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## Real Discrimination?

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## Real Discrimination?

Erwin Chemerinsky\*

In *Nevada Department of Human Resources v. Hibbs*,<sup>1</sup> the Court held that state governments may be sued for violating the family leave provisions of the Family and Medical Leave Act (FMLA).<sup>2</sup> In recent years, the Court had ruled that Congress may authorize suits against state governments only when it acts pursuant to Section 5 of the Fourteenth Amendment (“Section 5”) and not under any other congressional powers.<sup>3</sup> The Court thus concluded that federal laws prohibiting patent infringement,<sup>4</sup> age discrimination in employment,<sup>5</sup> and disability discrimination in employment could not be used to sue state governments<sup>6</sup> because they were not within the scope of Congress’s authority under Section 5.<sup>7</sup>

But in *Hibbs*, the Court found that the federal law requiring employers to give employees unpaid time off work for family leave could be used to sue state governments.<sup>8</sup> Chief Justice Rehnquist, writing for the Court in a 6–3 decision, said that Congress was concerned about preventing and remedying gender discrimination in

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1. 123 S. Ct. 1972 (2003).

2. 29 U.S.C. §§ 2601–54 (2000).

3. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

4. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (The Eleventh Amendment bars a claim against a state for violating patents. The Patent and Plant Protection Remedy Clarification Act is an unconstitutional exercise of Congress’s authority under Section 5 in authorizing federal court jurisdiction for such claims against state governments.).

5. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (state governments may not be sued in federal court for violating the Age Discrimination in Employment Act. The law is not a valid exercise of Congress’s Section 5 power that authorizes suits against state governments.).

6. *Bd. of Trs. Univ. of Ala. v. Garrett*, 531 U.S. 536 (2001) (state governments cannot be sued under section 1 of the Americans with Disabilities Act.).

7. Also, in *Tennessee v. Lane*, 124 S. Ct. 1978 (2004), the Supreme Court held that state governments can be sued for violating Title II of the Americans with Disabilities Act when the fundamental right of access to the courts is involved.

8. *Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972 (2003).

employment<sup>9</sup> and that Congress has more authority to act under Section 5 when it is dealing with types of discrimination, such as based on race or gender, which receive heightened scrutiny under equal protection.<sup>10</sup>

*Hibbs* is a significant victory for civil rights plaintiffs. The case will be very important as lower courts consider whether states can be sued under other statutes that provide more protection than the Constitution in dealing with race and gender discrimination. For example, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination where there is a disparate impact based on race, gender, or religion,<sup>11</sup> while the Constitution requires proof of discriminatory purpose.<sup>12</sup> Similarly, section 2 of the Voting Rights Act,<sup>13</sup> as amended in 1982, creates a cause of action for racially disparate impact in voting systems, while the Constitution requires proof of discriminatory intent.<sup>14</sup> After *Hibbs*, there is a strong argument that these crucial civil rights statutes can be used to sue state governments because they concern types of discrimination which receive heightened scrutiny.

Yet there is a troubling aspect of *Hibbs*: it draws a distinction among types of discrimination, allowing Congress latitude to enact laws preventing and remedying some, but not other, forms of discrimination by state governments. Under current equal protection law, constitutional challenges have relatively little chance of success in suits objecting to forms of discrimination, such as those based on age and disability, which receive only rational-basis review. Thus, it is especially important that Congress have the authority to deal with these types of discrimination by statute. Yet, the effect of *Hibbs* and its predecessor decisions by the Supreme Court over the last decade

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9. *Id.* at 1978–79.

10. *Id.* at 1977–78.

11. 42 U.S.C. § 2000e-2 (2000).

12. *See* Okruhlik v. Univ. of Ark., 255 F.3d 615 (8th Cir. 2001); *In re* Employment Discrimination Litig., 198 F.3d 1305 (11th Cir. 1999) (allowing suits against states pursuant to Title VII).

13. 42 U.S.C. § 1973 (2000).

14. *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271 (11th Cir. 2000); *Mixon v. Ohio*, 193 F.3d 389 (6th Cir. 1999) (section 2 of the Voting Rights Act does abrogate sovereign immunity).

is exactly the opposite: Congress is denied the authority to act where it is most needed.

I certainly applaud the result in *Hibbs*, but disagree with its premise that there are some types of discrimination that really matter, while other types of discrimination do not matter even enough to allow congressional action. The Court has unjustifiably defined and limited Congress's powers based on equal-protection jurisprudence's rigid levels of scrutiny.

Part I of this Article examines *Hibbs* and criticizes the distinction that it draws in allowing Congress much greater authority to act under Section 5 for some types of discrimination than for others. Part II explains the Court's error by focusing on a specific example: the authority to sue states under Title II of the Americans with Disabilities Act<sup>15</sup> for discrimination against people with disabilities in government programs, services, and activities. Under the reasoning in *Hibbs*, Congress does not have the same authority to authorize suits against disability discrimination as it does for gender discrimination. This is fundamentally misguided, as there is an even greater need for Congress to be able to deal with types of government discrimination where constitutional challenges are less likely to succeed. In *Tennessee v. Lane*,<sup>16</sup> the Court held that states sometimes can be sued under Title II, when a fundamental right is implicated. This is misguided in that states always should be able to be sued under Title II. Finally, Part III argues for an alternative conception of Congress's powers under Section 5, one that would broadly empower Congress to act to prevent and remedy government discrimination.<sup>17</sup>

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15. 42 U.S.C. §§ 12131–34 (2000).

16. 124 S. Ct. 1978 (2004).

17. In this Article, I do not challenge the Supreme Court's expansion of sovereign immunity in the last decade, which obviously underlies the issue of when Congress can authorize suits against state governments. I have argued against sovereign immunity elsewhere. See Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001). In this Article, I argue that even with the expansion of sovereign immunity, the Court has erred in its limits on Congress's powers to act under Section 5 to permit suits against state governments.

## I. *HIBBS*: DISCRIMINATING AMONG TYPES OF DISCRIMINATION

### A. *The Context of the Court's Decision in Hibbs*

*Nevada Department of Human Resources v. Hibbs*<sup>18</sup> is the Supreme Court's most recent effort to define the scope of Congress's powers under Section 5 and Congress's authority to permit suits against state governments. The Supreme Court first considered the authority of Congress to override sovereign immunity and authorize suits against states in *Fitzpatrick v. Bitzer*,<sup>19</sup> which held that Congress could authorize suits against state governments if it acts pursuant to Section 5. In *Fitzpatrick*, the Court held that state governments may be sued for violating Title VII of the Civil Rights Act of 1964, which prevents employment discrimination based on race, gender, and religion.<sup>20</sup> The Court, in an opinion by Justice Rehnquist, explained that the Fourteenth Amendment followed the Eleventh Amendment and thus can modify it.<sup>21</sup> More importantly, the Court said that the Fourteenth Amendment was intended as a limit on state power. Justice Rehnquist explained:

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 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.<sup>22</sup>

In *Pennsylvania v. Union Gas Co.*,<sup>23</sup> in 1989, the Supreme Court held, 5–4, that Congress may override the Eleventh Amendment and

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18. 123 S. Ct. 1972 (2003).

19. 427 U.S. 445 (1976).

20. 42 U.S.C. § 2000e–2 (2000).

21. *Fitzpatrick*, 427 U.S. at 456.

22. *Id.*

23. 491 U.S. 1 (1989).

authorize suits against state governments pursuant to any of its constitutional powers, so long as the law in its text expressly authorizes such suits. The Court ruled that state governments could be sued pursuant to a federal environmental law<sup>24</sup> because Congress was clear in acting under the commerce clause in authorizing suits against state governments.

Seven years later, in *Seminole Tribe v. Florida*,<sup>25</sup> the Supreme Court expressly overturned *Union Gas*. The simple reality is that between 1989, when *Union Gas* was decided, and 1996, when *Seminole Tribe* was decided, there was a significant change in the composition of the Supreme Court. Four of the Justices in the majority in *Union Gas* had left the Court: Brennan, Marshall, Blackmun, and White. All four of the dissenters in *Union Gas* remained on the Court. They were joined by Justice Clarence Thomas and overruled *Union Gas* by a 5–4 margin.

Chief Justice Rehnquist wrote for the Court and stressed that *Union Gas* was an unprecedented expansion in Congress's power to authorize suits against state governments. He explained:

Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The 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>26</sup>

The Court held that Congress only can authorize suits against state governments, and override the Eleventh Amendment, when it acts pursuant to Section 5.<sup>27</sup>

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24. See Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601–75 (2000).

25. 517 U.S. 44 (1996).

26. *Id.* at 72–73.

27. For an excellent criticism of *Seminole Tribe*, see Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe*, 52 VAND. L. REV. 407 (1999); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213 (1996); Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495 (1997).

A year after *Seminole Tribe*, the Court decided *City of Boerne v. Flores*<sup>28</sup> and significantly narrowed the scope of Congress's Section 5 powers. In *City of Boerne*, the Court held that the Religious Freedom Restoration Act (RFRA)<sup>29</sup> was not a valid exercise of Congress's powers under Section 5. The Court ruled that under Section 5, Congress may not create new rights or expand the scope of rights; rather, Congress may act only to prevent or remedy violations of rights already recognized by the courts and such laws must be narrowly tailored, they must be proportionate and congruent to dealing with proven constitutional violations.<sup>30</sup>

There is an obvious and crucial interrelationship between *Seminole Tribe* and *City of Boerne*: in deciding whether a state can be sued under a federal statute, the Court must resolve whether the law is a valid exercise of Congress's Section 5 powers. Congress's powers under Section 5 are limited to rights the Court already has recognized. If the Court upholds the law as permissible under Section 5, the state may be sued, otherwise the litigation cannot go forward against the state government.

Prior to *Hibbs*, there were three Supreme Court decisions—*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>31</sup> *Kimel v. Florida Board of Regents*,<sup>32</sup> and *University of Alabama v. Garrett*,<sup>33</sup>—in which the Court considered whether laws are valid exercises of Congress's Section 5 powers and a permissible basis for suits against state governments. In all three cases, the Court applied *City of Boerne*, and found the law invalid as an exercise of Congress's Section 5 powers and precluded the suit against the state government.

*Florida Prepaid* involved College Savings Bank, a New Jersey company that patented a system for students to save money to later pay for their college educations. Florida Prepaid, an agency of the Florida government, copied this system for use by Florida residents

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28. 521 U.S. 507 (1997).

29. 42 U.S.C. § 2000bb (2000).

30. *City of Boerne*, 521 U.S. at 519–20.

31. 527 U.S. 627 (1999).

32. 528 U.S. 62 (2000).

33. 531 U.S. 356 (2001).

to save money to attend Florida schools. College Savings Bank sued Florida Prepaid for, among other things,<sup>34</sup> patent infringement.<sup>35</sup>

In 1992, Congress expressly amended the patent laws to authorize suits against state governments for patent infringement.<sup>36</sup> The Supreme Court, however, held that the law was not a valid exercise of power under Section 5 and thus could not be used to sue the state government.<sup>37</sup> Although patents unquestionably are property and the Fourteenth Amendment protects property from being denied by state governments without due process, the Court found that the authorization of suits was impermissible because it was not proportionate or congruent to remedy constitutional violations.<sup>38</sup>

Chief Justice Rehnquist, writing for the Court, stated: “In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations. Unlike the undisputed record of racial discrimination confronting Congress in the voting rights cases . . . Congress came up with little evidence of infringing conduct on the part of the States.”<sup>39</sup> The Court held that the law was not valid under Section 5 because “[t]he legislative record thus suggests that the Patent Remedy Act does not respond to a history of ‘widespread and persisting deprivation of constitutional rights’ of the sort Congress has faced in enacting proper prophylactic § 5 legislation.”<sup>40</sup>

Several cases were consolidated in *Kimel*.<sup>41</sup> The named case involved a suit by current and former faculty and librarians at Florida State University, including Daniel Kimel, Jr. They alleged that the University’s failure to provide promised pay adjustments discriminated against older workers and thus violated the Age Discrimination in Employment Act (ADEA).<sup>42</sup> The Supreme Court

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34. College Savings Bank also sued for a violation of the Lanham Act, but the Supreme Court, in a separate opinion, also found that this was barred by sovereign immunity. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Expense Educ. Bd.*, 527 U.S. 666 (1999).

35. *Fla. Prepaid*, 527 U.S. at 630.

36. *See* 35 U.S.C. § 271 (2000).

37. *Fla. Prepaid*, 527 U.S. at 630.

38. *Id.* at 646–48.

39. *Id.* 527 U.S. at 640 (citation omitted).

40. *Id.* at 645.

41. 528 U.S. 62 (2000).

42. 29 U.S.C. §§ 621–34 (2000).

held that these claims against state agencies are barred by the Eleventh Amendment. By a 7–2 margin with only Kennedy and Thomas dissenting, the Court concluded that the ADEA is an express authorization of suit against the states.<sup>43</sup> The Court then ruled 5–4 that the ADEA is not a valid exercise of Congress’s power under Section 5 and that therefore it cannot be used to sue state governments.<sup>44</sup>

Justice O’Connor wrote the majority opinion and was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas. The Court concluded that the burdens the ADEA imposes on state and local governments are disproportionate to any unconstitutional behavior that might exist.<sup>45</sup> The Court emphasized that under prior decisions, only rational-basis review was used for age discrimination.<sup>46</sup> The Court explained that there is not a “history of purposeful discrimination” based on age and that “[o]ld age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it.”<sup>47</sup> Indeed, the Court said that states “may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification is rationally related to a legitimate state interest.”<sup>48</sup> The Court said that age often is a relevant criterion for employers.<sup>49</sup>

Therefore, the Court concluded that the broad prohibition of age discrimination in the ADEA was deemed to exceed the scope of Congress’s power. The Court declared: “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.’”<sup>50</sup>

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43. *Kimel*, 528 U.S. at 73–74.

44. *Id.* at 78–84.

45. *Id.* at 86.

46. *Id.* at 83–84; *see also, e.g.*, *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976).

47. *Kimel*, 528 U.S. at 83.

48. *Id.*

49. *Id.*

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

The Court stressed that the ADEA prohibits a great deal of conduct that is otherwise constitutional. The Court also emphasized that there were no “findings” by Congress of substantial age discrimination by state governments.<sup>51</sup> Therefore, the Court stated that because of “the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress’s power under Section 5 of the Fourteenth Amendment.”<sup>52</sup>

In *Alabama v. Garrett*,<sup>53</sup> the Court considered whether state governments may be sued for violating Title I of the Americans with Disabilities Act (ADA), which prohibits employment discrimination against the disabled and requires reasonable accommodation for disabilities by employers.<sup>54</sup> The plaintiff’s key argument to the Court was that the elaborate legislative history documenting government discrimination against the disabled made the ADA different from other laws the Court had considered in the last few years.<sup>55</sup> The Supreme Court, in a 5–4 decision, rejected this argument and held that state governments may not be sued for violating Title I of the ADA.

Patricia Garrett was the Director of Nursing at the University of Alabama, Birmingham hospital.<sup>56</sup> She was diagnosed with breast cancer and took time off work to have surgery, chemotherapy, and radiation.<sup>57</sup> When she returned to work she was informed that her position as Director of Nursing was no longer available. She sued under Title I of the ADA.<sup>58</sup>

Chief Justice Rehnquist’s majority opinion began by stating that the ADA was a substantial expansion of rights compared to the Constitution. He explained that under equal protection, discrimination based on disability only need meet a rational-basis

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51. *Id.* at 90.

52. *Id.* at 91.

53. 531 U.S. 356 (2001).

54. *See* 42 U.S.C. §§ 12111–17 (2000).

55. *See Hibbs*, 123 S. Ct. 1972, 1981–83 (2003).

56. *Garrett*, 531 U.S. at 362.

57. *Id.*

58. *Id.*

test, being rationally related to a legitimate government purpose.<sup>59</sup> The ADA prohibits discrimination well beyond what would fail a rational-basis test and its requirement for reasonable accommodation of disabilities is significantly greater than the Constitution requires.

The Court then concluded that Title I of the ADA is not proportionate or congruent to preventing and remedying constitutional violations. Chief Justice Rehnquist declared: “The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”<sup>60</sup> Justice Breyer attached a thirty-nine-page appendix to his dissenting opinion in which he listed the numerous references in the legislative history to government discrimination against the disabled.<sup>61</sup> Chief Justice Rehnquist’s majority opinion found these insufficient. He said that some were just anecdotes.<sup>62</sup> He said that most involved local governments, not state governments, and local governments are not protected by state sovereign immunity.<sup>63</sup> He said that some of the evidence concerns government discrimination against the disabled in providing services and that is Title II, not Title I, of the ADA. He observed that: “In 1990, the States alone employed more than 4.5 million people. It is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.”<sup>64</sup>

Chief Justice Rehnquist contrasted the legislative record for the Voting Rights Act of 1965, which he said was in “stark” contrast to the ADA.<sup>65</sup> He noted the statistical findings by Congress in enacting the Voting Rights Act, such as “an otherwise inexplicable 50-percentage-point gap in the registration of white and African-American voters in some States.”<sup>66</sup> He concluded that the congressional findings for the ADA were insufficient in comparison.

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59. *Id.* at 365 (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985)).

60. *Id.* at 368.

61. *Id.* at 389 (Breyer, J., dissenting).

62. *Id.* at 370.

63. *Id.* at 370–71.

64. *Id.* at 370 (citations omitted).

65. *Id.* at 374.

66. *Id.* at 373.

He wrote:

[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in *Cleburne*. Section 5 does not so broadly enlarge congressional authority.<sup>67</sup>

### *B. Hibbs and its Dubious Distinction Among Types of Discrimination*

*Hibbs* involved a provision of the FMLA which entitles an eligible employee to take up to twelve weeks of unpaid leave for, among other reasons, the onset of a "serious health condition" in the employee's spouse, child or parent.<sup>68</sup> The issue in *Hibbs* was whether this provision is a valid exercise of Congress's power under Section 5, allowing it to be used to sue state governments.

The Supreme Court, in a 6–3 decision, distinguished the early cases described above and permitted suits against state governments. Chief Justice Rehnquist, writing for the Court, focused on how "[t]he FMLA aims to protect the right to be free from gender-based discrimination in the workplace."<sup>69</sup> Although the FMLA is facially gender-neutral, and indeed *Hibbs* is male, the Court said that Congress made extensive findings that the absence of family leave has a disproportionate effect on women.<sup>70</sup> The Court concluded: "In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation."<sup>71</sup>

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67. *Id.*

68. 29 U.S.C. § 2612(a)(1)(C) (2000).

69. *Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1978 (2003).

70. *Id.* at 1978–81.

71. *Id.* at 1981.

The Court distinguished earlier cases, such as *Kimel* and *Garrett*, on the grounds that they involved types of discrimination that receive only rational-basis review, while gender discrimination triggers intermediate scrutiny.<sup>72</sup> But the crucial question is why Congress's power under Section 5 depends on the level of scrutiny applied by the Court under equal protection.

The only answer given by the Court is the statement in Chief Justice Rehnquist's majority opinion: "Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational basis test . . . it was easier for Congress to show a pattern of state constitutional violations."<sup>73</sup> There are several problems with this. First, the Court never found that the denial of family leave constituted a constitutional violation. Since the failure to provide family leave was gender-neutral, and since it is highly doubtful that it was motivated by a discriminatory purpose, the FMLA cannot be seen as remedying constitutional violations. Second, other statutes dealing with types of discrimination that receive only rational-basis review very well may be about remedying constitutional violations.<sup>74</sup>

Nor is there any other apparent reason why the level of scrutiny for a type of discrimination should define the scope of Congress's power to act under Section 5. In fact, the Court's approach seems to have it exactly backwards. In areas where constitutional protection is least likely to exist, statutory protection is most important. Under the Court's rational-basis jurisprudence, it is very difficult to successfully challenge discrimination that does not receive heightened scrutiny. Especially in these areas, such as age and disability discrimination, Congress needs to have the authority to prevent and remedy wrongful government actions.

The effect of *Hibbs* is that some types of discrimination matter and others do not; both constitutional and statutory protection is limited to the former. To show that this is a highly undesirable approach, the next part of the Article focuses on disability

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72. *Id.* at 1981–82.

73. *Id.* at 1982.

74. *See* discussion *infra* Part II (concerning Title II of the ADA).

discrimination and why it, too, should be deemed within the scope of Congress's power under Section 5.

## II. THE PROBLEMS WITH FOCUSING ONLY ON "REAL DISCRIMINATION": THE EXAMPLE OF TITLE II OF THE AMERICANS WITH DISABILITIES ACT

The problem with the Court's approach in *Hibbs* is illustrated by focusing on a type of discrimination which receives only rational-basis review: discrimination against people with disabilities. As the Court emphasized in *University of Alabama v. Garrett*,<sup>75</sup> this is a type of discrimination which receives only rational-basis review,<sup>76</sup> unlike *Hibbs*, which concerned gender discrimination that receives intermediate scrutiny under equal protection.<sup>77</sup> Focusing on disability discrimination shows the lack of any basis for drawing a distinction among types of discrimination in defining Congress's powers under Section 5 of the Fourteenth Amendment.

Moreover, in this part, I seek to demonstrate that even under the Court's restrictive approach, it should find that Title II can be used to sue state governments.

First, the Court's distinction in *Hibbs* between types of discrimination that warrant heightened scrutiny and those that receive only rational-basis review is misguided, because even the latter can often touch fundamental rights that warrant intermediate or strict scrutiny. The Supreme Court long has held that "classifications affecting fundamental rights are given the most exacting scrutiny."<sup>78</sup> For example, countless cases hold that discrimination with regard to voting, an express concern of Congress in enacting Title II, warrants strict scrutiny.<sup>79</sup> Likewise, infringements of the right to travel for individuals with disabilities, another explicit area identified by Congress in Title II, receive strict scrutiny.<sup>80</sup>

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75. 531 U.S. 356 (2001).

76. *Id.* at 367.

77. *Hibbs*, 123 S. Ct. at 1982.

78. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

79. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 334–35 (1972); *Reynolds v. Sims*, 377 U.S. 533, 565–68 (1964).

80. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (Since "the classification

Congress, in adopting Title II, also sought to prevent and remedy the unjustified institutionalization of individuals with disabilities and the violation of the fundamental right to be free from unreasonable confinement.<sup>81</sup> As described below, Congress found extensive discrimination against people with disabilities in the exercise of basic liberties, such as the right to marry, the right to procreate, and the right to custody of their children, all of which warrant strict scrutiny.<sup>82</sup>

Most profoundly, Title II is about ensuring that Americans with disabilities have the same access to their government as all other citizens. In many contexts, the Supreme Court has recognized the fundamental importance of every person having access to his or her government.<sup>83</sup> By prohibiting discrimination against individuals with disabilities in “services, programs, or activities,”<sup>84</sup> Title II, above all, is concerned with ensuring that individuals with disabilities have full and complete access to their governments.

In enacting Title II, Congress made express findings, supported by extensive documentation, of “pervasive” unconstitutional discrimination against individuals with disabilities in government services, programs, and activities.<sup>85</sup> The text of Title II includes explicit findings of persisting discrimination in “education . . . institutionalization . . . voting, and access to public services . . .”<sup>86</sup>

Congress, in enacting the ADA, found that, both historically and now, individuals with disabilities are subjected to the “widespread

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here touches on the fundamental right of interstate movement, its constitutionality must be judged by the stricter standard of whether it promotes a *compelling* state interest.”).

81. See *Olmstead v. L.C.*, 527 U.S. 581 (1999); *Youngberg v. Romeo*, 457 U.S. 307 (1982).

82. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (the right to marry as a fundamental right); *Stanley v. Illinois*, 405 U.S. 645 (1972) (the right to custody of one’s children as a fundamental right); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (the right to procreate as a fundamental right).

83. See, e.g., *Romer v. Evans*, 517 U.S. 620, 633 (1996) (declaring that it is “[c]entral both to the rule of law and to . . . equal protection” that the government be available on an equal basis “to all who seek its assistance”); *McDonald v. Smith*, 472 U.S. 479 (1985) (the right to petition government for redress of grievances); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (right of access to the courts).

84. 42 U.S.C. § 12132 (2000).

85. *Id.* § 12101(a)(2) (2000).

86. *Id.* para. (3).

and persisting deprivation of [their] constitutional rights” which the Court in *Florida Prepaid Postsecondary Education Board v. College Savings Bank*<sup>87</sup> said are required for Congress to act under Section 5.<sup>88</sup> For example, with regard to voting, Congress heard that “in the past years people with disabilities have been turned away from the polling places after they have been registered to vote because they did not look competent.”<sup>89</sup> The legislative history documents that many persons with disabilities “cannot exercise one of [the] most basic rights as an American” because polling places were not accessible to persons with disabilities.<sup>90</sup> In fact, a study found that twenty-one percent of polling places were inaccessible to individuals with disabilities in the 1988 elections and twenty-seven percent were inaccessible in the 1986 elections.<sup>91</sup> A hearing on discrimination with regard to voting is filled with specific examples of individuals with disabilities being denied their constitutionally guaranteed right to vote.<sup>92</sup>

Overall, the United States Civil Rights Commission, in a report extensively relied on by Congress in enacting the ADA, found that people with disabilities are “frequently denied . . . the right to vote”<sup>93</sup> and face barriers such as “[s]tate laws restricting voting rights of mentally handicapped persons, the “[d]enial of opportunity for institution residents to vote,” “[a]rchitectural barriers at polling places,” the “[a]bsence of assistance in ballot marking,” the

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87. *Fla. Prepaid Postsecondary Educ. Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999).

88. *Id.* at 640, 645 (The “propriety of any § 5 legislation must be judged with reference to the historical experience . . . it reflects.”).

89. *Americans with Disabilities Act of 1988: Joint Hearing on S. 2345 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Human Res. and the Subcomm. on Select Educ. of the House Comm. on Educ. and Labor*, 100th Cong. 2d Sess. (1988) (statement of Nancy Husted-Jensen, Chairman, Governor’s Commission on the Handicapped, Providence, R.I.), reprinted in 2 LEGIS. HIST. OF PUB. L. NO. 101-336: THE AMERICANS WITH DISABILITIES ACT, 100th Cong., 2d Sess., at 1220 (1990) [hereinafter LEGIS. HIST.].

90. S. REP. NO. 101-116, at 12 (1989).

91. FEDERAL ELECTION COMMISSION, POLLING PLACE ACCESSIBILITY IN THE 1988 GENERAL ELECTION 7 (1989).

92. *Equal Access to Voting for Elderly and Disabled Persons: Hearings on H.R. 1250 Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. (1984).

93. U.S. COMM’N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 39–40 (1983).

“[i]nequity of absentee ballots,” and “[r]estrictions on rights of handicapped persons to hold public office.”<sup>94</sup>

Similarly, Congress documented that those with disabilities were frequently unconstitutionally deprived of their right of access to the courts and to their government. The legislative history documents that “[t]he courthouse door is still closed to Americans with disabilities—literally.”<sup>95</sup> The Civil Rights Commission’s study found that seventy-six percent of state-owned buildings were inaccessible to persons with disabilities.<sup>96</sup> Congressional committees heard testimony of “innumerable complaints regarding lack of access to public service—people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building.”<sup>97</sup> These are examples of clearly unconstitutional acts of state and local governments in denying individuals with disabilities access to their government.

A particularly important example of pervasive unconstitutional state government actions that motivated the enactment of the ADA is the impermissible confinement of individuals with disabilities. The legislative history of the ADA recounts numerous instances of individuals with disabilities being unconstitutionally confined and institutionalized. Indeed, the “Findings and Purposes” section at the beginning of the ADA mentions persistent unjustified “institutionalization” of people with disabilities.<sup>98</sup> The Senate Report on the ADA explains that “[h]istorically, individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society[.]”<sup>99</sup> Senator

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94. *Id.* at 167; *see also* 135 CONG. REC. 19852 (Sept. 7, 1989) (statement of Sen. Gore) (summarizing testimony and concluding: “[a]s a practical matter, many Americans with disabilities find it impossible to vote.”).

95. LEGIS. HIST., *supra* note 89, at 936 (statement of Sen. Harkin).

96. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 93, at 39.

97. *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Sen. Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. (1989) (testimony of Illinois Attorney General Neil Hartigan).

98. 42 U.S.C. § 12101(a)(2)(3) (2000).

99. S. REP. NO. 101-116, at 6 (1989).

Harkin, in introducing the ADA, said that one of its key purposes is “getting people . . . out of institutions . . . .”<sup>100</sup>

The report of the United States Commission on Civil Rights, quoted extensively in the House and Senate Reports, discussed in detail the unconstitutional confinement of individuals with disabilities. The Civil Rights Commission described how historically individuals with disabilities have been needlessly isolated from the rest of society and confined, first at the hands of people who collected fees for their care and “locked their charges in the attic to starve or freeze to death”; then in unsanitary and overcrowded almshouses that generally did not provide care but were “merely custodial”; then in large state facilities that came to see their purpose as protecting society from people with disabilities as these individuals came to be seen as “sub-standard human creatures” and “waste products” during the growth of the eugenics movement.<sup>101</sup> The Civil Rights Commission report detailed the continuing unnecessary segregation and institutionalization of people with disabilities:

The harshest side of institutionalization is the systematic placement of handicapped people in substandard residential facilities, where incidents of abuse by staff and other residents, dangerous physical conditions, gross understaffing, overuse of medication to control residents, medical experimentation, inadequate and unsanitary food, sexual abuses, use of solitary confinement and physical restraints, and other serious deficiencies and questionable practices have been reported.<sup>102</sup>

Despite repeated calls for deinstitutionalization and integration of people with disabilities in society, widespread confinement continued. The Civil Rights Commission found:

Despite such initiatives, a great many handicapped persons remain in segregative facilities. The Comptroller General has

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100. 135 CONG. REC. 8508 (May 9, 1989); *see also* 136 CONG. REC. 10,877 (May 17, 1990) (statement of Congressman Miller, co-sponsor of the ADA) (“Society has made [people with disabilities] invisible by shutting them away in segregated facilities . . .”).

101. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 93, at 17–20.

102. *Id.* at 32–33.

estimated that about 215,500 persons were residing in public mental hospitals in 1974 and that some 181,000 persons were in public institutions for mentally retarded people as of 1971. In 1976, one study estimated that 1,550,120 people were in long term residential care facilities.<sup>103</sup>

Congress also intended Title II to prevent and remedy violations of fundamental rights to marriage, procreation, and custody of one's children. Congress was acutely aware of the tragic history of the eugenics movement in which states attempted to halt reproduction of people with disabilities and "nearly extinguish their race."<sup>104</sup> In fact, almost every state prohibited marriage and inflicted forced sterilization on individuals with disabilities.<sup>105</sup>

Nor were such violations of the basic rights to marry and procreate a thing of the past. The Civil Rights Commission report relied on by Congress noted that fifteen states continued to have compulsory sterilization laws on the books, four of which included persons with epilepsy.<sup>106</sup> Congress was aware that such abhorrent practices continued.<sup>107</sup> The Commission also found that "[m]any states restrict the rights of physically and mentally handicapped people to marry."<sup>108</sup>

The legislative history describes how "[h]istorically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent."<sup>109</sup> The House Report described discriminatory policies against individuals with disabilities in "securing custody of their children."<sup>110</sup> The Civil Rights Commission found that many parents with disabilities "have had custody of their children

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103. *Id.* at 35.

104. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 462 (1985) (Marshall, J., concurring).

105. *Id.* at 463; *see also* *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding compulsory sterilization "in order to prevent our being swamped with incompetence" and because "three generations of imbeciles is enough").

106. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 93, at 37.

107. *See* *Stump v. Sparkman*, 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" fifteen-year-old girl).

108. U.S. COMM'N ON CIVIL RIGHTS, *supra* note 93, at 40.

109. LEGIS. HIST., *supra* note 89, at 1611 n.10 (testimony of Arlene Mayerson).

110. H.R. REP. NO. 101-485, at 41 (1990).

challenged in proceedings to terminate parental rights and in proceedings growing out of divorce.”<sup>111</sup>

This brief description shows that even in an area of discrimination that receives rational-basis review—disability discrimination—there are implications for fundamental rights. Thus, the distinction in *Hibbs* between types of discrimination receiving strict scrutiny and those that receive only rational-basis review as the grounds for defining Congress’s power under Section 5 makes little sense.

Second, the Court’s approach in *Hibbs* ignores Congress’s authority to find extensive discrimination by state and local governments, even if it is not in an area that would trigger heightened scrutiny. The Court’s prior decisions require that the federal law be directed at preventing or remedying constitutional violations. In *Florida Prepaid*, for example, the Court stressed the lack of evidence of *unconstitutional* infringements of patents by state governments.<sup>112</sup> In *Garrett*, the Court again emphasized the lack of evidence of *unconstitutional* discrimination by state governments in state employment.<sup>113</sup> Nothing in *Hibbs* changes that; in fact, *Hibbs* emphasizes that in areas receiving heightened scrutiny Congress has greater authority to act beyond remedying constitutional violations.<sup>114</sup>

But this distinction makes no sense. Congress can find extensive government discrimination, warranting statutory action, regardless of whether there are constitutional violations. Again, Title II of the ADA illustrates this. The ADA was the result of more than twenty years of hearings and investigations into the pervasive discrimination against individuals with disabilities. Congress held sixteen committee hearings and sixty-three field hearings, issued five committee reports, and engaged in prolonged floor debate.<sup>115</sup> After two years of fine-tuning in committee and floor deliberations, the ADA was passed by a vote of 91–6 in the Senate and 377–28 in the House.<sup>116</sup>

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111. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 93, at 40.

112. Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627, 640 (1999).

113. 531 U.S. 356, 369 (2001).

114. Nev. Dep’t of Human Res. v. Hibbs, 123 S. Ct. 1972, 1977 (2003).

115. S. REP. NO. 101-116, at 4–5, 8–9 (1989); H.R. REP. NO. 101-485, at 24–28, 31 (1990).

116. Kathleen Hale, *Toyota v. Williams: Further Constricting the Circle of Difference*, 4

Congress included within the ADA explicit findings about widespread discrimination against individuals with disabilities by state and local governments in their services, programs, and activities. The ADA declares Congress's finding that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."<sup>117</sup> The statute itself states that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."<sup>118</sup> Based on these findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" as the basis for enacting the ADA.<sup>119</sup>

The point is that there is no basis for the Court's distinction in *Hibbs*, that only some types of discrimination are important enough to warrant congressional action and suits against state governments. I focus on Title II as my illustration, but certainly the same could be shown for countless other laws that prevent and remedy types of discrimination that receive only rational-basis review.

In *Tennessee v. Lane*<sup>120</sup> the Court confronted the issue of whether state governments could be sued for violating Title II.<sup>121</sup> The plaintiffs were a criminal defendant and a court reporter.<sup>122</sup> Both were paraplegics unable to reach second-floor courtrooms without elevators.<sup>123</sup> The named plaintiff, Lane, was forced to crawl up two flights of stairs to attend his hearing.<sup>124</sup>

In a 5–4 decision, the Court held that state governments may be sued for discriminating against people with disabilities with regard to

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J.L. Soc'y 275, 288 n.50 (2003).

117. 42 U.S.C. § 12101(a)(2) (2000).

118. *Id.* § 12101(a)(3) (2000).

119. *Id.* § 12101(b)(4) (2000).

120. 124 S. Ct. 1978 (2004).

121. 42 U.S.C. § 12132 (2000).

122. *Id.* at 1982–83.

123. *Id.* at 1982.

124. *Id.*

the fundamental right of access to the courts. Justice Stevens, writing for the Court, emphasized that there is a well-established fundamental right of access to the courts and that Congress may enforce it by authorizing suits against state governments. He explained: “The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the ‘right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.’”<sup>125</sup> The Court also explained that in other contexts as well, such as civil cases, a fundamental right of access to the courts has been recognized.<sup>126</sup> The Court thus concluded that the State of Tennessee could be sued in this case for discriminating against people with disabilities with regard to their right of access to the courts.

*Tennessee v. Lane* is to be applauded for allowing states to be sued under Title II, but the problem is that it appears that such suits can go forward only when a fundamental right is involved. But as described above, Congress found discrimination against people with disabilities across a broad spectrum of activities. The ability to sue under Title II should not be limited to just some of these. In fact, *Lane* is likely to cause courts significant problems in deciding when states can be sued under this statute. There is no canonical list of fundamental rights and it is not clear how much the fundamental right must be implicated to allow the suit against the state to go forward.

Moreover, Congress’s power to act under Section 5 should not depend on whether a fundamental right is involved. Congressional power is least needed when there is a fundamental right; these are the situations when judicial protection is likely to be available. *Lane*, for example, should have been able to succeed directly under the Constitution, since the state was denying his fundamental right of access to the courts. Congressional power is most important when no fundamental right is implicated because it is especially then that legislative remedies are crucial if there is to be any limit on discrimination against people with disabilities.

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125. 124 S. Ct. at 1988.

126. *Id.*

*Lane* thus takes the same approach to defining Congress's powers under section 5 as did *Hibbs* a year earlier. Together *Lane* and *Hibbs* establish that Congress has more authority to act under Section 5, and thus to authorize suits against state governments, when it is dealing with claims of discrimination or violations of rights which receive heightened scrutiny. But they are both flawed for the same reason: Congress's power to act under Section 5 should not depend on the level of scrutiny the Court has applied.

### III. AN ALTERNATIVE VIEW OF CONGRESSIONAL POWER: EMPOWERING CONGRESS UNDER SECTION 5

The central flaw in the Court's approach in cases like *Florida Prepaid*, *Kimel*, *Garrett*, and *Hibbs* is its very narrow conception of Congress's power under Section 5. This, of course, is based on its ruling in *City of Boerne*.<sup>127</sup> In this part, I argue for a very different view of Congress's power under Section 5, granting it broad authority to expand the protection of rights so long as rights and liberties are not diluted.

The Constitution's protection of rights long has been understood as the floor, the minimum liberties possessed by all individuals. The Ninth Amendment provides clear textual support for this view: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."<sup>128</sup> The Ninth Amendment is a clear and open invitation for government to provide more rights than the Constitution accords.

State governments certainly can do this both by judicial decisions and by statute. For instance, in *Pruneyard Shopping Center v. Robins*,<sup>129</sup> the United States Supreme Court held that the California Supreme Court could recognize a state constitutional right to use shopping centers for speech purposes, even though the United States Supreme Court had ruled that no such right exists under the Constitution.<sup>130</sup>

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127. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

128. U.S. CONST. amend. IX.

129. 447 U.S. 74 (1980).

130. *See* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

Likewise, there is no doubt that Congress, by statute, can provide rights greater than the Court recognizes in the Constitution. For example, private race discrimination does not violate the Constitution because of the absence of government action. However, federal civil rights laws that prohibit discrimination by private places of accommodation and private employers create statutory rights where the Court has found no constitutional protections.<sup>131</sup>

This seemingly obvious premise, based on the Ninth Amendment, that Congress can expand the scope of rights, means that Congress may do so even when it disagrees with a Supreme Court decision that refused to find a right in the Constitution. Some critics of the Religious Freedom Restoration Act emphasized that Congress should not be able to overrule the Supreme Court's "reading" of the Constitution.<sup>132</sup> But if the Court reads the Constitution to not include a right, Congress or the states may act to create and protect that right. In other words, the Court's interpretive judgment that a particular right is not *constitutionally* protected is in no way incompatible with a legislature's *statutory* recognition and safeguarding of the liberty.<sup>133</sup>

Section 5 should be interpreted as according Congress this authority. Section 5 states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."<sup>134</sup> As is usually the case with difficult constitutional issues, the answer to this question cannot be found in the text or the framers' intent. The word "enforce" is sufficiently ambiguous to allow either view as a plausible interpretation of Section 5. The Supreme Court in *City of Boerne* claimed that the word necessarily means that Congress can only remedy and cannot determine the substantive meaning of rights. Justice Kennedy, writing for the majority, stated:

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131. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding Title II of the Civil Rights Act of 1964 which prohibits racial discrimination by places of public accommodation).

132. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 443 (1994).

133. Part II argues why the Religious Freedom Restoration Act should be seen as a statutory expansion of rights.

134. U.S. CONST. amend XIV, § 5. The same issues can be raised as to Congress's powers under Section 2 of the Thirteenth Amendment and Section 2 of the Fifteenth Amendment that contain almost identical language.

Congress' power under § 5, however, extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. . . . The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the states. *Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is.*<sup>135</sup>

But this begs the key question of what "enforce" means. The *Oxford English Dictionary* defines "enforce" as: "**I.** To put force or strength into. . . . **II.** To bring force to bear upon. . . . **III.** To produce, impose, effect, by force."<sup>136</sup> Congress "enforces" the Fourteenth Amendment when it expands the scope of liberty under the due process clause or increases the protections of equal protection. In this sense, congressional expansion of rights is enforcing by strengthening the Fourteenth Amendment.

Dictionaries, of course, do not determine the meaning of the words in the Constitution. My point is simply that there is nothing certain about the meaning of the word "enforce" that supports Justice Kennedy's claim that it precludes Congress from using it to expand the scope of constitutional rights. Justice Kennedy argued as if the term enforce had a precise meaning that supported his position as the correct way to understand Congress's Section 5 power. No such precise meaning exists.

Phrased slightly differently, the word "enforce" might be defined in many alternative ways, two of which are to implement and to remedy. Justice Kennedy chose the latter. But the former seems equally plausible in the context of Section 5. Congress, by that provision, is given the authority to implement, as best it can, the protections of the Fourteenth Amendment, such as due process and equal protection. Congress can do this by expanding the scope of these rights if it decides that it is the best way to ensure, or to implement, these protections.

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135. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (emphasis added).

136. 5 OXFORD ENGLISH DICTIONARY 244–45 (2d ed. 1991).

Nor does the framers' intent behind the Fourteenth Amendment answer the issue. Even assuming that framers' intent should be controlling in constitutional interpretation, a premise that I reject,<sup>137</sup> there is no indication that the issue was ever considered when the Fourteenth Amendment was drafted and ratified. Justice Kennedy in *City of Boerne* argues that the legislative history of Section 5 resolves the issue: "The Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause."<sup>138</sup>

Justice Kennedy says that a rejected proposed version of Section 5 shows that Congress meant Section 5 power to be solely remedial.<sup>139</sup> Representative John Bingham had introduced a draft amendment which would have provided: "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property."<sup>140</sup> Justice Kennedy says that there was strong opposition to this provision and that the revised provision, Section 5, was not opposed in the same manner.<sup>141</sup>

There is no doubt that the revised Section 5 has less sweeping sounding language than the Bingham proposal. Yet, there is not a word in the debates quoted by Justice Kennedy that concerns whether Congress's power should be only to remedy what the Court determines to be a constitutional violation, or whether it includes congressional authority to expand rights. All that Justice Kennedy shows is that language with a narrower phrasing was enacted. The substantive difference in the phrasing is completely assumed by Justice Kennedy.

In fact, the quotations used by Justice Kennedy do not support his position that Section 5 was intended to be only remedial in scope. Justice Kennedy quotes Representative Bingham saying that "the new draft would give Congress 'the power . . . to protect by national law

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137. See generally ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION (1987) (arguing against originalism as a method of constitutional interpretation).

138. 521 U.S. at 520.

139. *Id.* at 520–22.

140. *Id.* at 520 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)).

141. *Id.* at 522–23.

the privileges and immunities of all the citizens of the Republic . . . whenever the same shall be abridged or denied by the unconstitutional acts of any State.”<sup>142</sup> Justice Kennedy next quotes Representative Stevens that “the new draft Amendment ‘allow[s] Congress to correct the unjust legislation of the States.’”<sup>143</sup> Finally, Justice Kennedy quotes Senator Howard as saying that Section 5 “enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment.”<sup>144</sup>

None of these quotations support the view that Congress’s power is solely to remedy violations of rights found by the Court, and not to expand rights safeguarded by the Fourteenth Amendment. Surely, the Religious Freedom Restoration Act can be seen, in Representative Bingham’s words, to “protect”<sup>145</sup> rights or to “correct the unjust legislation of the states,”<sup>146</sup> in Representative Stevens’ language. Laws expanding the scope of rights are very much in accord with Senator Howard’s goal of advancing the principles of the amendment. A careful reading of the very legislative history that Justice Kennedy invokes shows that it could be used equally persuasively to support either view.

Thus, the question concerning Congress’s Section 5 power is not resolved by the text, the framers’ intent, or precedent. The meaning of Section 5 must be decided based on policy considerations. I believe that this is virtually always the case in constitutional law and that rarely can normative questions about the desirable meaning of the Constitution be answered based on descriptive sources.

So what policy reasons does Justice Kennedy offer to support his view of Section 5? Justice Kennedy invokes the need to preserve the Court as the authoritative interpreter of the Constitution. Justice Kennedy quotes *Marbury v. Madison*<sup>147</sup> and writes: “If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount

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142. *Id.* at 522.

143. *Id.* at 522.

144. *Id.* at 522–23.

145. *Id.* at 522.

146. *Id.* at 522–23.

147. 5 U.S. (1 Cranch) 137 (1803).

law, unchangeable by ordinary means.’ It would be ‘on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it.’”<sup>148</sup> Justice Kennedy concludes this part of the majority opinion by declaring: “Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.”<sup>149</sup>

This is the fundamental flaw in Justice Kennedy’s opinion: he equates a Supreme Court decision failing to find a right in the Constitution with the conclusion that no right can be created by Congress. The former, however, in no way entails or implies the latter. The Court’s conclusion that a particular right does not exist in the Constitution does not mean that the right cannot exist through other legal sources, such as federal or state legislation.

In other words, Justice Kennedy makes a crucial error when he assumes that a Supreme Court decision finding that a constitutional right does not exist precludes the legislative process from recognizing such a right. If the Supreme Court concludes that the Constitution *requires* government to act in a particular way, Congress cannot overturn that result. For instance, Congress cannot overturn by statute *Gideon v. Wainwright*’s<sup>150</sup> holding that the government must provide counsel in criminal cases where there is a potential sentence of imprisonment. Similarly, if the Court decides that the Constitution *prohibits* the government from acting in a specific manner, Congress cannot authorize the forbidden conduct. For example, no legislature can overturn *Roe v. Wade*’s<sup>151</sup> holding that the Constitution prevents the government from prohibiting abortion.

But it is inherently different when the Court decides that no right exists in the Constitution. Such a ruling means that the government is unconstrained by the Constitution and may act as it wants. This includes the power of the legislature to create the very right that the Court concluded is not constitutionally protected. If the Court in *Roe v. Wade* had found that there was not constitutional protection of the

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148. 521 U.S. at 529 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

149. 521 U.S. at 529.

150. 372 U.S. 335 (1963).

151. 410 U.S. 113 (1973).

right to abortion, Congress and state legislatures still would have had the power to create and safeguard such a right by statute. This is what RFRA did: the Court in *Employment Division v. Smith*<sup>152</sup> had decided that there was no constitutional right of individuals to have an exemption from neutral laws of general applicability that burden religion.<sup>153</sup> In RFRA, Congress created a statutory right that protects individuals from such laws, except in cases where the government can meet strict scrutiny.<sup>154</sup>

There is another important flaw in Justice Kennedy's approach to Section 5: he assumes that it is possible to draw a meaningful distinction between laws that remedy violations of rights and statutes interpreting the Constitution. Justice Kennedy's majority opinion states: "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed."<sup>155</sup>

The problem is that any law expanding rights can be characterized as a remedy for a problem. The only reason why the legislature would act is based on a perceived ill that needs solution. Almost always Congress can tie this evil to some constitutional claim. The Court in *City of Boerne* accepts that the Voting Rights Act and its amendments were enacted under Section 5 to remedy discrimination in voting.<sup>156</sup> Likewise, RFRA was adopted by Congress because of its perception that there was a problem, in that people often had their religious freedom wrongly limited by neutral laws of general applicability.<sup>157</sup>

Limiting Congress under Section 5 to remedies simply imposes a fact-finding burden on the legislative process. Congress can enact any

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152. 494 U.S. 872 (1990).

153. *Id.* at 879.

154. 42 U.S.C. § 2000bb-1 (2000).

155. *City of Boerne*, 521 U.S. at 519–20.

156. *Id.* at 533; *but see* Stephen Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819, 841 (1986) (arguing that there was insufficient fact-finding to justify concluding that the Voting Rights Act is remedial).

157. In fact, Justice Kennedy cites to the extensive testimony in Congressional hearings supporting this view. *City of Boerne*, 521 U.S. at 530–31.

law expanding rights under Section 5, but it first must document the existence of a problem and call its action remedial. However, there is no constitutional requirement for legislative hearings or fact-finding. Indeed, the presumption in favor of upholding laws means that it is assumed that the legislature found sufficient facts to support its action unless it can be shown that the law serves no legitimate purpose or is not rationally related to the end. As Professor Cohen observed, once it is assumed that Congress is a better forum for determining issues of fact, congressional determinations of factual sufficiency should not need any evidence at all.<sup>158</sup>

There are two primary reasons why the Court should have concluded in cases from *City of Boerne* to *Hibbs* that Section 5 is not limited to remedial legislation, but rather allows Congress to expand rights. First, the protection of additional rights should be regarded as inherently desirable under the Constitution. The Ninth Amendment, so often forgotten, is significant here. The Ninth Amendment is a constitutional reminder that the rights in the Constitution are just the minimum and that the existence of these rights in no way denies the existence of other liberties.<sup>159</sup> The Ninth Amendment is a powerful signal encouraging the recognition of additional freedoms beyond those created by the Constitution.

How can other rights come into existence? One way, of course, is for the Court to interpret the Constitution to protect rights not enumerated in its text. In *Griswold v. Connecticut*, Justice Goldberg's concurring opinion, joined by Chief Justice Warren and Justice Brennan, invoked the Ninth Amendment as support for finding a constitutional right to privacy.<sup>160</sup> Another crucial way for additional rights to arise is for legislatures, including Congress, to create and protect them.

Where possible, the Constitution should be interpreted to fulfill the Ninth Amendment's teaching and allow government to create additional rights. In other words, in choosing between two plausible

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158. William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603, 612 (1975).

159. For an excellent collection of essays on the Ninth Amendment, see THE RIGHTS RETAINED BY THE PEOPLE, vols. 1, 2 (Randy E. Barnett ed., 1993).

160. 381 U.S. 479, 486–87 (1965).

interpretations of a constitutional provision, one which grants the legislature the authority to safeguard additional rights and one which does not, the former should be chosen. As described above there are two ways of interpreting Section 5, one which permits Congress to use its authority to expand rights, and the alternative which limits Congress to remedying violations of rights recognized by the Court. The former should be chosen under the principle that increasing rights is presumed desirable under the Constitution.

There is a second reason why it is desirable to allow Congress to expand constitutional rights under Section 5: it is preferable to allow each branch of government to interpret the Constitution so long as there is no violation of what the Court interprets the Constitution to mean. Every government official, at every level of government, takes an oath to uphold the Constitution.

In recent years, many constitutional scholars have supported the view that constitutional law is best understood as a dialogue between the Court, the other branches of government, and society.<sup>161</sup> As Professor Stephen Carter has forcefully argued, allowing Congress to protect a right pursuant to Section 5 in response to a Supreme Court decision refusing to recognize a constitutional right furthers this notion of a constitutional dialogue.<sup>162</sup> Legislatures cannot respond with statutes to Supreme Court decisions finding that the Constitution prohibits or requires government conduct. But legislatures can act when the Court finds no right in the Constitution, because that in no way implies a limit on the legislative power to statutorily create and protect the additional liberties.<sup>163</sup>

In other words, it is preferable to interpret Section 5 to accord Congress the authority to expand rights, both because increasing rights is presumptively desirable under the Constitution and because independent constitutional interpretation, not inconsistent with Supreme Court rulings, is desirable. Limiting Congress to providing remedies for violations of rights found by the Court, as the Court has

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161. See, e.g., PHILLIP BOBBITT, *CONSTITUTIONAL FATE* (1986); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

162. Carter, *supra* note 156, at 852–56.

163. For an excellent development of this position, see Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589 (1996).

done in cases from *City of Boerne* through *Hibbs*, loses both of these benefits and thus should be rejected.

#### CONCLUSION

The Supreme Court's recent federalism decisions limiting Congress's power to authorize suits against state governments are flawed on many levels. They are based on a broad concept of sovereign immunity that is at odds with a Constitution where all in government should be accountable and where no one is above the law. The decisions also fail to recognize a vital role for the federal government in acting to prevent and remedy civil rights violations.

Thus, it is not surprising that I applaud the Court's decision in *Hibbs* for rejecting sovereign immunity and according Congress power to enact and enforce a federal civil rights law. Although the result in *Hibbs* is laudable, its reasoning is not. The Court clearly is saying that only some forms of discrimination are sufficiently real and pervasive to warrant federal legislative or judicial action. But for those who are discriminated against based on their age or disability, the impact is just as real as race or gender discrimination. There is a need for national legislation to combat these, and other forms, of discrimination, and Congress's power should be interpreted to allow such laws.