and decided to hire 55 of the 125 employees who previously worked at the plant. *Id.* at 692. Allegheny Ludlum entered into a hiring agreement with the United Steelworkers of America. *See id.* at 693. Allegheny Ludlum also asked the Job Services offices of the Commonwealth of Pennsylvania, the function of which is to bring together employees and employers, to accept applications and administer its standard aptitude tests to potential employees. *See id.* The plaintiffs in this case are a group of employees who had worked for United States Steel Corporation and who were over 40 years of age. *Id.* The suit named as defendants Allegheny Ludlum, the United Steel Workers of America, and the Commonwealth of Pennsylvania, and alleged that the standardized tests administered by the Job Services offices violated the ADEA. *See id.* Allegheny Ludlum and the labor union were dismissed pursuant to a settlement agreement, leaving only the state agency. *Id.* The Commonwealth moved for summary judgment, asserting its sovereign immunity under the Eleventh Amendment. *Id.* The district court granted the summary judgment and the plaintiff class appealed. *Id.* at 693-94.

<sup>63</sup> *Id.* at 695. (“The statute simply leaves no room to dispute whether states and state agencies are included among the class of potential defendants when sued under the ADEA for their actions as ‘employers.’ ”).

<sup>64</sup> *See supra* notes 35-38 and accompanying text for a discussion of the standard for appropriate abrogation of sovereign immunity.

relies on the Supreme Court's holding in *EEOC v. Wyoming*<sup>65</sup> to support the proposition that the ADEA is a valid exercise of Congress' "plenary power to regulate interstate commerce under the Commerce Clause,"<sup>66</sup> thus adhering to the *Union Gas* holding. The Court then adds what seems to be a "backup" position, that the ADEA, according to "virtually every court which has addressed the question," is also a valid exercise of congressional power under section five of the Fourteenth Amendment.<sup>67</sup> This part of the court's reasoning is especially interesting in light of Justice Burger's dissent in *EEOC v. Wyoming*, which asserts that the ADEA is not valid section five legislation.<sup>68</sup>

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<sup>65</sup> *EEOC v. Wyoming*, 460 U.S. 226 (1983) (upholding the ADEA in the face of a Tenth Amendment challenge as a valid exercise of power under the Commerce Clause, but expressly reserving ruling on whether the ADEA is a valid exercise of Congress' power under section five of the Fourteenth Amendment).

<sup>66</sup> *Blanciak*, 77 F.3d at 695. The *Blanciak* Court cites directly to *Union Gas* to enumerate the appropriate standards for congressional abrogation of sovereign immunity:

Moreover, Congress may specifically abrogate the states' Eleventh Amendment immunity. *See, e.g.,* *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (finding abrogation in legislation passed pursuant to [section five] of the Fourteenth Amendment); and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (finding abrogation in legislation passed pursuant to the Congress' Article I, § 8 plenary power over commerce).

*Id.* at 694.

<sup>67</sup> *Id.* at 695. The court added:

Here, we have no trouble resolving the second part of this inquiry as the Supreme Court has held the ADEA to be a valid exercise of Congress' plenary power to regulate interstate commerce under the Commerce Clause. Moreover, virtually every court which has addressed the question has concluded that the ADEA was validly enacted pursuant to Congress' power to enforce section five of the Fourteenth Amendment.

*Id.* (citations omitted). However, the Court ultimately dismissed the suit on the grounds that the Eleventh Amendment and the language of the ADEA prohibited federal jurisdiction over the Commonwealth of Pennsylvania functioning as an employment agency, and not as an employer. *See id.* at 696 ("The statutory language of the ADEA simply does not evince an unmistakably clear intention to abrogate the states' Eleventh Amendment immunity from suit while acting in their capacity as employment agencies under that Act.").

<sup>68</sup> *See EEOC*, 460 U.S. at 259-63 (Burger, J. dissenting, joined by Justices Rehnquist, O'Connor, and Powell). Justice Burger states that he would hold the ADEA unconstitutional as applied to the states. *Id.* at 251. Although he

The *Blanciak* Court's rationale for allowing jurisdiction over a private ADEA suit against a state acting as an employer is very similar to the reasoning adopted by other courts that have addressed the same question.<sup>69</sup> Even if the suits ultimately failed for varying reasons, such as in *Blanciak*,<sup>70</sup> the line of reasoning for disposing of the Eleventh Amendment as a jurisdictional bar to suing a state acting as an employer remained the same: each court relied on the plain language of the 1974 amendments to demonstrate “clear and unmistakable intent,” and on *EEOC v. Wyoming* and *Union Gas*<sup>71</sup> to show that Congress properly abrogated sovereign immunity when it enacted those amendments.

### *B. The Fair Labor Standards Act of 1938*<sup>72</sup>

The wage and overtime provisions of the Fair Labor Standards Act were originally enacted to ensure that employers were paying workers a set minimum wage and paying non-exempt employees

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acknowledges that the Fourteenth Amendment allows Congress to enact legislation affecting the states, the Fourteenth Amendment is not a “blank check” to intrude into details of states' governments at will.” *Id.* at 259. He also cites an apparent discrepancy between subjecting the states to the ADEA and Congress’ own policies regarding retirement requirements:

And even were we to assume, arguendo, that Congress could redefine the Fourteenth Amendment, I would still reject the power of Congress to impose the Age Act on the states when Congress, in the same year that the Age Act was extended to the states, passed mandatory retirement legislation of its own . . . for law enforcement officers and firefighters. Over eight years have elapsed since the Age Act was extended to the states, yet early retirement is still required of federal air traffic controllers, . . . federal law enforcement officers, . . . federal firefighters, . . . employees of the Panama Canal Commission and the Alaska Railroad, . . . members of the Foreign Service, . . . and members of the Armed Services . . . .

*Id.* at 263 (citations omitted).

<sup>69</sup> See, e.g., *Hurd v. Pittsburg State Univ.*, 29 F.3d 564 (10th Cir. 1994); *Bell v. Purdue Univ.*, 975 F.2d 422 (7th Cir. 1992); *Davidson v. Board of Governors of State Colleges and Univ. for West. Ill. Univ.*, 920 F.2d 441 (7th Cir. 1990); *Reiff v. Philadelphia County Ct. of C. P.*, 827 F. Supp. 319 (E.D. Pa. 1993).

<sup>70</sup> See *supra* note 67.

<sup>71</sup> *Union Gas* is discussed in depth *supra* notes 39-51 and accompanying text.

<sup>72</sup> 29 U.S.C. §§ 201-19 (1994).

time and one-half for any hours worked that exceeded 40 per week.<sup>73</sup> To enforce the provisions of the FLSA, employees may bring a private suit against any employer in any federal or state “court of competent jurisdiction” to seek legal or equitable relief, as necessary to recover what was lost.<sup>74</sup> The FLSA also provides for suits brought by the Secretary of Labor to seek injunctive, legal, or equitable relief.<sup>75</sup>

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<sup>73</sup> See Brant, *supra* note 14, at 806-07 n.225 (noting that certain professional employees are exempted from the overtime requirements under 29 U.S.C. § 213 (1994)). Congress’ findings and policy are as follows:

(a) The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce. That Congress further finds that the employment of persons in domestic service in households affects commerce.

(b) It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

29 U.S.C. § 202 (1994). The minimum wage and maximum hours provisions are set forth in 29 U.S.C. §§ 206-07 (1994). The portion of the FLSA that comprises the Equal Pay Act is discussed *infra* notes 179-91 and accompanying text.

<sup>74</sup> See 29 U.S.C. § 216(b) (1994). Plaintiffs may seek relief such as back pay, reinstatement, or promotion; they may also seek lost wages as liquidated damages. See 29 U.S.C. § 216 (b). See also generally Brant, *supra* note 14, at 806-18.

<sup>75</sup> 29 U.S.C. §§ 216-17 (1994). Section 217 specifically grants jurisdiction over injunction proceedings to the federal district courts:

The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter. . . .

29 U.S.C. § 217.

In 1941, the Supreme Court held, in *United States v. Darby*,<sup>76</sup> that the FLSA is a valid exercise of power under the Commerce Clause.<sup>77</sup> However, the FLSA was not expanded to include states as employers until the 1960s, when Congress gradually added certain state agencies and instrumentalities, such as hospitals and schools, via amendments in 1961 and 1968.<sup>78</sup> In 1968, the Supreme Court held that those particular FLSA amendments were also valid

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<sup>76</sup> *United States v. Darby*, 312 U.S. 100 (1941). In this case, Darby was indicted in federal court for employing workers at a lumber yard and paying them less than the prescribed federal minimum wage. *See id.* at 111. Darby was charged, inter alia, with paying workers only \$.25 per hour and failing to pay them overtime. *Id.* On a direct appeal from the District Court for the Southern District of Georgia, the Supreme Court considered the issue of “whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum . . . .” *Id.* at 105.

<sup>77</sup> *See id.* at 119-22. The Court reasoned:

Congress, having by the present Act adopted the policy of excluding from interstate commerce all goods produced for the commerce which do not conform to the specified labor standards, it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities.

*Id.* at 121.

<sup>78</sup> Brant, *supra* note 14, at 807. Brant describes the evolution of FLSA:

Congress began to expand the FLSA to encompass state employers in the 1960s. In 1961, Congress included state-run “enterprises” engaged in commerce or in the production of goods for commerce in the Act’s definition of covered “employers.” In 1966, Congress added state-owned schools, hospitals, nursing homes and mental institutions to the list of covered employers.

*Id.* The current definition of “employer” under the FLSA includes the following language:

- (C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual--
  - (i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and
  - (ii) who--
    - (I) holds a public elective office of that State, political subdivision, or agency,

pursuant to Congress' powers to regulate commerce.<sup>79</sup>

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(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policymaking level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

29 U.S.C. § 203(e)(2) (1994).

<sup>79</sup> See generally *Maryland v. Wirtz*, 392 U.S. 183, 188-99 (1968). The Court reasons:

But while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.

*Id.* at 196-97. This case came to the Court after Congress amended the FLSA in the 1960's to include some state employers in the definition of "employer." See *id.* at 187. Interestingly, the state raised an Eleventh Amendment challenge, but the Court shirked the issue: "[q]uestions of state immunity are therefore reserved for appropriate future cases." *Id.* at 200.

*Maryland v. Wirtz* was overruled in *National League of Cities v. Usery*, in which the 1974 amendments to the FLSA were challenged. See *National League of Cities v. Usery*, 426 U.S. 833, 839 (1976). The Court held that the FLSA, as amended, was not a valid exercise of Congress' power under the Commerce Clause. *Id.* at 852. The Court held:

This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution. We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the Commerce Clause].

*Id.*

*National League of Cities* was in turn overruled in 1985 in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 530-31(1985). The Court analyzes the problems with *National League of Cities* as follows:

In [*National League of Cities*], this Court, by a sharply divided vote, ruled that the Commerce Clause does not empower Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act (FLSA) against the States "in areas of traditional governmental functions." . . . Our examination of this "function" standard applied in these and other cases over the last eight years now persuades us that the attempt to draw the boundaries of state regulatory immunity in terms of "traditional governmental function" is not only unworkable but is also

In 1973, the Supreme Court addressed an Eleventh Amendment challenge to the FLSA in *Employees v. Missouri Department of Public Health and Welfare*.<sup>80</sup> In *Employees*, the Court did not find any language in the 1966 amendments that indicated Congress' clear and unmistakable intent to abrogate state sovereign immunity.<sup>81</sup> The Court also found nothing in the legislative history of those amendments that demonstrated Congress' intent to allow a private citizen to sue in federal court.<sup>82</sup> In response to this decision, Congress amended the FLSA in 1974 to add language defining the states as “employers,” thereby expressing a clear intention to abrogate Eleventh Amendment immunity.<sup>83</sup>

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inconsistent with established principles of federalism and, indeed, with those very federalism principles on which *National League of Cities* purported to rest. That case, accordingly, is overruled.

*Id.* (citations omitted). For commentary on this line of cases, see generally Rubenstein, *supra* note 2, at 627-32.

<sup>80</sup> *Employees of the Dep't of Pub. Health and Welfare, Mo. v. Dep't of Pub. Health and Welfare, Mo.*, 411 U.S. 279 (1973). In this case, employees of state health facilities brought suit against the state for overtime compensation under the FLSA. *See id.* at 281. The district court dismissed the employees' complaint; the Court of Appeals for the Eighth Circuit affirmed the dismissal in an unreported decision. *Id.* On rehearing en banc, the court of appeals affirmed the district court's dismissal by a slim margin. *Id.*

<sup>81</sup> *See id.* at 285. The Court viewed the statutory language as follows:

It would also be surprising in the present case to infer that Congress deprived Missouri of her constitutional immunity without changing the [FLSA] . . . or indicating in some way by clear language that the constitutional immunity was swept away. . . . Thus, we cannot conclude that Congress conditioned the operation of these facilities on the forfeiture of immunity from suit in a federal forum.

*Id.*

<sup>82</sup> *Id.* (“But we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in the federal courts.”).

<sup>83</sup> *E.g.*, Brant, *supra* note 14, at 807. Congress' response to *Employees* included the following reasoning:

The 1974 amendment, which remains unchanged to date, defines an “employer” to include a “public agency,” and defines “public agency” to include “the government of a State or political subdivision thereof or any agency of . . . a State, or a political subdivision of a State.” This amendment resolved the Eleventh Amendment issues . . . .

After the 1974 amendments and prior to the *Seminole Tribe* decision,<sup>84</sup> courts consistently allowed FLSA suits against state employers to go forward on the basis of congressional abrogation.<sup>85</sup> For example, in *Hale v. Arizona*,<sup>86</sup> the Court of Appeals for the Ninth Circuit cited to *Union Gas* and Congress' power to abrogate sovereign immunity under the Commerce Clause.<sup>87</sup> However, the court did not set forth any authority to establish the FLSA as valid Commerce Clause – or section five – legislation.<sup>88</sup>

After cutting short its analysis of congressional power to abrogate Eleventh Amendment immunity, the court analyzed the language of the FLSA and state employees' ability to sue thereunder in federal courts, concluding that state employees indeed have a cause of action against their employers in federal court.<sup>89</sup> While it seems anomalous to exclude from the analysis any reference to any authority that establishes the FLSA as a valid exercise of power for congressional abrogation purposes, this

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*Id.* (citations omitted).

<sup>84</sup> *Seminole Tribe* is discussed in detail *infra* notes 112-29 and accompanying text.

<sup>85</sup> *See infra* note 90.

<sup>86</sup> *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993) (en banc). In this case, the court of appeals consolidated two similar cases in which a class of state prison inmates sued Arizona under the FLSA, asking to be paid the federal minimum wage for work performed while serving prison sentences. *Id.* at 1389. In both cases, the District Court for the District of Arizona granted summary judgment in favor of the state on the grounds of the Eleventh Amendment. *Id.*

<sup>87</sup> *Id.* at 1391 (“Congress has the power under the Commerce Clause to annul a state's Eleventh Amendment immunity. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).”).

<sup>88</sup> *See id.* at 1389-92.

<sup>89</sup> *See id.* at 1391-92 (“Congress has made its intention clear in the FLSA. . . . It has likewise manifested the intention that FLSA claims, including those against state employers, may be heard in federal court.”). In reaching this conclusion, the court first cited the *Atascadero* requirement for clear and unmistakable language and then parsed the language of the statute, focusing its attention on the portions of the FLSA that include the states as employers and that authorized suit in any state or federal court. *See id.* at 1391. The court then concluded that the language of the FLSA clearly meets the *Atascadero* standard for clear and unmistakable intent to submit the states to suit in federal court. *Id.* The *Atascadero* standard is discussed *supra* notes 35-38 and accompanying text.

seems to be the trend in the other cases that were decided during this time period.<sup>90</sup> While it is clear that *Union Gas* controlled at the time, and even that there was authority for the proposition that the FLSA is indeed a valid exercise of Commerce Clause regulation, the dominant theme in the case law focused primarily upon the language of the FLSA itself.

### C. *The Family and Medical Leave Act of 1993*<sup>91</sup>

The Family and Medical Leave Act was enacted in 1993 for the purpose of allowing employees who need to take time away from work for certain reasons to take this time off without worrying about losing their jobs.<sup>92</sup> Employers with 50 employees or more,<sup>93</sup> including state employers,<sup>94</sup> must excuse employees whose requests for time off are valid, and must guarantee those employees that their positions will still be available for them when they return to work.<sup>95</sup> Any employee who is denied leave may file a private suit against his or her employer.<sup>96</sup>

Because the FMLA was enacted in 1993, there are few federal cases decided during the time

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<sup>90</sup> See, e.g., *Brinkman v. Department of Corrections*, 21 F.3d 370 (10th Cir. 1994); *Reich v. New York*, 3 F.3d 581 (2d Cir. 1993); *American Fed'n of State, County and Mun. Employees, AFL-CIO v. Virginia*, No. CIV.A. 94-097-A, 1995 WL 913191 (W.D. Va. July 10, 1995); *Ackley v. Department of Corrections*, 844 F. Supp. 680 (D. Kan. 1994); *Ahern v. New York*, 807 F. Supp. 919 (N.D.N.Y. 1992).

<sup>91</sup> 29 U.S.C. §§ 2601-54 (1994).

<sup>92</sup> The purposes enumerated in the statute include “balanc[ing] the demands of the workplace with the needs of families; entitl[ing] employees to take reasonable leave for medical reasons [and] accomplishing these purposes in a manner . . . that minimizes the potential for . . . discrimination on the basis of sex . . . .” See 29 U.S.C. § 2601(b). See also generally Rubenstein, *supra* note 2, at 626-27.

<sup>93</sup> See 29 U.S.C. §§ 2611(2)(B)(ii) (4)(A)(i) (1994).

<sup>94</sup> See 29 U.S.C. §§ 2611(4)(A)(iii) 2611(4)(B).

<sup>95</sup> See generally 29 U.S.C. § 2612 (1994). See also generally Rubenstein, *supra* note 2, at 626-27 (stating that valid reasons to take time off include caring for a newborn or adopted child, or a sick dependent family member).

<sup>96</sup> See 29 U.S.C. § 2617 (1994). The statute provides, in pertinent part, that “[a]ny employer who violates [the Act] shall be liable . . . for damages equal to . . . any wages, salary, employment benefits or other compensation denied or lost . . . by reason of the violation.” 29 U.S.C. § 2617(a)(1)(A). Employers are also liable “for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.” 29 U.S.C. § 2617(a)(1)(B).

period between *Union Gas* and *Seminole Tribe*. However, the District Court for the District of Maryland decided *Knussman v. Maryland*,<sup>97</sup> an FMLA case that came down in 1996, shortly after the *Seminole Tribe* decision.<sup>98</sup> In this case, the state of Maryland raised an Eleventh Amendment defense against the plaintiff's FMLA complaint.<sup>99</sup> The Court held that the Eleventh Amendment did not bar the suit, basing its reasoning not on the holding in *Seminole Tribe*, but seemingly on earlier FLSA cases, which the Court found to be analogous to this one.<sup>100</sup>

Although the Court cites to *Seminole Tribe* and even acknowledges the overruling of *Union Gas*,<sup>101</sup> it nonetheless relies on *Union Gas* to articulate the Supreme Court's standards for finding congressional intent to abrogate state sovereign immunity.<sup>102</sup> The Court analyzes the language of the FMLA, concluding that, because the FMLA includes states as potential employers and allows suit in any state or federal court of competent jurisdiction, there is clear congressional intent to abrogate Eleventh Amendment immunity.<sup>103</sup> However, the Court never reaches the question of whether the FMLA is an example of valid congressional power to abrogate sovereign immunity – either under the

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<sup>97</sup> *Knussman v. Maryland*, 935 F. Supp. 659 (D. Md. 1996). The facts of the case surround a Maryland police officer's claim that he was improperly denied leave from his job immediately following the birth of his daughter. *Id.* at 662.

<sup>98</sup> *Knussman* was decided in August of 1996, just five months after the *Seminole Tribe* decision in March of 1996. *Seminole Tribe* is discussed in depth *infra* notes 112-29 and accompanying text.

<sup>99</sup> *Knussman*, 935 F. Supp. at 662 (“On October 16, 1995, defendants filed their motion seeking dismissal of Counts I and II on the grounds that the Eleventh Amendment bars suit against the State of Maryland . . .”).

<sup>100</sup> *See id.* at 662-63 (“In the instant case, while no court has expressly addressed the Eleventh Amendment's impact on suits against states under the FMLA, the language in the FMLA is identical to that found in the FLSA.”).

<sup>101</sup> *Union Gas* is discussed in detail *supra* notes 39-51 and accompanying text.

<sup>102</sup> *Knussman*, 935 F. Supp. at 663 (“The [*Union Gas*] Court analyzed CERCLA's language and found that Congress' explicit inclusion of states within the definition of . . . who may be liable under the statute . . . convey[s] a message of ‘unmistakable clarity’ that ‘Congress intended that States be liable . . .’”) (citations omitted).

<sup>103</sup> *See id.* (“Th[e] explicit inclusion of states and their political subdivisions in the statute's definition of ‘employer’ constitutes ‘unequivocal and textual’ evidence that Congress intended to subject states and their political

Commerce Clause or under section five of the Fourteenth Amendment – stating simply that it would not address the issue because it was not raised in the briefs or at oral argument.<sup>104</sup>

Because *Knussman* is the only case brought under the FMLA during the period between *Union Gas* and *Seminole Tribe*, it is not clear whether it represents a “typical” analysis of an Eleventh Amendment defense raised against the FMLA.<sup>105</sup> The *Knussman* decision is arguably unsound, given the Court's refusal to address whether the FMLA is a valid exercise of power under the *Atascadero* standard. The Court's shirking of this issue is inappropriate, because the Eleventh Amendment bars subject-matter jurisdiction, which is never waivable as a defense and which any party – or even the court itself – may raise at any time.<sup>106</sup>

Examining the case law prior to the Supreme Court's decision in *Seminole Tribe* demonstrates that the Eleventh Amendment was generally not a successful defense for state defendants to raise in suits brought under the ADEA and the FLSA. Even in the absence of case law directly on point, the same argument could be made for the FMLA as well, because it appears to meet the requirements of *Atascadero*: 1. the language of the statute clearly includes states and their agencies as employers within the ambit of the statute; and 2. the purposes of the statute are geared both to the Commerce Clause and to Congress' powers under section five of the Fourteenth Amendment.<sup>107</sup>

#### IV. SEMINOLE TRIBE AND CITY OF BOERNE: THE SUPREME COURT'S RETURN TO FEDERALISM

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subdivisions to suits by private citizens in federal court for violations of the FMLA.”).

<sup>104</sup> *See id.* (“[T]he Court would ordinarily address whether Congress has acted pursuant to a valid exercise of power. However, the Court cannot do so here since the issue was raised neither in the briefs nor at oral argument.”).

<sup>105</sup> Nothing in the direct history of the case indicates that it was appealed. It would be interesting to see how the court of appeals would have ruled on this particular segment of the district court's holding.

<sup>106</sup> Subject-matter jurisdiction is discussed *supra* note 8.

After the *Union Gas* decision,<sup>108</sup> state employees clearly enjoyed expansive rights to sue their employers in federal court under federal statutes.<sup>109</sup> Because the states could not assert an immunity defense in federal courts, state employees were guaranteed the ability to enforce their rights to overtime and minimum wages; to certain leaves of absence without fear of losing their jobs; and to be free of discrimination based on age. However, state employees' rights in the workplace changed in 1996 and 1997 when the Supreme Court decided *Seminole Tribe of Florida v. Florida*<sup>110</sup> and *City of Boerne v. Flores*.<sup>111</sup> These cases are extremely significant because they mark the start of the Rehnquist Court's return to federalist policies that profoundly affect Eleventh Amendment jurisprudence and, more disturbingly, state employees' rights in the federal courts.

#### A. *Seminole Tribe of Florida v. Florida*<sup>112</sup>

In *Seminole Tribe*, the state of Florida responded to a suit under the Indian Gaming Regulatory

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<sup>107</sup> The purposes of the FMLA are cited *supra* note 92 and accompanying text.

<sup>108</sup> *Union Gas* is discussed *supra* notes 39-51 and accompanying text.

<sup>109</sup> At least one commentator views Congress' authority after *Union Gas* as being too expansive:

Because virtually every federal statute is a product of either an Article I power or Section 5 of the Fourteenth Amendment, there was not a single statute for which abrogation was not possible. Congress took advantage of these holdings and proceeded to abrogate the Eleventh Amendment on a regular basis. Consequently, private parties could enforce virtually all federal statutory rights against the States in federal courts.

William E. Thro, *The Eleventh Amendment Revolution in the Lower Federal Courts*, 25 J.C. & U.L. 501, 503 (1999).

<sup>110</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), *aff'g* 11 F.3d 1016 (11th Cir. 1994), *rev'g* 801 F. Supp. 655 (S.D. Fla. 1992).

<sup>111</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997), *rev'g* 73 F.3d 1352, (5th Cir. 1996), *aff'g* 877 F. Supp. 355, 358 (W.D. Tex. 1995).

<sup>112</sup> *Seminole Tribe*, 517 U.S. 44.

Act of 1988 (hereinafter IGRA)<sup>113</sup> by moving to dismiss the suit on Eleventh Amendment grounds, claiming that both the state and its governor at the time, Lawton Chiles, were entitled to sovereign immunity.<sup>114</sup> The district court denied the motion, holding that Congress abrogated Eleventh Amendment immunity when it enacted the IGRA.<sup>115</sup> The Court of Appeals for the Eleventh Circuit reversed and remanded the case, finding that the IGRA was not passed pursuant to a valid exercise of

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<sup>113</sup> The IGRA provides that Indian tribes may sue states that refuse to enter into negotiations relating to gaming on the Indian reservation lands, and is codified at 25 U.S.C. §§ 2701-21 (1994). The Seminole Tribe brought its suit against the state and its then governor, Lawton Chiles, based on the following statutory provision:

Any Indian tribe having jurisdiction over the Indian lands upon which [certain] gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the *State shall negotiate with the Indian tribe in good faith* to enter into such a compact.

25 U.S.C. § 2710(d)(3)(A) (1994) (emphasis added). *See also Seminole Tribe*, 801 F. Supp. at 656.

<sup>114</sup> *Seminole Tribe*, 517 U.S. at 52 (1996). The state and Governor Chiles argued that the case should be dismissed on sovereign immunity grounds despite specific language in the IGRA that authorizes suits against the states:

The United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith . . . .

25 U.S.C. § 2710(d)(7)(A)(i).

<sup>115</sup> *See Seminole Tribe*, 801 F. Supp. at 657-63. The district court first analyzed the language of the IGRA, finding clear intent to abrogate immunity in the jurisdictional provision. *See id.* at 658. The court also found that Congress acted pursuant to a valid power, the Indian Commerce Clause, when it enacted the IGRA. *See id.* at 658-63. The court rejected the state's argument that *Union Gas* was not controlling:

[A] majority of the Supreme Court in *Union Gas* held that Congress had the power to abrogate the States' immunity under the Interstate Commerce Clause; *Union Gas* is binding authority on this Court. It is a mistake to simply dismiss *Union Gas* as being inapposite, especially since congressional power over both interstate and Indian commerce derives from precisely the same Constitutional clause . . . and since its power in both areas is plenary.

power and thus Congress could not abrogate state sovereign immunity.<sup>116</sup> The Supreme Court granted certiorari to hear the issue and, in an opinion by Chief Justice Rehnquist, affirmed the Court of Appeals decision by a close majority.<sup>117</sup>

The majority's treatment of congressional abrogation within the IGRA begins with a discussion of the Eleventh Amendment and the *Hans* decision,<sup>118</sup> in which Justice Rehnquist notes that the Eleventh Amendment has always been interpreted to include any suit against a state by any party other than the federal government or another state.<sup>119</sup> Justice Rehnquist stresses the meaning of “sovereignty” and quotes from *Hans* to reason that states should not be amenable to suits by private citizens.<sup>120</sup>

The majority's analysis continues with a statement of the appropriate standard for congressional abrogation of Eleventh Amendment immunity and an analysis of how it applies to the IGRA. In its discussion of congressional intent to abrogate state sovereign immunity, the first prong of the test, the Court points out that the importance of the Eleventh Amendment and the “broader principles that it

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*Id.* at 661.

<sup>116</sup> *Seminole Tribe*, 11 F.3d 1016, 1019 (11th Cir. 1994). The court stated:

We hold that, although decisions of the Supreme Court demonstrate that Congress does possess the power to abrogate the states' Eleventh Amendment sovereign immunity in certain cases, Congress did not possess that power when enacting IGRA under the Indian Commerce Clause. Thus, the states retain their sovereign immunity and the federal courts do not have subject-matter jurisdiction over suits brought under IGRA.

*Id.*

<sup>117</sup> *Seminole Tribe*, 517 U.S. at 76.

<sup>118</sup> *Hans v. Louisiana* is discussed *supra* notes 23-26 and accompanying text.

<sup>119</sup> See *Seminole Tribe*, 517 U.S. at 54.

<sup>120</sup> *Id.* (“[F]ederal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.' ”) (citations omitted). *But see id.* at 85-86, 100-02 (Stevens, J. dissenting; Souter, J. dissenting).

reflects” are the reasons for requiring such a high standard of clarity within the legislation itself.<sup>121</sup> The Court then finds unmistakably clear language to abrogate immunity in the IGRA.<sup>122</sup>

Chief Justice Rehnquist then turns to the more complicated question of whether the IGRA is a valid exercise of Congress' power to abrogate state sovereign immunity. This inquiry is limited to whether the IGRA was passed pursuant to a constitutional provision that grants Congress such power, noting that the Court has historically recognized only two potential sources of such power: section five of the Fourteenth Amendment and the Commerce Clause.<sup>123</sup> The Chief Justice sharply criticizes the *Union Gas* decision for several reasons: 1. its severely fractured opinion rested on no real majority proposition and merely confused the lower courts trying to apply it; 2. its rationale deviates from established Eleventh Amendment jurisprudence; and 3. its holding unconstitutionally expands Congress' powers to add to the federal courts' Article III jurisdiction.<sup>124</sup> The majority thus soundly overruled

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<sup>121</sup> *See id.* at 55-56. This prong of the test is essentially the same requirement that the Court set forth in *Atascadero*, which is discussed *supra* notes 35-38 and accompanying text.

<sup>122</sup> *See id.* at 56-57. To find an unmistakable expression of congressional intent to abrogate immunity, the Court relies on the jurisdictional provision of the IGRA, cited *supra* note 114. The Court also points out a great deal of language that names the states as potential parties to a cause of action, which indicates congressional contemplation of suits against the states: “[i]n sum, we think that the numerous references to the ‘State’ in the text of [the IGRA] make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit.” *Id.* at 57.

<sup>123</sup> *See id.* at 59. The Court then narrowed its focus to whether the Indian Commerce Clause grants sufficient authority pursuant to which Congress may abrogate sovereign immunity: “[i]nstead, accepting the lower court's conclusion that the Act was passed pursuant to Congress' power under the Indian Commerce Clause, petitioner now asks us to consider whether that clause grants Congress the power to abrogate the States' sovereign immunity.” *Id.* at 60.

<sup>124</sup> *See id.* at 63-66. The Court reasons:

Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment. Indeed, it had seemed fundamental that Congress could not expand the jurisdiction of the federal courts beyond the bounds of Article III.

*Id.* at 65 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803)).

*Union Gas*, concluding that “[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”<sup>125</sup>

The majority opinion<sup>126</sup> in this case emphasizes the important policy of recognizing the states as sovereign entities and conferring upon them the benefits of such status, including immunity from certain suits to which they do not consent.<sup>127</sup> The Chief Justice also upholds the principles of stare decisis and the lineage of expansive interpretations of the Eleventh Amendment, starting with *Hans*.<sup>128</sup> In light of these policies, the majority demonstrates a desire to use these expansive interpretations to grant the states immunity in from suits under certain federal laws, thereby curtailing Congress' ability to override sovereign immunity when enacting certain types of legislation. The *Seminole Tribe* decision accomplishes this goal by reigning in Congress' ability to abrogate state sovereign immunity: 1. Congress

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<sup>125</sup> *Seminole Tribe*, 515 U.S. at 72-73.

<sup>126</sup> The dissenting opinions, written by Justice Stevens and Justice Souter respectively, criticize the majority's reliance on *Hans* as the underlying precedent for upholding sovereign immunity. *See id.* at 89, 102. Both distinguish *Hans* based on the fact that the controversy arose from contract law, not a federal statute, and point out that the actual text of the Eleventh Amendment does not support the majority's eventual holding. *See id.* at 84, 111. Both Justices also object to the majority's using the *Hans* rationale to “constitutionalize” sovereign immunity, which both characterize as strictly a common-law principle that is distinct from the Eleventh Amendment. *See id.* at 95-96, 117-19.

Justice Souter's dissent is especially compelling because it sets up a paradigm of compromise in which the plain meaning of the text of the Eleventh Amendment would allow it to serve as a complete bar only to diversity suits against the states; the Eleventh Amendment could have no bearing on federal-question suits against the states. *See id.* at 110-16. Instead, the common-law doctrine of sovereign immunity would, in certain circumstances, bar suits against the states that are based on federal-question jurisdiction: if a given federal-question suit is brought pursuant to a federal statute, then the issue of Congress' power to abrogate common-law sovereign immunity arises. *See id.* at 156-59. Under this paradigm, because the Eleventh Amendment and congressional abrogation could never be co-existing issues, the Eleventh Amendment could never bar federal jurisdiction over state employees' suits that arise under federal laws, such as the ADEA, the FLSA, and the FMLA.

<sup>127</sup> *See id.* at 68 (“There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a ‘surrender of this immunity in the plan of the convention.’”) (citations omitted).

<sup>128</sup> *See id.* at 69 (“For over a century, we have grounded our decisions in the oft-repeated understanding of state

must express a clear and unmistakable intent in the language of the statute; and 2. Congress must have acted pursuant to a valid exercise of power, which can only be section five of the Fourteenth Amendment.<sup>129</sup>

*B. City of Boerne v. Flores*<sup>130</sup>

On its own, the *Seminole Tribe* decision does not appear to be a major upheaval of the congressional-abrogation and sovereign-immunity analysis: its holding essentially reiterates the *Atascadero* standard<sup>131</sup> and returns to the original proposition set forth in *Fitzpatrick v. Bitzer*<sup>132</sup> – that section five of the Fourteenth Amendment is the only valid power pursuant to which Congress can abrogate state sovereign immunity. However, in 1997, the Supreme Court decided *City of Boerne*, which changed the landscape in terms of determining whether a given piece of legislation is indeed valid section five legislation. The holding in *City of Boerne* therefore has a profound effect on the second prong of the *Seminole Tribe* abrogation test by creating a standard under which fewer acts of Congress are deemed to be a “valid exercise of power” pursuant to which Congress may abrogate state sovereign immunity.

The dispute in *City of Boerne* centers around a claim under the Religious Freedom and

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sovereign immunity as an essential part of the Eleventh Amendment.”).

<sup>129</sup> *See id.* at 55 (“In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has ‘unequivocally expresse[d] its intent to abrogate the immunity,’ and second, whether Congress has acted ‘pursuant to a valid exercise of power.’”) (citations omitted).

<sup>130</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997), *rev'g* 73 F.3d 1352 (5th Cir. 1996), *aff'g* 877 F. Supp. 355 (W.D. Tex. 1995).

<sup>131</sup> *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985), is discussed *supra* notes 35-38 and accompanying text.

<sup>132</sup> *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), is discussed *supra* notes 31-34 and accompanying text.

Restoration Act of 1993 (hereinafter RFRA).<sup>133</sup> The District Court for the Western District of Texas considered the issue of whether the RFRA is unconstitutional and concluded that it is.<sup>134</sup> The Court of Appeals for the Fifth Circuit reversed, holding that the RFRA is indeed constitutional.<sup>135</sup> The Supreme Court granted certiorari to decide the issue and, by a six-to-three vote, reversed the circuit court's decision.<sup>136</sup>

Justice Kennedy wrote for the majority and began his analysis with an in-depth explanation of the Fourteenth Amendment, section five, and Congress' power thereunder.<sup>137</sup> Justice Kennedy states that although section five is indeed a "positive grant" of broad congressional powers, those powers are limited.<sup>138</sup> Accordingly, Congress may not enforce a right by changing or otherwise determining what that right is; there must be a congruence and proportionality between the injury to be prevented and the means of preventing it.<sup>139</sup>

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<sup>133</sup> The RFRA is codified at 42 U.S.C. § 2000bb (1994). The RFRA provides that: "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the Government demonstrates that application of the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). The RFRA applies both to federal and state laws, even if they were enacted before the RFRA became effective. *See* 42 U.S.C. § 2000bb-3(a).

<sup>134</sup> *See Flores v. City of Boerne*, 877 F. Supp. 355, 358 (W.D. Tex. 1995). The court concluded that Congress overstepped its boundaries when it enacted the RFRA: "[t]he Court is cognizant of Congress' [a]uthority under Section 5 of the Fourteenth Amendment, yet is convinced of Congress' violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary." *Id.* at 357.

<sup>135</sup> *Flores v. City of Boerne*, 73 F.3d 1352, 1354 (5th Cir. 1996) ("We hold that Section 5 of the Fourteenth Amendment empowered Congress to enact the Religious Freedom Restoration Act. We further hold that RFRA does not usurp the judiciary's power to interpret the Constitution.").

<sup>136</sup> *City of Boerne v. Flores*, 521 U.S. 507, 512 (1997).

<sup>137</sup> *See id.* at 517-29.

<sup>138</sup> *Id.* at 518-19 ("Congress' power under § 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment. The Court has described this power as 'remedial.' ") (citation omitted).

<sup>139</sup> *See id.* at 519-20. To support this construction of section five power, the majority examines the legislative history of the Fourteenth Amendment and both early and recent case law interpreting it. *See id.* at 520-24. Designing the

After delineating the boundaries of section five power, the majority considers whether the RFRA is indeed a valid exercise of this power within these boundaries.<sup>140</sup> Justice Kennedy concludes that Congress far exceeded those boundaries in enacting the RFRA because the Act is not a proportional response to what may be unconstitutional actions.<sup>141</sup> The majority characterizes the RFRA as “sweeping” and “intrusive” because it requires the states to show a compelling governmental interest in a challenged statute and that the statute in question is the least restrictive means of furthering that interest.<sup>142</sup>

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Fourteenth Amendment in such a way is consistent with traditional notions of the separation of powers between the legislature and the judiciary: it is for the judiciary to interpret the Constitution in a given case or controversy, and it is for the legislature to enforce those interpretations. *See id.* at 523-24.

Prior to *City of Boerne*, the standard for assessing section five legislation was articulated in *Katzenbach v. Morgan*: (1) whether the statute may be regarded as an enactment to enforce the Equal Protection Clause; (2) whether the statute is “plainly adapted to that end”; and (3) whether the statute is not prohibited by, but is consistent with, the “letter and spirit of the Constitution.” *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (citations omitted). In *City of Boerne*, the Court rejects this expansive approach, holding instead that “Congress has the power to expand Fourteenth Amendment protections beyond Supreme Court mandates.” *See also* Note, *Section 5 and the Protection of Nonsuspect Classes after City of Boerne v. Flores*, 111 HARV. L. REV. 1542, 1542-43 (1998) (noting also that the *Morgan* interpretation of section five power is called the “ratchet theory” because it allows Congress to increase, but not dilute, Fourteenth Amendment protections). *See also generally* Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores*, 32 IND. L. REV. 163, 169-78 (1998) (discussing the Supreme Court’s interpretations of section five power up until the *City of Boerne* decision).

<sup>140</sup> *See City of Boerne*, 521 U.S. at 529.

<sup>141</sup> *See id.* at 532 (“[The] RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.”).

<sup>142</sup> *Id.* The Court states that:

Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. RFRA's restrictions apply to every agency and official of the Federal, State, and local Governments. RFRA applies to all federal and state law, statutory or otherwise, whether adopted before or after its enactment. RFRA has no termination date or termination mechanism. Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion.

*Id.* (citations omitted).

The policy considerations that underlie the majority's opinion focus on the separation-of-powers doctrine first enumerated in *Marbury v. Madison*.<sup>143</sup> For example, Congress must determine whether and what legislation is necessary to enforce the guarantees of the Fourteenth Amendment, and its conclusions to that end are entitled to deference.<sup>144</sup> In this same vein, the Judiciary retains the power to interpret the Constitution and whether Congress has exceeded its authority thereunder.<sup>145</sup> With these policies in mind, the majority held that the RFRA exceeds Congress' section five power because it “contradicts the vital principles necessary to maintain separation of powers and federal balance.”<sup>146</sup>

While *City of Boerne* does not pertain to the Eleventh Amendment and state sovereignty *per se*, the underlying ideals of appropriate balance and power among the three branches of the federal government complement the Court's policy considerations in *Seminole Tribe*, which address the appropriate balance of power between the federal and state governments. Thus, when read together, these cases clearly demonstrate a sort of “new federalism” in which the Supreme Court focuses on

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<sup>143</sup> See *id.* at 535-36. The majority cites the preservation of the Constitution as the primary policy concern in this case:

Our national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is.

*Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137 (1803)).

<sup>144</sup> See *id.* at 536.

<sup>145</sup> See *id.*

<sup>146</sup> *City of Boerne*, 521 U.S. at 536. Justices O'Connor's, Souter's, and Breyer's dissents in *City of Boerne* do not figure into this Comment because they address the Court's interpretation of the Free Exercise Clause and the propriety of the Court's decision in *Employment Division Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which pertains to that issue. Justice O'Connor specifically states in her dissent that she agrees with the majority's construction of Congress' powers under section five of the Fourteenth Amendment. See *id.* at 544.

maintaining state sovereignty and thus according to the states what the Court views as their appropriate status in our system of government.<sup>147</sup>

V. ENFORCING EMPLOYMENT RIGHTS AGAINST STATE EMPLOYERS AFTER *SEMINOLE TRIBE* AND *CITY OF BOERNE*

The holdings in *Seminole Tribe* and *City of Boerne* work together to tighten the requirements for allowing congressional abrogation of state sovereign immunity under the Eleventh Amendment. To abrogate state sovereign immunity under the Eleventh Amendment, Congress must express unequivocal intent to abrogate immunity in a given piece of legislation, and it must also do so according to a valid exercise of power. Although the nature of the test remains ostensibly unchanged,<sup>148</sup> the second prong now entails a much more rigorous and concrete analysis of whether Congress acted pursuant to a valid exercise of power when it enacted certain statutes.<sup>149</sup> Under this more rigorous analysis, the federal courts can ensure that Congress does not overstep its boundaries by creating substantive rights under the Fourteenth Amendment and thereby inappropriately subjecting the states to certain federal legislation.

The result of reigning in Congress' power to legislate vis-à-vis the states achieves what the Rehnquist Court apparently views as the appropriate balance of power, where states are accorded a sovereign status that is practically equal to that of the federal government.<sup>150</sup> However, the decisions in

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<sup>147</sup> As one commentator stated, “[i]n sum, when *Seminole Tribe* and [*City of Boerne*] are combined, the Eleventh Amendment immunity of the States, . . . is now almost absolute in the federal courts.” Thro, *supra* note 109, at 504. The origin of the term “new federalism” is discussed *supra* note 10.

<sup>148</sup> This standard is essentially the same standard the Court enumerated earlier in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). *Atascadero* is discussed *supra* notes 35-38 and accompanying text.

<sup>149</sup> The *City of Boerne* approach to interpreting section five powers is discussed *supra* notes 130-47 and accompanying text.

<sup>150</sup> See, e.g., Bernard James, *The States' Rights Cases Provoke Fire*, NAT'L. L. J., Aug. 16, 1999, at B10 (referring to

and policies behind *Seminole Tribe* and *City of Boerne* profoundly impact state employees trying to sue their employers in the federal courts.

Examining the case law after these decisions indicates a dramatic shift in the lower courts' dispositions on Eleventh Amendment immunity challenges and in the reasoning that underlies these decisions. Thus, this section focuses on cases that were decided in 1997 or after, and that address the issue of Eleventh Amendment immunity in claims under the ADEA, the FLSA, and the FMLA.

#### A. *The Age Discrimination in Employment Act*

Prior to January of 2000, a majority of the courts found that the ADEA<sup>151</sup> validly abrogated Eleventh Amendment sovereign immunity under the *Seminole Tribe* and *City of Boerne* standards.<sup>152</sup> For example, in *Wichmann v. Board of Trustees of Southern Illinois University*,<sup>153</sup> the Court of Appeals for the Seventh Circuit held that the ADEA properly abrogates state sovereign immunity under

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states' rights cases as "dual sovereignty cases" and discussing the shift in power that these cases represent).

<sup>151</sup> The provisions and background of the ADEA are discussed *supra* notes 54-60 and accompanying text.

<sup>152</sup> See, e.g., *Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761 (7th Cir. 1998); *Meekison v. Voinovich*, 17 F. Supp. 2d 725 (S.D. Ohio 1998) *reconsideration denied sub nom.* *Meekison v. Ohio Dep't of Rehabilitation & Corr.*, 181 F.R.D. 571 (S.D. Ohio 1998); *Hines v. Ohio State Univ.*, 3 F. Supp. 2d 859 (S.D. Ohio 1998); *Young v. Pennsylvania House of Representatives, Republican Caucus*, 994 F. Supp. 282 (M.D. Pa. 1998) *rev'd* 208 F.3d 207 (3d Cir. 2000); *Cooper v. New York State Office of Mental Health*, 162 F.3d 770 (2d Cir. 1998) *vacated and remanded in light of* *Kimel v. Board of Regents*, 120 S. Ct. 928 (2000); *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998) *vacated and remanded in light of* *Kimel v. Florida Board of Regents*, 120 S. Ct. 928 (2000); *Coger v. Board of Regents of Tenn.*, 154 F.3d 296 (6th Cir. 1998) *vacated and remanded*, 120 S. Ct. 928 (2000); *Scott v. University of Miss.*, 148 F.3d 493 (5th Cir. 1998); *Debs v. Northeastern Ill. Univ.*, 153 F.3d 390 (7th Cir. 1998); *Keeton v. University of Nev. Sys.*, 150 F.3d 1055 (9th Cir. 1998).

<sup>153</sup> *Wichmann v. Board of Trustees of S. Ill. Univ.*, 180 F.3d 792 (7th Cir. 1999), *cert. granted* 528 U.S. 1111 (2000) (vacating the judgment and remanding for consideration in light of *Kimel v. Florida Board of Regents*, which is discussed *infra* notes 162-68 and accompanying text). In *Wichmann*, the plaintiff was 48 years old and had worked at his job as an experiential educator and director of Southern Illinois University's nature center for 20 years when he was fired. *Id.* at 795. The University cited budgetary reasons for the firing, which *Wichmann* contested as pretextual. *Id.* *Wichmann* sued the University under the ADEA, seeking back pay, liquidated damages, reinstatement, and attorney fees. See *id.* at 796. In a bifurcated trial, a jury found liability and the judge awarded *Wichmann* the damages he sought. *Id.*

the requirements of both *Seminole Tribe* and *City of Boerne*.<sup>154</sup>

In upholding the ADEA in the face of the Eleventh Amendment, the Court cited the Supreme Court's decision in *Seminole Tribe* as the appropriate inquiry for proper congressional abrogation.<sup>155</sup> The Court then analyzed the language of the statute to find clear and unmistakable intent to abrogate, and found this intent manifested in the 1974 amendments to the ADEA, which added the states to the list of employers covered under the statute.<sup>156</sup>

The Court's discussion of the second prong, whether the ADEA is a valid exercise of section five power, is a necessarily more complicated analysis because it is based on the *City of Boerne* inquiry into whether the legislation in question is indeed valid enforcement legislation.<sup>157</sup> The *Wichmann* Court cites the *City of Boerne* decision and divides the inquiry into two prongs: 1. the intrusiveness of the statute into state government activities; and 2. the proportionality of the ADEA's response to the evils to be remedied.<sup>158</sup> The Court concludes that the ADEA is not overly intrusive because it is limited to a discrete class of state laws and actions; it is prohibitory and does not require any affirmative action on the state's part; and it requires only a rationality test, not a strict scrutiny test, for state policies that may violate the Act.<sup>159</sup> The Court also found the ADEA to be a proportional response to Congress' findings

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<sup>154</sup> *Id.* at 796-800.

<sup>155</sup> *See id.* at 796 (“However, Congress may abrogate a state's immunity if it has (1) 'unequivocally expresse[d] its intent to abrogate . . .' and (2) acted 'pursuant to a valid exercise of power.'”) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996)).

<sup>156</sup> *See id.* at 797 (“The language we consider here is unmistakably clear because the amendment makes ‘a State’ an employer and the statute prohibits employers from engaging in age discrimination.”) (citing 29 U.S.C. § 623(a)(1) (1994)).

<sup>157</sup> The standards set forth in *City of Boerne* are discussed *supra* notes 130-47 and accompanying text.

<sup>158</sup> *See Wichmann*, 180 F.3d. at 799-800.

<sup>159</sup> *See id.* The court contrasts the ADEA with the RFRA, which was the underlying statute in *City of Boerne*:

of arbitrary age discrimination and its effects on older workers.<sup>160</sup> Thus, applying the ADEA to the states and to public employment situations is necessary to remedy or deter what Congress perceived to be constitutional violations.<sup>161</sup>

In January of 2000, the Supreme Court decided *Kimel v. Florida Board of Regents*,<sup>162</sup> a case

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[T]he ADEA is limited to a “discrete class” of state laws and actions, [such as] those concerning age criteria for public employment. The ADEA, unlike RFRA, is prohibitory, imposing no affirmative obligations on the states. The burden the ADEA places upon them, unlike RFRA . . . , does not require “searching judicial scrutiny,” . . . but is more like a rationality test in forbidding discrimination on the arbitrary grounds of age.

*Id.* (citations omitted).

<sup>160</sup> *See id.* at 800. The congressional findings to which the court refers are discussed *supra* note 57.

<sup>161</sup> *See id.* The court stated:

It is fairly determinable that Congress has properly concluded that application of the ADEA to public employment is necessary to remedy or deter constitutional violations of an extent great enough to make this legislative response proportional and congruent in view of its relative lack of intrusiveness. We therefore reaffirm our prior holdings that Congress clearly abrogated the states' sovereign immunity under a valid exercise of its § 5 enforcement powers.

*Id.* Although a number of circuits adopted the reasoning set forth in *Wichmann*, a number of circuits also found that Eleventh Amendment sovereign immunity is not abrogated in the ADEA, basing this decision primarily on the premise that the language of the ADEA does not indicate a clear intent to abrogate immunity. *See, e.g.,* *Goss v. Arkansas*, 164 F.3d 430 (8th Cir. 1999); *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822 (8th Cir. 1998); *Driesse v. Florida Bd. of Regents*, 26 F. Supp. 2d 1328 (M.D. Fla. 1998) (citing *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000), which is discussed *infra* notes 162-68 and accompanying text); *Hall v. Missouri Highway and Transp. Comm'n*, 995 F. Supp. 1001 (E.D. Mo. 1998).

<sup>162</sup> *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000), *aff'g* 139 F.3d 1426 (11th Cir. 1998). The 11th Circuit case consolidated *Kimel* with two others: *MacPherson v. University of Montevallo*, 938 F. Supp. 785 (N.D. Ala. 1996), and *Dickson v. Florida Department of Corrections*, No. 5:9CV207-RH, 1996 WL 1353240 (N.D. Fla., Nov. 5, 1996). In January of 2000, the Supreme Court granted certiorari in *Dickson* to address the issue of whether Congress validly abrogated sovereign immunity when it enacted the Americans with Disabilities Act. *See Florida Dept. of Corrections v. Dickson*, 120 S. Ct. 976 (2000). In granting certiorari, the Court consolidated *Dickson* with another ADA case, *Alsbrook v. Arkansas*, 120 S. Ct. 1003 (2000), *granting cert. sub nom. Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999). However, certiorari was dismissed in both cases on February 23rd and March 1st of 2000. *See Florida Dep't of Corrections v. Dickson*, 120 S. Ct. 1236 (2000); *Alsbrook v. Arkansas*, 120 S. Ct. 1265 (2000). In *Dickson*, the state agreed to pay the plaintiff the \$142,000.00 he was seeking. *See Joan Biskupic & Al Kamen, 2 Appeals Involving Disabilities Act Voided; Settlements Preclude High Court Decisions*, WASH. POST, March 2, 2000, at A10. The terms of Alsbrook's settlement are not clear; the *Washington Post* states only that “[n]ational advocates for the disabled

that put to rest any disagreement as to whether Eleventh Amendment immunity is indeed abrogated under the ADEA. In a severely fragmented opinion, the Court concluded that, while the ADEA contains a clear statement of intent to abrogate immunity, it is not valid section five legislation.<sup>163</sup>

Justice O'Connor wrote for the plurality and analyzed the ADEA according to the familiar *Seminole Tribe* standard: 1. whether Congress expressed an unequivocal intent to abrogate sovereign immunity; and 2. if so, whether it did so according to an appropriate power.<sup>164</sup> Justice O'Connor quickly dispenses with the first requirement, agreeing with the Petitioners that the language of the ADEA reflects an "unmistakably clear" intent to allow suits against states.<sup>165</sup> However, Justice O'Connor rejected the Petitioners' claim that the ADEA was passed pursuant to Congress' section five powers,

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have been trying to avoid a high court ruling that would narrow the ADA's protections. And Arkansas officials, who had won in a lower appeals court, were easily persuaded to settle." *Id.*

On April 17, 2000, the Supreme Court granted certiorari on this same issue in *University of Ala. at Birmingham Bd. of Trustees v. Garrett*, 120 S. Ct. 1669 (2000). The high court heard oral arguments in the case in October of 2000. See, e.g., Tony Mauro, *U.S. Supreme Court Watch: ADA Boosters Square off Against States' 11th Amendment Immunity*, N.J. L.J., Oct. 23, 2000, at 8. According to Mr. Mauro, the justices' primary focus was "whether Congress had made a strong case for passing the law as a way to enforce equal protection under Section 5 of the 14th Amendment." *Id.* Mr. Mauro opines that the state of Alabama is not likely to win the case and notes that the disability rights community has framed the issue in the case as one that is a "larger test of the Court's commitment to civil rights as opposed to states' rights." *Id.*

Mr. Mauro's analysis turned out to be correct; on February 21, 2001, the Supreme Court held that the Alabama employees could not recover damages under Title I of the ADA because "such suits are barred by the Eleventh Amendment." *Board of Trustees of Univ. of Ala. v. Garrett*, 2000 WL 33179681 (U.S. Feb. 21, 2001). The Court found that the ADA is not appropriate section five legislation because there is not ". . . pattern of discrimination by the States which violates the Fourteenth Amendment," and the remedy imposed by Congress is not "congruent and proportional to the targeted violation." *Id.*

<sup>163</sup> *Kimel*, 120 S. Ct. at 637 ("We conclude that the ADEA does contain a clear statement of Congress' intent to abrogate the States' immunity, but that the abrogation exceeded Congress' authority under § 5 of the Fourteenth Amendment.").

<sup>164</sup> See *id.* at 640 ("To determine whether petitioners are correct, we must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority.").

<sup>165</sup> *Id.* Although she concedes that the ADEA passes this prong of the test, her expression is somewhat cynical: "[r]ead as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States

basing this conclusion on the precedent set in *City of Boerne*.<sup>166</sup>

Justice O'Connor concludes that the ADEA does not meet the *City of Boerne* standard for numerous reasons: older people are not a suspect class entitled to strict constitutional protection; it is possible to discriminate against older people within the bounds of the Fourteenth Amendment; and the ADEA prohibits more conduct than does the Fourteenth Amendment, making it too broad to fit into the this narrow standard of "congruence and proportionality."<sup>167</sup> Ironically, at the end of the opinion, Justice O'Connor acknowledges – and explains away – the heart of the problem with the Supreme Court's hardline federalist approach: that state employees are now on unequal footing with their private sector counterparts, who are still entitled to sue their employers in federal courts for violations of the ADEA.<sup>168</sup>

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to suit for money damages at the hands of individual employees." *Id.*

<sup>166</sup> *See id.* at 644-45 (referring to the *City of Boerne* standard as the "congruence and proportionality" test).

<sup>167</sup> *See id.* at 645-47. Justice O'Connor rejects the Petitioners' argument that the ADEA applies only to arbitrary age discrimination, which would violate the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 647. Instead, she finds that applying the ADEA to the states was outside the bounds of Congress' power based on the evidence of Congress' findings:

Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of [a] constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports.

*Id.* at 648-49.

<sup>168</sup> *See id.* at 650. As the Court explains:

Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals.

## B. The Fair Labor Standards Act

In contrast with the ADEA cases, the majority of courts that have addressed the issue of sovereign immunity in FLSA<sup>169</sup> claims have found that the minimum wage and overtime provisions of the Act do not meet the *Seminole Tribe* and *City of Boerne* standard for abrogation because these provisions were not passed pursuant to section five of the Fourteenth Amendment.<sup>170</sup> The Supreme Court sealed the fate of the FLSA in *Alden v. Maine*,<sup>171</sup> which the Court decided at the end of the 1998-1999 term.

In *Alden*, the Supreme Court considered whether the Eleventh Amendment bars FLSA suits

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State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision.

*Id.* Justice Stevens writes separately to concur with the conclusion that the language of the ADEA clearly expresses congressional intent vis-à-vis the states, but to dissent from the finding that the ADEA does not apply to the states. *See id.* at 650-54. Justice Stevens rejects the Court's federalism approach, finding that neither the Eleventh Amendment nor the common-law doctrine of sovereign immunity precludes Congress from regulating certain portions of the economy. *See id.* at 650. Justice Stevens acknowledges the disparity of rights that these decisions are creating: "[f]ederal rules outlawing discrimination in the workplace, like the regulation of wages and hours or health and safety standards, may be enforced against public as well as private employers." *Id.* at 650-51.

Prior to the *Kimel* decision, commentators expressed concern about the future of ADEA claims against the states after the *Seminole Tribe* and *City of Boerne* decisions. *See, e.g.,* Brant, *supra* note 14, at 834-37 (expressing concern that the ADEA will not pass muster under the restrictive *City of Boerne* standards); Noonan, *supra* note 28, at 904 ("If *Seminole* is followed, state employees may have lost some of their protections against arbitrary discrimination based on their age. There may be no federal forum to bring their claims against the state, and at the very least they will have lost some very effective remedies."). *See also generally* McCann, *supra* note 58 (focusing on the impact of *Seminole Tribe* and *City of Boerne* and arguing—now erroneously—that neither case supports allowing Eleventh Amendment sovereign immunity to defeat ADEA claims against the states); Rubenstein, *supra* note 2, at 647-58 (predicting, incorrectly, that ADEA suits against the states will be upheld in the federal courts).

<sup>169</sup> The purposes and relevant provisions of the FLSA are discussed *supra* notes 72-75 and accompanying text.

<sup>170</sup> *See, e.g.,* *Abril v. Virginia*, 145 F.3d 182 (4th Cir. 1998); *Close v. New York*, 125 F.3d 31 (2d Cir. 1997); *Aaron v. Kansas*, 115 F.3d 813 (10th Cir. 1997); *Castro v. Puerto Rico*, 43 F. Supp. 2d 186 (D.P.R. 1999), *consolidated on appeal and aff'd sub nom. Mercado v. Puerto Rico*, 214 F.3d 34 (1st Cir. P.R. 2000).

<sup>171</sup> *Alden v. Maine*, 527 U.S. 706 (1999), *aff'g sub nom. Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997), *aff'g sub nom. Mills v. Maine*, No. 92-410-P-H, 1996 WL 400510 (D. Me. July 3, 1996).

brought in state, as opposed to federal, courts.<sup>172</sup> By a narrow majority, the Court held that the states may assert a sovereign-immunity defense in their own courts to avoid private suits under the FLSA.<sup>173</sup> In the majority opinion, Justice Kennedy relies on the historical genesis of the Eleventh Amendment and of sovereign immunity in this country, engaging in a lengthy discussion of historical facts and principles to describe the status of the states as sovereign entities deserving of a certain level of dignity within our system of government.<sup>174</sup> Within this framework of sovereign status and deserved dignity, the majority posits that, in exercising its Article I powers, Congress can only subject the states to private suits in their

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<sup>172</sup> See *Alden v. Maine*, 527 U.S. 706, 712 (1999). The petitioners in this case were a group of probation officers who were employees of the state of Maine and who brought a class-action suit against the state under the FLSA, seeking compensation and liquidated damages for unpaid overtime hours. See *id.* at 711. As the suit was pending in federal court, the Supreme Court decided *Seminole Tribe*. *Id.* at 712. The District Court for the District of Maine dismissed the case based on *Seminole Tribe* and the notion that the state had not waived its Eleventh Amendment immunity. See *Mills v. Maine*, No. 92-410-P-H, 1996 WL 400510, at \*1 (D. Me. July 3, 1996). The court of appeals affirmed the dismissal. See *Mills v. Maine*, 118 F.3d 37, 56 (1st Cir. 1997). Petitioners then filed the same action in state court, which dismissed the suit on the basis of sovereign immunity. *Alden*, 527 U.S. at 712. The Maine Supreme Judicial Court affirmed the dismissal. *Alden v. Maine*, 715 A.2d 172, 176 (Me. 1998).

<sup>173</sup> See *Alden*, 527 U.S. at 712 (1999) (“We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts.”). Justice Souter wrote the dissenting opinion, joined by Justices Breyer, Stevens, and Ginsburg. See *id.* at 760-814 (Souter, J. dissenting). Justice Souter challenges largely every aspect of the majority's opinion, including the majority's interpretation of the Tenth Amendment as a basis for sovereign immunity, as well as the majority's construction of our federal system and states' rights therein; his criticism is particularly scathing in certain portions of the opinion:

The sequence of the Court's positions prompts a suspicion of error, and skepticism is confirmed by scrutiny of the Court's efforts to justify its holding. There is no evidence that the Tenth Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood, and no evidence that any concept of inherent sovereign immunity was understood historically to apply when the sovereign sued was not the font of the law. Nor does the Court fare any better with its subsidiary lines of reasoning, that the state-court action is barred by the scheme of American federalism, a result supposedly confirmed by a history largely devoid of precursors to the action considered here.

*Id.* at 761.

<sup>174</sup> See *id.* at 712-30. Justice Kennedy describes the status of the states as follows: “[t]he federal system established by our Constitution preserves the sovereign status of the States . . . [by] reserv[ing] to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status.” *Id.* at

own courts if there is “compelling evidence” that the states were required to surrender their sovereign power to Congress pursuant to what Justice Kennedy calls the “constitutional design.”<sup>175</sup>

According to the majority, Congress' submitting the states to suit in their own courts is even more an affront to their sovereignty because it is anomalous to force state courts to assume jurisdiction over cases that could not be brought in the federal courts.<sup>176</sup> This means that, because the Eleventh Amendment is a bar to the federal courts' Article III jurisdiction, it must also bar state court jurisdiction in similar circumstances. Under this analogy, the Petitioners' suit could not proceed in state court because it was barred in federal court by the Eleventh Amendment and sovereign immunity. In addition, the suit cannot go forward in state court because Maine did not consent thereto.<sup>177</sup> Thus, based on this

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<sup>175</sup> *Id.* at 731 (citations omitted). This means that the Supremacy Clause only applies to those federal laws that accord with this “design” and that substantive federal laws do not necessarily override the states' sovereign immunity:

The cases we have cited . . . came . . . to the conclusion that neither the Supremacy Clause nor the enumerated powers of Congress confer authority to abrogate the States' immunity from suit in federal court. The logic of the decisions, however, does not turn on the forum in which the suits were prosecuted but extends to state-court suits as well.

*Id.* at 733. The Supremacy Clause provides that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, . . .

U.S. CONST. art. VI, cl. 2.

<sup>176</sup> *Alden*, 527 U.S. at 754 (“We are aware of no constitutional precept that would admit of a congressional power to require state courts to entertain federal suits which are not within the judicial power of the United States and could not be heard in federal courts.”).

<sup>177</sup> *Id.* at 758 (“To the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit. The State, we conclude, has not consented to suit.”). Consent as an exception to sovereign immunity is

decision, it is now clear that state employees cannot sue their employers in federal – or state! – courts to enforce the wage and overtime provisions of the FLSA.<sup>178</sup>

Despite the fact that the wage and overtime provisions of the FLSA are no longer enforceable in federal courts against state employers, the section of the FLSA that comprises the Equal Pay Act<sup>179</sup> has

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discussed *supra* note 27.

<sup>178</sup> To address the problem of state employees' lacking any forum in which to seek redress for non-compliance with the minimum wage and overtime provisions of the FLSA, the majority relies on the states to refrain from “disregard[ing] the Constitution or valid federal law,” citing the states' good faith in so doing as an “important assurance” that the states will uphold federal law as the “supreme Law of the Land.” *Alden*, 527 U.S. at 755. As another possible solution to this very serious problem, the majority alludes to the federal government bringing suit on behalf of other state employees in situations similar to that of the petitioners in this case. *See id.* at 759-60. As the Court suggests:

The difference between a suit by the United States on behalf of the employees and a suit by the employees implicates a rule that the National Government must itself deem the case of sufficient importance to take action against the State; and history, precedent, and the structure of the Constitution make clear that, under the plan of the Convention, the States have consented to suits [by the federal government].

*Id.*

Prior to the *Alden* decision, commentators predicted that the FLSA would not fare well against Eleventh Amendment challenges after *Seminole Tribe* and *City of Boerne*. *See, e.g.,* Rubenstein, *supra* note 2, at 652-53. Scholars caution:

While individual plaintiffs have argued that the FLSA also addresses “equal protection of the laws” for state employees, to date no such arguments have been successful. . . . [T]he fate of individual claims against states seems all too clear. Although the states appear bound to follow the FLSA, the federal courts are powerless to force states to meet this obligation.

*Id.* *See also generally* Brant, *supra* note 14, at 806-18 (concluding that because the FLSA does not properly abrogate state sovereign immunity, state employees are left with disadvantageous options for enforcing the wage and overtime provisions of the Act against their employers); Robert B. Fitzpatrick, *Current Developments in Employment Law: The Effect of Seminole Tribe and the 11th Amendment in Employment Cases*, A.L.I.-A.B.A. CONTINUING LEGAL EDUCATION 113, 116-17 (1998) (noting that the majority of federal courts have concluded that states are immune from FLSA claims and summarizing various cases); Donald J. Spero, Article, *State Immunity to Suits in Federal Courts Under Federal Employment Laws After Seminole Tribe v. Florida*, 29 U. MEM. L. REV. 739, 757-65 (1999) (observing that states are immune from FLSA suits in the wake of *Seminole Tribe*).

<sup>179</sup> The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994). The Equal Pay Act provides, in pertinent part:

generally held up under *Seminole Tribe* and *City of Boerne* scrutiny.<sup>180</sup> For

example, in *Varner v. Illinois State University*,<sup>181</sup> the Court of Appeals for the Seventh Circuit upheld the Equal Pay Act as an example of appropriate section five legislation, designed to combat gender discrimination in the workplace.<sup>182</sup>

The *Varner* Court applied the *Seminole Tribe* and *City of Boerne* standards for appropriate abrogation of sovereign immunity, first concluding that the Equal Pay Act contains an adequate expression of intent to abrogate.<sup>183</sup> In its treatment of the second prong of the analysis – whether the

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No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (1994).

<sup>180</sup> See, e.g., *Anderson v. New York*, 169 F.3d 117 (2d Cir. 1999), *vacated and remanded in light of Kimel v. Florida Board of Regents*, 120 S. Ct. 929 (2000); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833 (6th Cir. 1997); *Ussery v. Louisiana, ex rel La. Dep't. of Health and Hosp.*, 150 F.3d 431 (5th Cir. 1998) *cert dismissed*, 526 U.S. 1013 (1999); *Belch v. Board of Regents of Univ. Sys. of Ga.*, 27 F. Supp. 2d 1341 (M.D. Ga. 1998) *aff'd*, 211 F.3d 598 (11th Cir. 2000); *Perdue v. City Univ. of N.Y.*, 13 F. Supp. 2d 326 (E.D.N.Y. 1998). *But see Larry v. Board of Trustees of Univ. of Ala.*, 975 F. Supp. 1447 (N.D. Ala. 1997), *aff'd on reh'g*, 996 F. Supp. 1366 (N.D. Ala. 1998) *rev'd in part and vacated in part*, 211 F.3d 598 (11th Cir. 2000) (concluding that the Equal Pay Act could not have been passed pursuant to Congress' powers under section five of the Fourteenth Amendment because the Fourteenth Amendment requires a showing of intent to discriminate and the Equal Pay Act requires no such showing).

<sup>181</sup> *Varner v. Illinois State Univ.*, 150 F.3d 706 (7th Cir. 1998) *vacated and remanded in light of Kimel v. Florida Board of Regents*, 120 S. Ct. 928 (2000).

<sup>182</sup> See *Varner*, 150 F.3d at 716-17. In this case, a class of female tenure-track faculty members at Illinois State University sued the university for alleged violations of the Equal Pay Act and Title VII, seeking injunctive and monetary relief, including compensatory damages for intentional violations of Title VII. *Id.* at 707-08. Title VII is discussed *supra* note 55.

<sup>183</sup> *Id.* at 709-10. (“In addressing the ‘clear and unmistakable’ prong of the test, the court cites to the 1974 amendments to the FLSA, concluding that the Equal Pay Act shares those amendments in terms of the definition of ‘employer’ and the enforcement provisions.”).

Equal Pay Act is a valid exercise of section five power – the Court breaks the inquiry into two components: 1. whether Congress acted pursuant to section five of the Fourteenth Amendment when it applied the Equal Pay Act to the states; and 2. if it did, whether the Equal Pay Act is indeed within the scope of Congress' section five powers, as interpreted in *City of Boerne*.<sup>184</sup>

In its analysis of the first inquiry, the Court reasons that the Equal Pay Act was enacted to protect employees from wage disparities based on arbitrary gender discrimination; that the purpose of the Fourteenth Amendment is to prohibit arbitrary and discriminatory conduct; and that Congress therefore acted pursuant to its section five powers in enacting this portion of the FLSA.<sup>185</sup> In its analysis of the second inquiry, the Court considers whether the Equal Pay Act was designed to deter unconstitutional conduct in a way that is congruent and proportional to the “evils” Congress has found.<sup>186</sup> The Court concludes that the Equal Pay Act meets these criteria, citing Congress' inquiry into gender-based wage discrimination and its enumerated purpose in enacting the Equal Pay Act – namely, to remedy the general problem of employment discrimination and the specific problem of disparity in wages based on gender.<sup>187</sup> Thus, the Court finds that the Equal Pay Act does not create or change

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<sup>184</sup> *See id.* at 711-12.

<sup>185</sup> *See id.* at 714. Based upon policy, the court concludes:

Pursuant to this analysis, we have little difficulty in concluding that the objectives of the Equal Pay Act were within Congress's powers under the Fourteenth Amendment. As we have discussed, the purpose of the Equal Pay Act is to prohibit arbitrary sex-based wage disparities. Prohibiting “arbitrary, discriminatory government conduct . . . is the very essence of the guarantee of equal protection of the laws of the Fourteenth Amendment.”

*Id.* (citations omitted).

<sup>186</sup> *See id.* at 715-16.

<sup>187</sup> *See id.* at 716-17. The court reasoned that the Equal Pay Act is not out of proportion to the problems posed by

substantive rights under the Fourteenth Amendment; it merely serves to protect employees from intentional gender discrimination.<sup>188</sup>

Based on the reasoning in *Varner*, it appears that state employees can at least continue to enforce the Equal Pay Act provision of the FLSA claims under the Equal Pay Act against their employers in federal courts.<sup>189</sup> The fact that the Equal Pay Act is simply one portion of the FLSA is irrelevant because, as the *Varner* Court points out, Congress included a severability clause in the Act, which allows it to stand on its own if other portions of the Act are invalidated for some reason.<sup>190</sup> Other courts that have considered Equal Pay Act claims against states or state agencies have, like the *Varner* Court, concluded that the Act represents appropriate congressional abrogations of state sovereign immunity under the Eleventh Amendment.<sup>191</sup> Even though state employers no longer have a federal remedy for violations of the wage and overtime provisions of the FLSA, they may at least sue their employers in the federal court system – and presumably in state courts – for wage disparity based on gender discrimination.

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discrimination because the Act provides three affirmative defenses (seniority system, merit system, quantity/quality pay system) and a “catch-all” defense that a pay structure is valid as long as it is “based on any factor other than gender.” *Id.* at 717 (citing 29 U.S.C. § 206(d)(1)(iv)).

<sup>188</sup> *Varner*, 150 F.3d at 717. (“[T]he fact that the statute's sweep includes some constitutional conduct is not fatal. The Equal Pay Act . . . does not redefine the substantive rights of the Fourteenth Amendment, nor are its provisions out of proportion to the harms that Congress intended to remedy and deter.”) (citations omitted).

<sup>189</sup> Commentators have generally agreed with the proposition that Equal Pay Act claims will continue to be redressable against the states in federal courts. *See, e.g.*, Brant, *supra* note 14, at 845-47; Fitzpatrick, *supra* note 178, at 126-27; Rubenstein, *supra* note 2, at 653 n.231; Spero, *supra* note 178, at 776-78.

<sup>190</sup> *Varner*, 150 F.3d at 714. The court cites to the provision of the statute that provides that “[i]f any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.” 29 U.S.C. § 219 (1994).

<sup>191</sup> The cases in which federal courts have upheld Equal Pay Act claims against state employers are listed *supra* note 180.

### C. The Family and Medical Leave Act

As in the years between *Union Gas* and *Seminole Tribe*,<sup>192</sup> there are not many cases decided after *Seminole Tribe* and *City of Boerne* that address the FMLA<sup>193</sup> and the Eleventh Amendment. Of those cases that do address the issue, all of which are district court cases, the majority finds that the FMLA does not abrogate state sovereign immunity.<sup>194</sup> There are only two cases that stand for the proposition that states may be sued under the FMLA: *Joliffe v. Mitchell*<sup>195</sup> and *Biddlecome v. University of Texas*.<sup>196</sup>

However, both of these decisions incorporate arguably flawed reasoning and have been rejected by other courts.<sup>197</sup> For example, the *Joliffe* Court completely misconstrues the holding in *Seminole Tribe*<sup>198</sup> and thus misstates the appropriate inquiry for whether Congress validly abrogated

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<sup>192</sup> FMLA cases prior to the *Seminole Tribe* and *City of Boerne* decisions are discussed *supra* notes 91-106 and accompanying text.

<sup>193</sup> The purposes and provisions of the FMLA are discussed *supra* notes 91-96 and accompanying text.

<sup>194</sup> See, e.g., *Sims v. University of Cincinnati*, 46 F. Supp. 2d 736 (S.D. Ohio 1999), *aff'd*, 219 F.3d 559 (6th Cir. 2000); *Post v. Kansas Dep't. of Human Resources*, No. 98-1238-JTM, 1998 WL 928677 (D. Kan. Dec. 10, 1998); *McGregor v. Goord*, 18 F. Supp. 2d 204 (N.D.N.Y. 1998); *Thomson v. Ohio State Univ. Hosp.*, 5 F. Supp. 2d 574 (S.D. Ohio 1998); *Garrett v. Board of Trustees of Univ. of Ala.*, 989 F. Supp. 1409 (N.D. Ala. 1998) *aff'd in part and rev'd in part*, 193 F.3d 1214 (11th Cir. 1999). For a discussion of the typical reasoning in these cases, see *infra* notes 204-11 and accompanying text.

Commentators have generally agreed with the proposition that the FMLA does not abrogate state sovereign immunity under the Eleventh Amendment. See, e.g., Fitzpatrick, *supra* note 178, at 127-28 (analyzing FMLA cases); *Case Law Development: Employment: Medical Leave/Exams*, 23 MENTAL & PHYSICAL DISABILITY L. REP. 84 (1999) (summarizing FMLA cases); *Law and Motion: Family and Medical Leave Act - Eleventh Amendment Immunity*, 13 FED. LITIGATOR 306 (1998) (stating that states are immune from FMLA cases and summarizing cases).

<sup>195</sup> *Joliffe v. Mitchell*, 986 F. Supp. 339 (W.D. Va. 1997).

<sup>196</sup> *Biddlecome v. University of Tex.*, No. 96-1872, 1997 WL 124220 (S.D. Tex. Mar. 13, 1997).

<sup>197</sup> For example, the *Biddlecome* decision was either criticized or rejected in three cases: *Driesse v. Florida Board of Regents*, 26 F. Supp. 2d 1328, 1334 (M.D. Fla. 1998), *Sims v. University of Cincinnati*, 46 F. Supp. 2d 736, 738 (S.D. Ohio 1999), and *Thomson v. Ohio State University Hospital*, 5 F. Supp. 2d 574, 581 (S.D. Ohio 1998). *Driesse* is discussed more in depth *infra* notes 204-11 and accompanying text.

<sup>198</sup> *Seminole Tribe* is discussed in depth *supra* notes 112-29 and accompanying text.

sovereign immunity when it enacted the FMLA.<sup>199</sup> Although the *Biddlecome* Court cites the appropriate test for abrogation,<sup>200</sup> both courts analyze very superficially whether the FMLA is a valid exercise of congressional power under section five of the Fourteenth Amendment: instead of adhering to the standards in *City of Boerne*<sup>201</sup> and determining whether the FMLA is a proportional and congruent response to unconstitutional behavior relating to medical leave, both Courts rely solely on the statements of purpose in the FMLA that pertain to the Equal Protection Clause.<sup>202</sup> The Court's error in *Biddlecome* is perhaps understandable, in that its decision was rendered in March of 1997, before *City of Boerne*, which was decided in June of 1997. However, *Joliffe* was decided in November of 1997, a full five months after *City of Boerne*, making it less clear why the *Joliffe* Court did not apply the correct precedent to its analysis.

The *Biddlecome* and *Joliffe* decisions are aberrational in comparison to other cases in which the courts address the FMLA and the Eleventh Amendment because those courts generally find no abrogation in the Act.<sup>203</sup> For example, in *Driesse v. Florida Board of Regents*,<sup>204</sup> the District Court

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<sup>199</sup> See *Joliffe*, 986 F. Supp. at 341. The court states that “[t]he Supreme Court has recently ruled that sovereign immunity may be abrogated by federal statute only if the Constitutional provision underlying the statute was enacted after the Eleventh Amendment.” *Id.* (citing *Seminole Tribe*). While the court accurately states the second prong of the *Seminole Tribe* test for appropriate abrogation, it makes no mention of the clear intent prong. See *id.*

<sup>200</sup> See *Biddlecome*, 1997 WL 124220 at \*2 (“Congress can abrogate Eleventh Amendment immunity, but only if two requirements are met: Congress must express an intent to abrogate state immunity, and the legislative action must be ‘pursuant to a valid exercise of power.’ ”).

<sup>201</sup> *City of Boerne* is discussed in detail *supra* notes 130-47 and accompanying text.

<sup>202</sup> See *Biddlecome*, 1997 WL 124220 at \*3 (“The legislative history of the FMLA states that it is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment.”); *Joliffe*, 986 F. Supp. at 341-42 (“The combination of the express language of [the FMLA] and the apparent congressional concern with equal protection in the workplace convince this court that the Fourteenth Amendment is, indeed, the constitutional provision underlying the FMLA.”). The purposes of the FMLA are discussed *supra* note 92 and accompanying text.

<sup>203</sup> For a list of cases finding that the FMLA does not abrogate Eleventh Amendment sovereign immunity, see *supra* note 194.

for the Middle District of Florida upheld the state's sovereign immunity and granted the state summary judgment as to plaintiff Driesse's FMLA claims.<sup>205</sup>

The *Driesse* Court cites the holding in *Seminole Tribe* to articulate the appropriate inquiry for congressional abrogation of state sovereign immunity, and finds no clear statement of congressional intent to abrogate state sovereign immunity.<sup>206</sup> Despite finding no clear intent, the Court analyzes the second prong of the test, whether Congress enacted the FMLA pursuant to its section five power, and concludes that it did not.<sup>207</sup>

The Court takes an interesting approach in this portion of its decision, finding that, because the FMLA overlaps other legislation designed to combat gender discrimination (i.e., Title VII<sup>208</sup>), it is not a congruent or proportional response to unconstitutional behavior.<sup>209</sup> The court also finds that the FMLA

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<sup>204</sup> *Driesse v. Florida Bd. of Regents*, 26 F. Supp. 2d 1328 (M.D. Fla. 1998).

<sup>205</sup> *Id.* at 1335. In this case, a state university employee who was diagnosed with prostate cancer asked for and received a certain amount of medical leave, sued the university after it terminated his employment while he was recovering from prostate surgery. *Id.* at 1330. Driesse protested his termination and was reinstated, although his hours were reduced and his tasks were significantly altered. *Id.* Driesse also brought a claim under the ADEA. *Id.* (The ADEA is discussed *supra* notes 54-71, 151-68 and accompanying text). The court also granted the defendant's summary judgment as to Driesse's ADEA claim, but not as to his claim under the Americans with Disabilities Act. *Driesse*, 26 F. Supp. 2d at 1330. The Americans with Disabilities Act is discussed in the context of the Eleventh Amendment *supra* note 162.

<sup>206</sup> *Driesse*, 26 F. Supp. 2d. at 1331-32. The court cites the court of appeals decision in *Kimel* to support this proposition: "as the *Kimel* court held, the inclusion of states and their agencies within the definition of 'employer' does not provide the necessary clear statement of intent to allow suits against states by private citizens in federal courts." *Id.* (citing *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1432 (11th Cir. 1998)). *Kimel* is discussed more in depth *supra* notes 162-68 and accompanying text.

<sup>207</sup> *Driesse*, 26 F. Supp. 2d. at 1334.

<sup>208</sup> Title VII is discussed *supra* note 55.

<sup>209</sup> *Driesse*, F. Supp. 2d at 1333. As the court stated:

The FMLA also cannot be considered congruent and proportional to the goal of preventing gender discrimination in the workplace because of existing legislation that already addresses this goal. If an employee is denied leave solely because of his or her gender, such discrimination is actionable under Title VII of the Civil Rights Act of 1964 . . . .

requires employers to provide a substantial economic benefit to employees by granting them 12 weeks of leave for the reasons set forth in the statute.<sup>210</sup>

The Court concludes that “[t]his is patently the sort of substantive legislation that exceeds the proper scope of Congress’ authority under section five.”<sup>211</sup>

Although there is not much case law pertaining to the FMLA and state sovereign immunity, it is clear from the already existing precedent that the Act probably would not survive the strict inquiry under *Seminole Tribe* and *City of Boerne* for appropriate congressional abrogation of state sovereign immunity under the Eleventh Amendment. This may explain why none of the plaintiffs in these cases appealed the trial courts’ decisions. Were an FMLA claim to reach the Supreme Court, it is highly likely that the Court would not allow the claim to go forward. Although the Court would probably find clear intent via the definitional and enforcement provisions of the statute,<sup>212</sup> it is unlikely that the Court would deem the FMLA to be valid section five legislation for reasons similar to those enumerated in

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*Id.* (citations omitted).

<sup>210</sup> *Id.* The court states that:

The FMLA provides employees with an affirmative entitlement to twelve weeks of leave for the reasons set forth in the statute. Congress seems to be suggesting that this entitlement is necessary under the Equal Protection Clause in order to prevent gender discrimination. Thus, the FMLA mandates that not only are employers required to treat leave requests the same for both men and women, but they are required to provide a valuable economic benefit in the form of twelve weeks of leave.

*Id.* The net result of providing an “economic benefit” to employees is a concomitant economic burden on the state, which derives from the notion that the FMLA requires employers to either find replacements for employees on leave or suffer a decrease in productivity due to a reduced work force. *Id.* at 1334.

<sup>211</sup> *Id.* at 1333 (citing *Thomson v. Ohio State Univ. Hosp.*, 5 F. Supp. 2d 574 (S.D. Ohio 1998)).

<sup>212</sup> This theory is supported by the result in *Kimel*, where the Supreme Court found that the ADEA’s definition of “employer” provides a clear expression of intent to abrogate immunity, even though it is not appropriate section five

*Driesse.*

## VI. CONCLUSION

Examining state employees' rights both before and after the *Seminole Tribe* and *City of Boerne* decisions demonstrates the dramatic and disturbing shift in ideology that has taken place in recent years. Because of the resurgence of the Eleventh Amendment and the exaltation of states' rights thereunder, state employees now find themselves with fewer rights in the workplace than their private sector counterparts enjoy. In the employment arena, the net effect of the Supreme Court's "new federalism" is to deprive state employees any meaningful remedies that correspond to their rights to be paid overtime, to take medical leave when necessary, and to retain their jobs despite their age.

**Christina M. Royer**

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legislation. *Kimel* is discussed in depth *supra* notes 162-68 and accompanying text.