THE FAMILY AND MEDICAL LEAVE ACT: WELL MEANING LEGISLATION MEETS THE STRONG ARM OF THE CONSTITUTION OF THE UNITED STATES

Elizabeth A. Simmons*

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.¹

- Chief Justice John Marshall

Congress, under Article I of the Constitution, has the power to enact legislation that is necessary and proper to carry out any of the specific legislative powers granted in the Constitution.² Section five of the Fourteenth Amendment gives Congress the power to enact legislation to enforce the provisions of the Amendment.³

Congress' legislative powers, however, often conflict with the States' autonomy to govern. Both the history of the Constitution and the Eleventh Amendment demonstrate that the States are sovereign entities.⁴ State sovereignty is protected by making States immune from certain suits

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* Catholic University of America, Columbus School of Law, candidate for Juris Doctor May 2001; Wake Forest University, Bachelor of Arts May 1998. The author wishes to thank Professor Roger Hartley for his guidance, the Journal staff for their hard work and her family for their support in the process of writing this article.

2. Id.
3. The Fourteenth Amendment says, in pertinent parts:
Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .
Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
U.S. CONST. amend. XIV.
4. Hans v. Louisiana, 134 U.S. 1, 12-13 (1890) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton)).
by individuals. An action against a State may only be brought if the State has waived its sovereign immunity or if Congress has abrogated the State's immunity. Congress can abrogate the States' immunity from suit by individuals through its Section five power.

When Congress exercises its Section five power, questions sometimes arise with respect to the validity of its action. The question of validity arises when considering the Family and Medical Leave Act. The Family and Medical Leave Act is designed to require that all employers, including States, grant employees conditional leave for personal and family medical emergencies. Congress enacted this legislation pursuant to both its commerce and Section five powers. The Family and Medical Leave Act creates a private right of action for employees, to bring against a State, in either state or federal courts.

Part I of this Comment describes the basic provisions in the Act. This part summarizes the statutory history of the Family and Medical Leave Act and gives particular attention to the Congressional findings and testimony made before Senate and House committees.

Part II examines the States' sovereign immunity. This part examines the sources of sovereign immunity, how the adoption of the Eleventh

7. Kimel v. Fla. Bd. of Regents, 120 S. Ct. 631, 640 (2000). In this recent decision, the court held that in order to determine whether Congress properly abrogated the States' immunity from suit, two questions must be answered: “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.” "Id. A detailed discussion regarding the scope of this test will be discussed later in this Comment.
10. Id.
11. 29 U.S.C. § 2601(b)(4) (1993). The State serves a dual role in America. Each State functions as a sovereign entity, with power to govern its residents through legislation. Each State also functions as an employer, providing jobs, benefits, and paychecks for employees within different levels of government. As an employer, each State is subject to federal laws governing employment, including minimum wage laws, maximum work-week hour limitations and the Family and Medical Leave Act. Where the State employment law provides for private suit as a remedy for a violation, the Family and Medical Leave Act provides for damage suits against the State, sued in its capacity as an employer by the aggrieved employee.
Amendment protects sovereign immunity, and how Congress may abrogate the States’ immunity through legislation. This part first looks at sovereign immunity from a historical perspective. It includes an in-depth analysis of proper constitutional abrogation by Congress under its powers granted by the Fourteenth Amendment. This analysis then describes the necessary steps Congress must follow to abrogate the States’ sovereign immunity. First, Congress must have constitutional authority. Second, Congress’ intent must be unmistakably clear. Finally, the exercise of the power must be valid under the circumstances. The evaluation of the steps of a valid exercise of Congress’ abrogation power entails an analysis of the United States Supreme Court’s recent holdings of *Kimel v. Florida Board of Regents*\(^\text{13}\) (2000), *Seminole Tribe of Florida v. Florida*\(^\text{14}\) (1996) and *City of Boerne v. Flores*\(^\text{15}\) (1997) and of how these decisions affect the holding of *Katzenbach v. Morgan*.\(^\text{16}\) Specifically, the analysis focuses on the test of congruence and proportionality required by *Flores*\(^\text{17}\).

Part III examines whether the Family and Medical Leave Act remains a valid exercise of the Section five power as a result of the recent Supreme Court decisions. This Comment argues that, under the contemporary interpretation of the Section five power, the Family and Medical Leave Act is unconstitutional to the extent that it provides a private right of action for damages against the States. Part III establishes that although Congress’ intent to abrogate the States’ sovereign immunity from private suit is unmistakably clear, and although Congress plainly intended to invoke its Section five power, the legislation is not a congruent and proportional means of enforcing the rights guaranteed by the Fourteenth Amendment.

I. HISTORICAL BACKGROUND OF THE FAMILY AND MEDICAL LEAVE ACT

A. The Provisions of the Family and Medical Leave Act

The Family and Medical Leave Act provides eligible employees with an entitlement of up to twelve work-weeks of conditional leave in a twelve-month period.\(^\text{18}\) If an employer meets certain criteria, it must provide

\(^13\) 120 S.Ct. 631 (2000).
\(^15\) 521 U.S. 507 (1997).
\(^16\) 384 U.S. 641 (1966).
\(^17\) 521 U.S. 507 (1997).
leave under the Family and Medical Leave Act. First, an employer must engage in a business that somehow "affects commerce." Second, it must employ at least fifty employees for every workday during twenty workweeks in the current or preceding calendar year. The term employer includes not only the owner of the business, but also "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer; and . . . any successor in interest of an employer." An employee must also meet the statutory prerequisites to be eligible for leave under the Family and Medical Leave Act. First, an employee must have been employed for at least one year by the employer from whom he or she is requesting leave. Second, the employee must have worked at least 1250 hours in the same twelve-month period with that

22. 29 U.S.C. § 2611(4)(ii) (1993). The courts differ in their interpretation of what constitutes an employer under the Family and Medical Leave Act. A corporate employer's president and vice president fit the definition because they acted directly in the interest of the employer in dealing with employee. Stubl v. T.A. Systems, Inc., 984 F. Supp. 1075, 1083 (E.D. Mich. 1997). In one hospital, an employee's immediate supervisor, the supervisor's supervisor and the vice president of human resources were all capable of denying an employee her right to leave under the Family and Medical Leave Act and were therefore deemed employers under the Family and Medical Leave Act's definition of employer. Freeman v. Foley, 911 F. Supp. 326, 331 (N.D. Ill. 1995). Compare these with Johnson v. A.P. Products, Ltd., 934 F. Supp. 625, 629 (S.D.N.Y. 1996), where a human resources manager was not an employer under the Family and Medical Leave Act because he did not exercise control over the employee's ability to obtain leave.
24. 29 U.S.C. § 2611(2)(A) (1993). The period of twelve months is crucial for determining if an employee has a right of action. If the employer makes the decision to terminate the employee before the twelve-month period passes but fails to actually discharge the employee until just after the one year mark, the employee is no longer an "eligible employee," and is therefore unprotected under the Family and Medical Leave Act. Coleman v. Prudential Relocation, 975 F. Supp. 234, 245 (W.D.N.Y. 1997).
same employer.\(^{25}\) A federal officer or an employee under Title five, chapter sixty-three, subchapter V is excluded from eligibility.\(^{26}\)

To qualify for leave under the Family and Medical Leave Act, the employee must request leave for one of four reasons.\(^{27}\) The employee's request for leave must be:

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

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

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

(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.\(^{28}\)

If all other conditions are satisfied and if an employee meets one of these criteria, the employee is entitled to leave.\(^{29}\) An employee shall not take leave intermittently or on a reduced leave schedule unless the employer and the employee agree.\(^{30}\) If the intermittent leave requested by the employee is due to planned medical treatment, an employer may require the employee to transfer temporarily to an alternative position that is equivalent in pay and benefits but better accommodates the intervals of leave.\(^{31}\) In such situations, the employee must make every reasonable effort to schedule the medical treatment so that it does not disrupt the employer's operations.\(^{32}\) The employee must give at least thirty days

\(^{28}\) 29 U.S.C. § 2612(a)(1). See, e.g., Cox v. Autozone, Inc., 990 F. Supp. 1369, 1381 (M.D. Ala. 1998) (stating that the Family and Medical Leave Act provides a total of twelve weeks of leave, not in addition to the leave already provided by the employer).

One interesting note is that while an employer is required to give an employee leave to care for a seriously ill child under the Family and Medical Leave Act, an employer is not required under the same statute to give an employee bereavement leave. Beal v. Rubermaid Commercial Products Inc., 972 F. Supp. 1216, 1226 (S.D. Iowa 1997).

\(^{30}\) 29 U.S.C. § 2612(b)(1) (1993). Congress defines intermittent leave as irregular, periodic or sporadic, as compared to planned leave.


notice for foreseeable leave, especially for planned medical treatment and, if possible, for childbirth. If the leave is due to an unexpected condition, the employee shall provide notice to the extent practicable. The employer may require certification for leave due to a serious health condition, and may request a second opinion at the employer's expense if it doubts the validity of the certification.

The employee's choice of intermittent leave does not reduce the total amount of leave the employee is entitled to under the Family and Medical Leave Act. The leave may be unpaid if the employer provides fewer than twelve work-weeks of paid leave. While on leave, the employer must maintain the employee's group health benefits. Upon return from leave, the employee is entitled to be restored to the position of employment held before leave or to an equivalent position with

309, 320 (W.D. Pa. 1997) (determining that employer has an obligation to inquire further into the details surrounding a request for leave when the Family and Medical Leave Act may be involved).


35. 29 U.S.C. § 2613(a) (1993). An employer may deny leave based on the employee's doctor's prior certification that the employee was not qualified for leave under the Family and Medical Leave Act. Stoops v. One Call Communications, Inc., 141 F.3d 309, 313 (7th Cir. 1998).

36. 29 U.S.C. § 2613(c) (1993). An employer is not obligated to grant employee leave under the Family and Medical Leave Act solely because a doctor has certified the employee's medical condition. Compare Stoops, 141 F.3d at 313 (7th Cir. 1998) (allowing employer to deny Family and Medical Leave Act leave where employer knows employee's reason for absence, based on a doctor's certification, did not qualify under the Family and Medical Leave Act) with Diaz v. Fort Wayne Foundry Corporation., 131 F.3d 711, 713-714 (7th Cir. 1997) (determining that the employee was still required to obtain a second opinion even though employee was out of the country).


38. 29 U.S.C. § 2612(d)(1) (1993). If the employer intends for employee leave to be included in the allotment designated in the Family and Medical Leave Act, it should be explicit. The Fourth Circuit determined that a form used in requesting leave did not provide sufficient notice that the employer intended to include employee's vacation days in his or her eligible entitlement under the Family and Medical Leave Act because the form only referenced medical leave, not vacation leave. Cline v. Wal-Mart, 144 F.3d 294, 300-301 (4th Cir. 1998). The court reasoned that a reasonable employee would not be put on notice that his vacation days were meant to be included under the Family and Medical Leave Act. Id.

equivalent benefits. It is unlawful for an employer to interfere with the rights provided under the Act or to discriminate against an employee who opposes any practice by the employer that was made unlawful by the Act. An employee has an express right to enforcement of the Family and Medical Leave Act. An employee has a right of action in any Federal or State court of competent jurisdiction. An employee may sue to recover damages which may include the amount of wages lost or actual monetary losses sustained as a direct result of the violation.

B. Congressional Intent and Basis for Enactment

After years of planning and debate, Congress enacted the Family and Medical Leave Act in 1993 to equalize the burdens of family care on parents while securing jobs for employees who choose family care over work. In its findings, Congress found that the number of single parent or multiple parent households in which both parents work was on the rise. Congress also found that it was important “for the development of children and the family unit” that both parents be able to participate in child raising and care of seriously ill family members. Congress found that the ability of parents to care for their family members was jeopardized because the current employment atmosphere forced parents to choose between their job security and their responsibilities as parents.
them from working for temporary periods, there was less than adequate job security. Congress further found that the role of caretaking primarily falls on women, affecting their working lives more than men’s. Finally, Congress found that employment standards which apply more to one gender over another “have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender.”

Congress attempted to minimize this potential for discrimination by passing the Family and Medical Leave Act in a manner “consistent with the Equal Protection Clause of the Fourteenth Amendment.” The purposes of the Family and Medical Leave Act are:

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.

These purposes served as a compromise to accommodate the legitimate interests of the employer while ensuring minimal discrimination under the Fourteenth Amendment and promoting equal employment for men and women.

Congress professed that the Family and Medical Leave Act was enacted pursuant to its Section five powers. Since the statute covers States as employers, it provides that a State may be sued for damages for failure to grant leave under the Family and Medical Leave Act. In short, Congress attempted to abrogate the States’ immunity from suit ensured to it by the Eleventh Amendment and the sovereign immunity values in the Constitution. This Comment examines whether the Family Medical Leave Act represents a valid exercise of congressional power under

55. 29 U.S.C. § 2601(b)(4) (1993). The focus of this Comment is that Congress failed in its attempt to pass the Family and Medical Leave Act in a manner consistent with the Fourteenth Amendment. A discussion of this failure begins in section II(B).
56. U.S. CONST. amend. XI.
Section five of the Fourteenth Amendment of the Constitution.

II. A STATE'S RIGHT TO IMMUNITY FROM SUIT IN FEDERAL COURT

A. Sovereign Immunity Under the Eleventh Amendment

Historically, each State is sovereign and not "amenable to the suit of an individual without its consent."\(^{57}\) Sovereign immunity has been an absolute right of States for centuries.\(^{58}\) Only consent by the sovereign could abolish this immunity.\(^{59}\) A sovereign entity could waive its immunity from suit if it so chose.\(^{60}\)

The writers of the Constitution "considered immunity from private suits central to sovereign dignity."\(^{61}\) From its creation, the Constitution has "specifically recognize[d] the States as sovereign entities[]."\(^{62}\) According to the Supreme Court in *Alden v. Maine,*\(^{63}\)

[t]he phrase [Eleventh Amendment Immunity] is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment. Rather, as the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.\(^{64}\)

The Constitution's federal system preserves each State's sovereignty in two ways: by reserving a portion of the Nation's sovereignty and by rejecting a central government for a system of state and federal governments coexisting to govern the people.\(^{65}\) Therefore, the States

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57. Hans v. Louisiana, 134 U.S. 1, 13 (1890) (quoting *THE FEDERALIST No. 81* (Alexander Hamilton)).
59. *Id.*
63. *Alden,* 527 U.S. at 713.
64. *Id.* at 714. The Supreme Court further expanded on this idea. The Constitution reserved for the States not only a large part of the Nation's sovereignty, but also "the dignity and essential attributes inhering in that status."
preserve "'a residuary and inviolable sovereignty.' They are not relegated
to the role of mere provinces or political corporations, but retain the
dignity, though not the full authority, of sovereignty." The Constitution
gave Congress "the power to regulate individuals, not states." The States' principle of sovereign immunity is so basic within our
system it does not need to be formally asserted in court. The Tenth Amendment quells any doubts about the States' sovereign immunity. The Tenth Amendment reads, "[T]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved
to the States respectively, or to the people." This Amendment was enacted "to allay lingering concerns about the extent of the national power." The express language of the Tenth Amendment, coupled with the Constitution's history, reinforces the principle that the States enjoy sovereign immunity regardless of the Eleventh Amendment.

The Supreme Court first addressed the issue of sovereign immunity in 1793. In Chisholm v. Georgia, the Court upheld a citizen's right to sue the State of Georgia in a private suit without the State's consent. Five justices, four of whom wrote separate concurring opinions, agreed that the case fell within the literal language of Article III, which grants jurisdiction "between a State and Citizens of another State." Two justices went so far as to argue that sovereign immunity was inconsistent with the

Id. The States are each a distinct and independent portion of the Nation and are not subject to the Nation's authority to any larger respect than the Nation is subject to them. Id. (citing THE FEDERALIST NO. 39, at 245 (James Madison)). In addition, the design of the Constitution embraced a system of coexistence whereby both governments would exercise "concurrent authority over the people . . . 'the only proper subjects of government.'" Id. (quoting Printz v. United States, 521 U.S. 898, 919-20 (1997) (quoting THE FEDERALIST NO. 15 at 109 (Alexander Hamilton))).

65. Alden, 527 U.S. at 715.
67. Hans v. Louisiana, 134 U.S. 1, 16 (1890) ("The suability of a State, without its consent, was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that is hardly necessary to be formally asserted.").
68. Alden, 527 U.S. at 713.
69. U.S. CONST. amend. X.
71. 2 U.S. 419 (1793).
The others agreed that the text of the Constitution, particularly Article III, “evidenced the States’ surrender of sovereign immunity as to those provisions extending jurisdiction over suits to which States were parties.[7]

The Supreme Court’s decision in *Chisholm* was heavily criticized[7] and served as a catalyst for the Eleventh Amendment to the Constitution. In the next session of Congress, the Eleventh Amendment was proposed.[76] The amendment, in effect, reversed the Supreme Court’s decision in *Chisholm*. Congress intended to return the Constitution to its original design.[77] Congress argued that the Constitution was understood “to preserve the States’ traditional immunity from private suits.”[79] The Constitution would have failed ratification “if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.”[80] The Eleventh Amendment passed both the House and the Senate swiftly, defeating all attempts to weaken it.[81] The original understanding was that sovereign immunity would be intact after ratification of the Constitution, so ratification of the Amendment only served to reinforce that understanding.[82]

The Eleventh Amendment served only to reconfirm the historic principle of States’ sovereign immunity.[83] The Supreme Court explained this intent in *Seminole Tribe of Florida v. Florida*:[84]

> Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, “we have understood the Eleventh Amendment to stand not so much for what it says but for the presupposition . . . which it confirms.” That presupposition, first observed over a century ago in *Hans v. Louisiana*, has 2 parts: first, that each State is a

74. *Alden*, 527 U.S. at 719 (citing *Chisholm*, 2 U.S. at 452, 468).
76. *Id.*
77. *Id.*
78. *Alden*, 527 U.S. at 722.
79. *Id.* at 724.
83. *Alden*, 527 U.S. at 728-729.
sovereign entity in our federal system; and second, that "it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent[.]" Therefore, each State maintains a presumptive right of sovereign immunity. Only through express waiver or explicit abrogation by Congress will a State be amenable to suit.

B The Process By Which Congress May Abrogate the State's Immunity from Suit in Federal Court

Congress may not enact legislation on a whim which abrogates the States' immunity. Because of the importance of State sovereignty, Congress must follow a specific process for an abrogation to meet constitutional requirements. First, Congress must make its intention to abrogate sovereign immunity unmistakably clear in the language of the legislation. Second, Congress must appropriately exercise its Section five power, the only power that enables Congress to abrogate State sovereign immunity. Finally, the legislation must be a valid exercise of the Section five power.

1. Congress' Intent to Abrogate Must be Unmistakably Clear in the Language of the Legislation

The threshold question is whether Congress' intent to abrogate is unmistakably clear through the language of the legislation. The Supreme Court recognized that "[t]he fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion." Congress' intent must be "obvious from 'a clear legislative statement.'"

85. Id. at 54 (1996) (quoting Hans, 134 U.S. at 13 (emphasis deleted), quoting THE FEDERALIST NO. 81 (Alexander Hamilton) (citations omitted)).
88. City of Boerne v. Flores, 521 U.S. 507, 520 (1997). In Kimel v. Fla. Bd. of Regents, 120 S.Ct. 631 (2000), the Court reiterated that "the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult." Id. at 644. With this in mind, the Court developed the congruence and proportionality test to help determine the line between the two types of legislation. Id.
90. Id.
In *Dellmuth v. Muth*, the Supreme Court noted that

[t]o temper Congress’ acknowledged powers of abrogation with due concern for the Eleventh Amendment’s role as an essential component of our constitutional structure, we have applied a simple but stringent test: “Congress may abrogate the States’ constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.”

For a statute to constitute a waiver of immunity, “it must specify the States’ intention to subject itself to suit in federal court.” Congress must do more than grant jurisdiction via the language of the statute. Only by making its intention unmistakably clear may Congress abrogate the States’ immunity.

The Supreme Court has held that Congress made its intent unmistakably clear in several pieces of legislation. For example, the Court found that the Indian Gaming Regulatory Act (IGRA) contained an unmistakably clear statement of Congress’ intention to abrogate the States’ immunity, even though the statute does not expressly mention the States’ immunity. The IGRA places the burden of proof upon the State to determine whether the State acted in good faith. For the Court, this language indicated an unmistakably clear statement of intent. The Court also found that Congress’ intention in enacting the Age Discrimination in Employment Act of 1967 (ADEA) was to extend its application to the States. The ADEA incorporates provisions of the Fair Labor Standards Act (FLSA) for the purpose of authorizing private actions against the State without the State’s consent. In addition, the Court found that the


98. *Id.*


102. *Alden v. Maine*, 527 U.S. 706, 712 (1999). In its recent decision, *Kimel*, the Court held that the ADEA’s application was extended to the States by a simple amendment of the definition of employer under the Fair Labor Standards Act to include “a State or political subdivision of a State and any agency or
Patent Remedy Act\textsuperscript{103} (PRA) was intended by Congress to abrogate the States' immunity.\textsuperscript{104} The Court concluded that based on the language of the PRA, Congress' intent could not have been clearer.\textsuperscript{105}

Legislation passed under Section five of the Fourteenth Amendment is proper if it is passed to enforce the provisions of the Amendment.\textsuperscript{106} In light of the history of Section five of the Fourteenth Amendment, discussed supra, it is commonly held that Congress has the authority to enact legislation that guarantees the enforcement of a right guaranteed by the Fourteenth Amendment.\textsuperscript{107} If there is a Fourteenth Amendment right at issue, Congress may properly enact legislation to enforce that right.\textsuperscript{108}

According to the Family and Medical Leave Act, the ultimate purpose of the Act is "to promote the goal of equal employment opportunity for women and men[.]"\textsuperscript{109} Congress clearly linked this unmistakable intent to the Fourteenth Amendment in concluding that one of the purposes of the Family and Medical Leave Act is to accomplish equal treatment in the workplace in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{110} In the Act, Congress also established a right

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\item instrumentality of a State or a political subdivision of a State." \textit{Id.} at 637 (quoting 29 U.S.C. § 630(b) (1993)). Although concluding this was Congress' intent, the Court further held that the ADEA was an unconstitutional abrogation of the States' immunity from private suit under Section five of the Fourteenth Amendment. \textit{Kimel}, 120 S. Ct. at 637.
\item \textit{Id.} According to the PRA, "Any State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in federal court . . . for infringement of a patent." 35 U.S.C. § 296(a) (2000) (\textit{quoted in Fla. Prepaid Postsecondary Educ. Expense Bd.}, 527 U.S. at 635). Similar to its decision in \textit{Kimel}, the Court again found that the PRA was an unconstitutional abrogation of the States' immunity from suit by a private individual under Section five of the Fourteenth Amendment. \textit{Fla. Prepaid Postsecondary Educ. Expense Bd.}, 527 U.S. at 630.
\item \textit{See}, e.g. City of Boerne v. Flores, 521 U.S. 507, 519 (1997), where the Court upheld Congress' power to enact legislation under Section five that enforced the constitutional right to freedom of religion.
\item \textit{See \textit{Fla. Prepaid Postsecondary Educ. Expense Bd.}}, 527 U.S. at 639.
\end{itemize}
of action for aggrieved employees. Employees may sue to recover damages or equitable relief against employers in any federal or state court of competent jurisdiction, even if the employer is a public agency. By including the States in the definition of employer and then providing employees with a right of action against their employers, Congress made its intent to abrogate the States' sovereign immunity unmistakably clear in the language of the statute.

2. Congress Must Act in a Valid Exercise of Section Five Power

After establishing the unmistakably clear intent of Congress, courts ask whether "the act in question [was] passed pursuant to a constitutional provision granting Congress the power to abrogate[.]" The Supreme Court has held that only two provisions of the Constitution permit Congress to abrogate the States' Eleventh Amendment immunity. First, Congress at one time was understood to possess the power to abrogate the States' immunity pursuant to its Article I powers. An example of this approach can be found in Pennsylvania v. Union Gas, where Congress abrogated the States' sovereign immunity pursuant to its power to regulate interstate commerce under Article I, Section eight. In that case, the Court stated "the power to regulate interstate commerce would be 'incomplete without the authority to render States liable in

112. H.R. Rep. No. 103-8, at 70 (1993) ("All types of employers above the 50-employee threshold, including State and local governments, are covered - regardless of the nature of their operations.").
113. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996). See also Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976). The decision of the Court in Seminole Tribe departs from the traditional factors that were used to determine whether Congress acted pursuant to a valid exercise of power. The old test, as pronounced in Katzenbach v. Morgan, 384 U.S. 641 (1966), was three pronged: first, whether the statute may be regarded as an enactment to enforce the equal protection clause; second, whether it is plainly adapted to an identified Fourteenth Amendment purpose; and third, whether it is not prohibited by, but is consistent with the letter and spirit of the Constitution. Id. at 649-58. Congress did not reverse the Morgan standards, but simply consolidated the three prongs into one question in Seminole Tribe. As will be discussed later, the Court further modified the test in Flores to one of congruency and proportionality. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).
116. Id.
damages." The Supreme Court overruled this interpretation in *Seminole Tribe.* There, the Court recognized that "the Eleventh Amendment restricts judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."

The second provision of the Constitution under which Congress may abrogate the States' immunity from suit is the Fourteenth Amendment. In *Fitzpatrick v. Bitzer,* the Court held that the Fourteenth Amendment altered the balance between state and federal power by expanding federal power at the expense of state autonomy. The Court recognized that the Fourteenth Amendment included provisions expressly prohibiting state action. In addition, Section five of the Fourteenth Amendment gives Congress the power to enforce the provisions of the Amendment through appropriate legislation. As interpreted in *Seminole Tribe,* *Fitzpatrick* held "that through the Fourteenth Amendment, federal power extended to intrude upon the province of the Eleventh Amendment and therefore that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment."

The Supreme Court has consistently held that the States' immunity is limited by the enforcement provision of the Fourteenth Amendment. As Justice Rehnquist wrote:

In [the enforcement provision of the Fourteenth Amendment] Congress is expressly granted the authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on [S]tate authority. When Congress acts pursuant to § 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 embody their own terms embody limitations on [S]tate 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

120. Id. at 59 (citing *Fitzpatrick v. Bitzer,* 427 U.S. 445, 455 (1976)).
121. *Fitzpatrick,* 427 U.S. at 453.
122. Id. at 453 (citing U.S. CONST. amend. XIV, § 5).
constitutionally impermissible in other contexts. Recent federalism cases have followed this holding, reaffirming that Congress has discretion to enact laws to enforce the rights protected by the Fourteenth Amendment. For example, in Seminole Tribe, the Supreme Court determined that congressional authority to abrogate the States’ immunity was historically upheld under Section five of the Fourteenth Amendment. In Flores, the Court repeated the idea that Section five is a “‘positive grant of legislative power’ to Congress.” The Court, quoting Ex Parte Virginia, further defined the scope of Congress’ powers under Section five:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power. Finally, in Alden v. Maine, the Court held that the States were required to “surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its Section 5 enforcement power.” Based on constitutional case law, Congress appears to have the authority under Section five of the Fourteenth Amendment to enact legislation which abrogates the States’ immunity from private suit.

125. Id.
128. Flores, 521 U.S. at 517-18 (quoting Ex Parte Virginia, 100 U.S. 641, 651 (1880)).
130. This sentiment was echoed in other cases in which the court reaffirmed the idea that Section five amounted to a positive grant of power, authorizing Congress to permit private persons to bring suits against the States. See, e.g. Kimel v. Fla. Bd. of Regents, 120 S.Ct. 631, 644 (2000) (“Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States' sovereign immunity.”); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999) (“Congress may authorize [a suit by an individual against a State] in the exercise of its power to enforce the Fourteenth Amendment – an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance.”); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savi. Bank, 527 U.S. 627, 637 (1999) (“Congress retains the authority to abrogate state sovereign immunity
3. Legislation Must Be a "Valid Exercise of Power"

Once it is established that Congress intended to abrogate the States' immunity from prosecution and that Congress validly exercised its Section five power, the remaining question is whether the exercise of Section five power is valid. Until 1996, the Supreme Court decision in Morgan set the standard for a valid exercise of Section five power. Under this test, Congress had to act under proper constitutional authority and make its intention to abrogate the States' sovereign immunity unmistakably clear in the express language of the statute.

However, in 1997 the Supreme Court embarked on a new approach in Flores. According to the Supreme Court, there must now be a showing that Congress' action was a congruent and proportional response to the violation of a protected right under the Fourteenth Amendment. Congress may abrogate the States' immunity from suit under the power of the Enforcement Clause of the Fourteenth Amendment by creating legislation aimed to remedy or prevent a pattern of unconstitutional discrimination. Under the Court's mandate, legislation that abrogates the States' immunity from suit is congruent to a proscription in the Fourteenth Amendment. Additionally, the abrogation of the States' immunity from suit must be a proportionate response to the pattern of unconstitutional behavior. There are two steps required to prove that the abrogation is a proportional response to the pattern of unconstitutional behavior. First, there must be a pattern of unconstitutional behavior. Second, the legislation must be closely tailored to remedy or prevent such conduct.

pursuant to the Fourteenth Amendment.

134. Id. at 520. Congress must have the authority to enact the legislation which divests the States' of their sovereign immunity. Green v. Mansour, 474 U.S. 64, 68 (1985).
135. Flores, 521 U.S. at 518.
137. Id. at 638.
138. Id.
III. The Family and Medical Leave Act is Unconstitutional as it Applies to States as Employers Because it Improperly Abrogates the States' Immunity from Suit

A. The Family and Medical Leave Act was Not Aimed at Preventing or Remedying a Pattern of Unconstitutional Behavior and Therefore It Lacks Congruence

Congress' first step in enacting remedial legislation congruent and proportional to the injury of a protected right under the Fourteenth Amendment is to identify the evil or wrong the legislation attempts to remedy.\textsuperscript{139} Congress must consider the evil or wrong in light of its historical background.\textsuperscript{140} Unless the evil involves an unconstitutional discrimination of a suspect class, the proportional response must meet the rational basis test. To meet the rational basis test, the potentially discriminatory legislation must be rationally related to a legitimate State interest.\textsuperscript{141} To determine whether unconstitutional discrimination exists, the Court looks at the legislative history to see if there is a record of unconstitutional conduct that the legislation attempts to remedy.\textsuperscript{142}

The objective of the Family and Medical Leave Act seeks to achieve is not prevention or remedy of a pattern of unconstitutional behavior. Both Houses of Congress were in rare agreement on posing legislation that corrected the current state of employment. The House of Representatives determined that:

[P]rivate sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to impose a heavy burden on families, employees, employers and the broader society. [This bill] provides a sensible response to the growing conflict between

\textsuperscript{139} Id. (quoting Flores, 521 U.S. at 525).
\textsuperscript{140} Flores, 521 U.S. at 525.
\textsuperscript{141} See, e.g. Vance v. Bradley, 440 U.S. 93, 97 (1979).
\textsuperscript{142} Kimel v. Fla. Bd. of Regents, 120 S.Ct. 631, 645 (2000). The Court summarized its rationale behind Flores, noting that “the legislative record contained very little evidence of the unconstitutional conduct purportedly targeted by RFRA’s substantive provisions.” Id. at 645. In Kimel, the Court also explained its reasoning in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, where the Court held that in the legislative record of the Patent Remedy Act “Congress identified no pattern of patent infringement by the [S]tates, let alone a pattern of constitutional violations.” Id. at 640.
work and family by establishing a right to unpaid family and medical leave for all workers covered under the act.\textsuperscript{143} The Family and Medical Leave Act thus seeks to achieve the objective of accommodating important societal interests by setting a minimum standard for leave.\textsuperscript{144}

One of the overriding needs cited for the enactment of the Family and Medical Leave Act was the report from the General Accounting Office (GAO) that the female civilian labor force is increasing at a rate of one million per year.\textsuperscript{145} The GAO stated that demographic changes in employment rates coupled with new responsibilities in caring for families and relatives has led to "emotionally and physically deprived children and adults."\textsuperscript{146}

Congressional testimony indicated that there is inequality in the workplace between genders. Ms. Beverly Wilkinson, a former secretary, testified that she lost her job when her company downsized while she was on maternity leave.\textsuperscript{147} Ms. Rebecca Webb, a television anchor, lost her job because her employer did not have policy for maternity leave.\textsuperscript{148} Ms. Carmen Maya, a pharmacy technician, lost her job because she needed special arrangements, including twelve weeks of leave, to care for her child's medical condition and her own medical condition.\textsuperscript{149} Mr. Thomas Riley lost his job as a supervisor at a jewelry manufacturing company because he took six days off during the final six months of his son's life, while still managing to put in fifty-hour weeks.\textsuperscript{150}

Although poignant and heart-wrenching, these stories do not justify enactment of the Family and Medical Leave Act. As the Minority stated


\textsuperscript{149} Id.

\textsuperscript{150} Id.
in House Report 103-8 part 1, "[H.R. 1] is a legislative initiative in search of a problem to solve." Congress never identified any pattern of unconstitutional gender discrimination by the States. For Congress to defend gender-based legislation, it must demonstrate an "exceedingly persuasive justification." Congress must show that gender classification serves an important government interest and that the discriminatory means used by the States are substantially related to that interest. However, Congress may not rely on overbroad generalizations about males and females that will create or perpetuate the legal, social, and economic inferiority of women to justify its reason for supporting the Family and Medical Leave Act.

It is not debated that Congress' genuine interest is to eliminate gender discrimination. But Congress does not present sufficient justification to support passage of the legislation. Furthermore, the discriminatory means used are not substantially related to the promotion of that interest. Congress' means of achieving the stated end were overbroad. Congress passed the Family and Medical Leave Act because the public demanded leave so that women and men could meet the demands of work and home, a need businesses have not met on their own. A demand for legislation cannot meet the proper justification under the enforcement clause of the Fourteenth Amendment.

There exists no disparaging gap between genders when it comes to who receives leave and who is denied. Rather, research demonstrates that when employers deny leave, they do so on a case by case basis, usually determined by the amount of leave requested by the employee. Because no violation of a Fourteenth Amendment right was established, Congress' legislation did not seek to remedy any difference in employers' dispensation of leave between males and females. Rather, the legislation attempted to provide appropriate leave for all workers. The evidence supporting the requisite inequality position is scant, and therefore, the

153. Id. at 533.
154. Id.
156. This conclusion is drawn from the testimony and statistics cited in H.R. Rep. No. 103-8 (1993) and S. Rep. No. 103-3 (1993). Neither report provides evidence that persons were denied leave and consequently lost their jobs due to their gender. For most families, demographic changes require that both parents work. The effects of a parent losing his or her job, especially due to care-giving reasons, are difficult to manage. H.R. Rep. No. 103-8, at 24 (1993).
Family and Medical Leave Act cannot be sustained under Section five of the Fourteenth Amendment.

Employers may not be overly responsive to their employees' needs, but employer unresponsiveness does not warrant such extreme action. In 1991 the Bureau of Labor Statistics conducted a study of employers with more than 100 employees. The study revealed that "ninety-six percent provided paid vacation, sixty-seven percent provided paid sick leave, and thirty-seven percent provided unpaid maternity leave." The GAO also testified that many employers without formal policies tend to accommodate employees as best they can.

The Family and Medical Leave Act is estimated to cover only fifty percent of the workforce and a mere five percent of the nation's businesses. Additionally, since the guaranteed leave is unpaid leave, only those who could make ends meet without a paycheck can take advantage of the provisions for leave. The bill, in essence, has very little beneficial effect. This lack of beneficial effect is compounded by the extraordinary costs placed on employers. As of February 1, 1993, the GAO estimated that the cost of leave to employers was at least $647 million each year. In 1991 the Small Business Administration estimated that six weeks of maternity leave and infant care would cost $612 million annually. These cost estimates only include health care costs; they fail to include recruitment, replacement and training costs for the business or lost profits due to an employee's extended absence. In addition, many employers are beginning to offer "pot-luck benefits," but this legislation will force employers to either cease their current benefit plan or reduce their plan, a plan the employees may prefer. There are also public costs which must be considered. Since state and local governments are

158. Id.
159. Id.
160. Id. at 60.
161. Id.
162. Id.
163. Id.
164. Id. at 61.
165. Id. at 61-62.
166. "Pot-luck benefit plans" or "cafeteria plans" are plans where the employer offers the employee a wide variety of benefits and the employee selects the one most suitable to his or her needs. These plans are more flexible, offering the employees a choice in their coverage.
included in the Family and Medical Leave Act, the costs will be paid for either through cuts in services or increased taxes.168

This is not to say that a problem in America does not exist with respect to the terms of coverage for family and medical leave. But congressional testimony and government statistics indicate that Congress' intention was not to prevent discrimination between genders in the work place, but rather to provide leave for all persons for family and medical needs. This aim is not a protected right under the Fourteenth Amendment. American citizens are not guaranteed the right to take unpaid sick leave to care for their dying mother under the Fourteenth Amendment. While this legislation makes sense morally, it does not pass constitutional muster. Congress cannot abrogate a State's right to sovereign immunity in order to protect an employee's right to leave under these circumstances.

Analysis of the congruence element of the congruence and proportionality test for abrogation of sovereign immunity is best explained by example. The constitutionality of the Religious Freedom Restoration Act of 1993169 (RFRA) was successfully challenged in Flores.170 Congress enacted the legislation in response to the Supreme Court's ruling in Employment Division v. Smith,171 which eliminated the condition that the government "justify burdens of religious exercise imposed by laws neutral toward religion."172 Congress concluded that State governments should not be able to significantly burden a person's religious exercise without compelling justification.173 The legislative history demonstrated an attempt to eliminate the general laws which place incidental burdens on religious exercise, not to eliminate religious persecution in this country.174

The Court in Flores found that the legislation's history made it "difficult to maintain that [the testimonies and laws] are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate a widespread pattern of religious discrimination in this country."175 The Court determined that Congress'

175. Id. at 531.
concern went only to the burdens imposed incidentally by other laws. The RFRA was deemed to be neither remedial nor preventive legislation because it was not an attempt to prevent or to respond to unconstitutional behavior. Remedial legislation "should be adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against." 

The Supreme Court also applied the congruence and proportionality test in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*. The Supreme Court held that the Patent Remedy Act (PRA) was unconstitutional because the abrogation of the States' sovereign immunity through legislation designed to enforce the Fourteenth Amendment's due process clause was improper. The legislative history of the PRA revealed that the PRA's basic aims were "to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime." The concerns expressed by Congress were not aimed at preventing or remedying a violation of a protected right under the Fourteenth Amendment. Because the goal was not to protect a right guaranteed by the Fourteenth Amendment, the means taken were not sufficient to withstand constitutional challenge and the PRA failed the congruence and proportionality test.

B. Congress' Actions Were Not Proportional to the Behavior on the Record

Once identified, the steps taken by Congress to remedy the evil must be analyzed to determine whether the congruence between "the means used and the ends to be achieved" is proportional. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." This balancing test of congruence and proportionality exists to determine whether the legislation functions to protect Fourteenth Amendment rights or to create rights not established

176. Id.
177. Id. at 532.
178. Id. (quoting Civil Rights Cases, 109 U.S. 3, 13 (1883)).
182. Id. at 647-48.
183. Id. at 643.
185. Id. (citing South Carolina v. Katzenbach, 383 U.S. 301, 334 (1966)).
by the Fourteenth Amendment.\textsuperscript{186}

When examining Congress' power, it is important to remember that Congress' enforcement power under Section five of the Fourteenth Amendment is remedial in nature.\textsuperscript{187} "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'\textsuperscript{188} However, this power to abrogate States' immunity is not unlimited.\textsuperscript{189} The Supreme Court has held that "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."\textsuperscript{190} A line exists between "measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law,"\textsuperscript{191} and although Congress has wide latitude to determine where it is, the line must be observed. To enact valid legislation pursuant to Section five of the Fourteenth Amendment, the legislation must be remedial and preventive in nature.\textsuperscript{192} Congress "must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."\textsuperscript{193}

Congress failed these requirements when it passed the RFRA. As the Supreme Court determined in \textit{Flores}, the RFRA's substantial costs far exceeded any unconstitutional conduct, and the legislation's imposition of a least restrictive means requirement indicated that the means used in the RFRA were broader than what is appropriate to prevent and remedy constitutional violations.\textsuperscript{194} As such, the RFRA was declared unconstitutional.\textsuperscript{195}

The most recent example of the application of the proportionality test can be found in \textit{Kimel v. Florida Board of Regents}.\textsuperscript{196} The Supreme Court

\begin{footnotesize}
\begin{enumerate}
\item[186.] \textit{Flores}, 521 U.S. at 519-20.
\item[187.] \textit{Id.} at 519.
\item[188.] \textit{Id.} at 518 (quoting \textit{Fitzpatrick v. Bitzer}, 427 U.S. 445, 455 (1976)).
\item[189.] \textit{Flores}, 521 U.S. at 518.
\item[190.] \textit{Id.} at 519.
\item[191.] \textit{Id.} at 519-20.
\item[192.] \textit{Id.} at 524.
\item[194.] \textit{Flores}, 521 U.S. at 534-35.
\item[195.] \textit{Id.} at 536.
\item[196.] 120 S.Ct. 631 (2000).
\end{enumerate}
\end{footnotesize}
declared the ADEA unconstitutional for failure to validly abrogate the States' sovereign immunity.\textsuperscript{197} Passing the first requirement of abrogation, the Supreme Court noted that Congress had clearly demonstrated its intent to abrogate the States' sovereign immunity in the express language of the ADEA.\textsuperscript{198} Unfortunately, the ADEA failed the proportionality test. Specifically, the Court held that the ADEA was not "appropriate legislation under § 5 of the Fourteenth Amendment."\textsuperscript{199} The Court held that "judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA 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.'"\textsuperscript{200} As with the RFRA and the PRA, the ADEA has fallen victim to the new interpretation of valid abrogation of the States' sovereign immunity.

As the ADEA was so out of proportion, so too is the Family and Medical Leave Act. Although the stated aim was to eradicate gender discrimination, the Family and Medical Leave Act, on its face, fails to remedy sufficient unconstitutional behavior to warrant the extreme action of abrogation. There are few instances where the statute references gender discrimination. Congress addressed the finding that women take primary responsibility for the care of the family, affecting their working lives more than men.\textsuperscript{201} Congress also acknowledged that single-gender employment standards have the potential for encouraging employers to discriminate against employees of that gender.\textsuperscript{202} But Congress seeks to balance the needs of employees to serve their families better by providing leave for medical and compelling family reasons.\textsuperscript{203} The proportion of unconstitutional discrimination prevented by the Family and Medical Leave Act is minuscule in proportion to the constitutional behavior prohibited by forcing employers to grant leave for employees in these situations.

CONCLUSION

The Family and Medical Leave Act attempts to correct a pressing public issue. Americans are tired of being forced to place their job

\textsuperscript{197} Id. at 637.
\textsuperscript{198} Id. at 640.
\textsuperscript{199} Id. at 645 (citation omitted).
\textsuperscript{200} Id. at 647 (quoting City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).
security ahead of their family responsibilities. As the congressional record demonstrates, more and more persons are being reprimanded or fired from their jobs due to pressing needs at home.

Although this practice raises sympathies, the discrimination does not rise to a level that warrants abrogation of the States’ sovereign immunity. Yes, Congress had the proper authority under the Fourteenth Amendment to enact valid legislation. And yes, Congress made its intent to abrogate the States’ sovereign immunity unmistakably clear in the express language of the statute. Congress’ abrogation was not, however, a congruent and proportional response to the discrimination on the record. Simply put, the difficulties in receiving leave for family medical purposes is a problem all employees face, regardless of gender. As such, the Family and Medical Leave Act did not seek to protect gender inequality. Thus, the Act did not seek to guard a right protected by the Fourteenth Amendment. Because the Act does not validly protect a Fourteenth Amendment right, the Family and Medical Leave Act is not congruent and proportional legislation, and it improperly abrogates the States’ immunity from suit. Therefore the Family and Medical Leave Act is unconstitutional as it applies to the States as employers.

Congress cannot overstep its power and go so far as to abrogate the States’ right to sovereign immunity to satisfy public opinion. Congress may not attempt to cure a societal ill using unconstitutional means. Americans are not left without a remedy. Citizens may compel their States, as individual sovereign entities and employers, to provide a higher standard of leave and job security for their employees. Congressional action does not provide a proper remedy for the issue of family and medical leave.