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The Unmaking of a Precedent

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How far can you stretch precedent before it breaks? The 2002 Term suggests that some Justices seem to think that treating precedent like silly putty is preferable to acknowledging that it might be in need of revision. But obvious inconsistencies in the application of precedent are a strong indication of underlying doctrinal problems. In this article, I suggest that the majority's misuse of precedent in *Nevada Department of Human Resources v Hibbs*[1] should lead us to question the soundness of the Supreme Court's previous cases defining the limits of Congress's authority under Section 5 of the Fourteenth Amendment. But the cloud that *Hibbs* casts over precedent has a silver lining: the ways in which the Court misused its own precedent point us to a better and more coherent reading of Section 5.

Other scholars who have criticized the Court for its Section 5 doctrine have argued that the Court's jurisprudence is fundamentally mistaken because it misallocates authority between Congress and the Court. I propose instead to take as a given that the Court should police the boundaries of Congress's Section 5 power, and that ultimately the Court rather than Congress must decide whether a problem is sufficiently important to justify the congressional response, including the abrogation of state immunity from

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[1] 123 S Ct 1972 (2003).

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suit. My suggested doctrinal revisions thus do not require a radical shift for a Court determined to limit congressional authority. I also remain agnostic on the soundness of particular outcomes. Whatever we might think of the decisions in recent Section 5 cases, this Court is unlikely to overrule them; the advantage of my approach is that it preserves most of the cases but makes them consistent with one another. Finally, my approach to Section 5 has the added benefit of forcing the Court to be more candid about the value choices that it inevitably makes. Note, then, that my purpose in this article is limited: I do not mean either to critique or to defend particular outcomes, but rather to make suggestions about the process by which the Court should decide cases—although process will inevitably have some effect on outcomes. Outcomes aside, however, improvements in the judicial decision-making process increase the Court's legitimacy, foster adherence to the rule of law, and diminish the opportunities for abuse of judicial authority.

I

A

Hibbs was decided against a rich background of recent federalism cases, many of them focusing on the contours of state sovereign immunity. Between 1999 and 2001, the Court invalidated five different congressional statutes that attempted to permit individual damage suits against states allegedly violating federal law. In each case, the Court relied on the confluence of two earlier precedents: *Seminole Tribe of Florida v Florida*,[2] which held that Congress is constitutionally permitted to abrogate state sovereign immunity only when it acts under the powers granted by Section 5 of the Fourteenth Amendment, and *City of Boerne v Flores*,[3] which limited the reach of Congress's Section 5 authority. The five subsequent cases held that in order to justify abrogating immunity, Congress must document a widespread pattern of unconstitutional action by states, and must enact only a congruent and proportional remedy. Among the federal statutes that failed this test were two that protected the aged and the disabled from discrimination.

[2] 517 US 44 (1996).

[3] 521 US 507 (1997).

During 2000 and 2001, eight United States Courts of Appeals applied this line of precedent to determine whether Congress had validly abrogated state immunity in the 1993 Family and Medical Leave Act (FMLA),[4] which, among other things, requires employers to provide unpaid leave for employees who are caring for an ill family member. Seven of the eight easily concluded that the FMLA could not constitutionally abrogate state sovereign immunity—and thus that individuals could not sue states for damages—because the FMLA was not a valid exercise of Congress's Section 5 powers as defined by the Supreme Court.[5] In 2002, the Supreme Court agreed to hear an FMLA abrogation case from the Ninth Circuit, the only appellate court that had upheld the abrogation.[6] Experts confidently predicted a reversal.

But in *Hibbs*, the Court affirmed the Ninth Circuit by a six to three vote, upholding Congress's abrogation of state immunity in the FMLA. The Court purported to rely entirely on existing precedent, holding that the FMLA met the requirements first elucidated in *City of Boerne* and elaborated in the subsequent cases. In the remainder of Part I of this essay, I argue that the seven presumably surprised Courts of Appeals were unequivocally right—and the Ninth Circuit and the Supreme Court wrong—in their application of precedent. Despite the Court's protestations to the contrary, under the precedents the FMLA is indistinguishable from the previously invalidated statutes. In Part II, I discuss the implications of this conclusion, and offer a revision of the Court's test of the scope of congressional power.

B

The Supreme Court's sovereign immunity jurisprudence is byzantine, and the precedents have been subject to much academic

[4] 29 USC §§ 2611–54.

[5] See *Laro v New Hampshire*, 259 F3d 1 (1st Cir 2001); *Lizzi v Alexander*, 255 F3d 128 (4th Cir 2001); *Townsel v Missouri*, 233 F3d 1094 (8th Cir 2000); *Chittister v Department of Community & Economic Development*, 226 F3d 223 (3d Cir 2000); *Kazmier v Widmann*, 225 F3d 519 (5th Cir 2000); *Sims v University of Cincinnati*, 219 F3d 559 (6th Cir 2000); *Hale v Mann*, 219 F3d 61 (2d Cir 2000).

[6] As it happens, the three judges on the panel were among the most liberal on the Ninth Circuit, all appointed by Democratic presidents: Reinhardt (Carter), Tashima (Clinton), and Berzon (Clinton).

criticism.[7] The basic doctrines, however, are fairly simple to state. The Eleventh Amendment, which provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State," means both more and less than it says. Despite its apparent limitation to "suits in law or equity" brought by "citizens of another state," it also prohibits suits in admiralty and suits brought by citizens of the defendant state.[8] Moreover, it embodies a principle that also protects unconsenting states from suits in their own courts.[9] On the other hand, "any suit" does not mean *any* suit; states are immune from suits seeking damages but not from suits that are nominally against state officials and seek purely prospective relief.[10]

By themselves, these doctrines—some of which date back to the turn of the last century—are quite protective of states. But the Rehnquist Court raised the federalism stakes even higher at the end of the twentieth century. Most of the earliest suits had involved cases arising under state law, or cases in which it was not clear that Congress intended federal law to permit suit against an unconsenting state. But what if Congress determined that states *should* be subject to suit for the violation of federal law? Could Congress abrogate the states' immunity, at least to the extent that that immunity was not dictated by the language of the Eleventh

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[7] See, for example, Symposium, *State Sovereign Immunity and the Eleventh Amendment*, 75 Notre Dame L Rev 817 (2000); Edward A. Purcell, Jr., *The Particularly Dubious Case of Hans v. Louisiana: An Essay on Law, Race, History, and "Federal Courts,"* 81 NC L Rev 1927 (2003); James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 Cornell L Rev 1269 (1998); Carlos Manuel Vazquez, *What Is Eleventh Amendment Immunity?* 106 Yale L J 1683 (1997); Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 Colum L Rev 2213 (1996); Daniel Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 Supreme Court Review 1; William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U Chi L Rev 1261 (1989); Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment and State Sovereign Immunity*, 98 Yale L J 1 (1988); William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 Stan L Rev 1033 (1983); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum L Rev 1889 (1983).

[8] *Ex parte New York*, 256 US 490 (1921) (admiralty); *Hans v Louisiana*, 134 US 1 (1890) (in-state citizens).

[9] *Alden v Maine*, 527 US 706 (1999).

[10] *Ex parte Young*, 209 US 123 (1908); *Edelman v Jordan*, 415 US 651 (1974).

Amendment? In two pre-1990 cases, the Court said yes: in *Fitzpatrick v Bitzer*[11] the Court held that states could be sued for damages under Title VII of the 1964 Civil Rights Act, and in *Pennsylvania v Union Gas Company*[12] the Court held that states could be sued for damages under the federal environmental statute CERCLA. In both cases, the plaintiff was a citizen of the defendant state, so that Congress was abrogating not the Eleventh Amendment itself but its extension by the Court.

The primary difference between *Fitzpatrick* and *Union Gas* was the source of Congress's power to enact the underlying statute. Title VII was enacted under Section 5 of the Fourteenth Amendment, which gives Congress the power to "enforce, by appropriate legislation" the substantive provisions of the amendment. CERCLA was enacted under the Commerce Clause. That difference became pivotal in 1996, when the Court overruled *Union Gas* in *Seminole Tribe of Florida v Florida*.[13] The *Seminole Tribe* case held that Congress has no power to abrogate state sovereign immunity unless it does so as a valid exercise of its Section 5 powers; the Commerce Clause gives Congress authority to enact laws, and to apply such laws to the states, but not to abrogate the states' immunity from suit.

By itself, *Seminole Tribe* might not have served to curtail federal power much. In 1996, established precedent gave Congress quite broad latitude in determining how to "enforce" the Fourteenth Amendment. But a year later, in a case that did not involve sovereign immunity, the Court sharply limited Congress's authority under Section 5. In *City of Boerne v Flores*,[14] the Court struck down the Religious Freedom Restoration Act (RFRA) as beyond Congress's authority under Section 5. The Court held that RFRA was an attempt to "enforce" an interest that was not actually protected by the Constitution under the Court's own precedent. "Congress," Justice Kennedy's majority opinion declared, "does not enforce a constitutional right by changing what the right is."[15]

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[11] 427 US 445 (1976).

[12] 491 US 1 (1989).

[13] 517 US 44 (1996).

[14] 521 US 507 (1997).

[15] Id at 519.

Thus began a series of cases in which the primary question was whether, in abrogating state sovereign immunity, Congress was enforcing existing constitutional rights or was instead creating new rights. The former abrogations would be constitutional; the latter would not. The Court eventually refined the test to hold that, acting under Section 5, Congress could outlaw behavior beyond that prohibited by the Constitution itself only if the legislation was shown to be a "congruent and proportional" response to "a widespread pattern" of unconstitutional action by the states.[16] From 1997 until 2003, the Court did not uphold a single federal statute under this test. It struck down abrogations of immunity, as beyond the scope of Section 5, in the Age Discrimination in Employment Act (ADEA),[17] the Americans With Disabilities Act (ADA),[18] the Fair Labor Standards Act (FLSA),[19] the Lanham Act,[20] and the Patent and Plant Variety Protection Remedy Clarification Act.[21]

Then in *Hibbs* the Court upheld the abrogation of state immunity in the FMLA. So how is the FMLA different? Justice Rehnquist's majority opinion suggests two possibilities. First, because gender, unlike age or disability, is a suspect classification subject to intermediate scrutiny, Congress's power may be correspondingly broader when it seeks to remedy or prevent gender discrimination. Additionally or alternatively, Congress may have had sufficient evidence of a pattern of state constitutional violations when it enacted the FMLA. A close comparison between *Hibbs* and the earlier cases shows that neither distinction is sound.

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[16] See *City of Boerne* 521 US at 520 ("congruence and proportionality"), 526 ("widespread and persisting deprivation of constitutional rights"), 531 ("widespread pattern"); *Florida Prepaid Postsecondary Educ Expense Bd v College Savings Bank*, 527 US 627, 639 ("congruence and proportionality"), 645 ("widespread and persisting deprivation of constitutional rights") (1999); *Kimel v Florida Board of Regents*, 528 US 62, 81 ("congruence and proportionality"), 82 ("widespread pattern"), 90 ("widespread pattern"), 91 ("widespread and unconstitutional . . . discrimination") (2000); *Board of Trustees of the University of Alabama v Garrett*, 531 US 356, 365 ("congruence and proportionality"), 368 ("history and pattern"), 372 ("congruence and proportionality"), 373 ("serious pattern"), 373 ("marked pattern"), 374 ("congruent and proportional") (2001).

[17] *Kimel v Florida Board of Regents*, 528 US 62 (2000).

[18] *Board of Trustees of the University of Alabama v Garrett*, 531 US 356 (2001).

[19] *Alden v Maine*, 527 US 706 (1999).

[20] *College Savings Bank v Fla Prepaid Postsecondary Educ Expense Bd*, 527 US 666 (1999).

[21] *Fla Prepaid Postsecondary Educ Expense Bd v College Savings Bank*, 527 US 627 (1999).

C

In *Hibbs*, the Court twice noted that gender classifications are subject to heightened scrutiny.[22] It explained that because age and disability discrimination are judged only under a rational basis test, "it was easier for Congress to show a pattern of state constitutional violations" in support of the FMLA than in support of the ADEA or the ADA.[23] But the doctrine of heightened scrutiny is of limited relevance in this context. It means only that the state must have a greater justification for discriminating on the basis of gender than for discriminating on the basis of other traits. That might mean that each individual *instance* of discrimination is more likely to be unconstitutional, but it is not, under the Court's precedents, a substitute for a congressional finding of a widespread pattern of unconstitutional discrimination.

Imagine, for example, that states impose additional requirements before granting driver's licenses to people over sixty-five and to women of all ages, on the basis of evidence that those groups are somewhat poorer drivers than the rest of the population. The additional requirements are rational, but probably not sufficiently important (or carefully enough tailored) to withstand intermediate scrutiny; thus the requirements are constitutional with regard to age but not with regard to gender. Evidence of such state behavior would therefore support a federal law designed to prevent gender discrimination, but not a federal law designed to prevent age discrimination. Nevertheless, if states (or most states) do *not* place these additional requirements on women seeking to obtain driver's licenses, the hypothetical federal law is not valid under Section 5 regardless of the level of scrutiny. The differing levels of scrutiny focus only on whether particular conduct is unconstitutional, not on whether the states have broadly engaged in the conduct.

In other words, under the requirement that Congress have evidence of a widespread pattern of unconstitutional state discrimination, the level of scrutiny affects only the *unconstitutional* portion of the test: there must still be *discrimination*, by *states*, sufficient to form a *widespread pattern*. Ultimately, then, the question is still reduced to whether there was more evidence of discrimination in

[22] 123 S Ct at 1978, 1982.

[23] Id at 1982.

Hibbs than in the earlier cases, and cannot be resolved by looking purely at the nature of the discrimination itself. As the next section shows, even assuming that all of the evidence before Congress involved gender discrimination that was not carefully tailored to achieve a sufficiently important state interest—and therefore would not survive heightened scrutiny—it still did not add up to any more of a pattern of unconstitutional action by states than did the evidence in the earlier cases.

D

In determining whether there is a widespread pattern of unconstitutional discrimination by states, the Court has carefully defined each of the relevant terms. In particular, in striking down the ADA's abrogation of immunity in *Board of Trustees of the University of Alabama v Garrett*[24] and the ADEA's abrogation in *Kimel v Florida Board of Regents*,[25] the Court made clear that three inquiries limit the type of evidence that can be used to justify a statute under Section 5. *Who*, *what*, and *how much* all matter. In *Hibbs*, however, the Court unquestioningly accepted the same type of evidence that it had previously found insufficient to support the ADA or the ADEA.

Discrimination by whom? In both *Kimel* and *Garrett*, the Court reiterated that Congress may not abrogate state sovereign immunity unless it finds a pattern of unconstitutional action *by the states*. It therefore rejected evidence of discrimination by private companies and by municipalities and other government entities. In *Kimel*, the Court explained that "the United States' argument that Congress found substantial age discrimination in the private sector . . . is beside the point."[26] In *Garrett*, the Court refused to credit a congressional finding that "society" had traditionally discriminated against the disabled, because "the great majority of" the incidents supporting that finding "[did] not deal with the activities of States."[27] The plaintiffs in *Garrett* also argued that evidence of discrimination by governmental actors other than states ought to count toward the

[24] 531 US 356 (2001).

[25] 528 US 62 (2000).

[26] Id at 90.

[27] 531 US at 369.

pattern of discrimination, because local governments, too, are subject to the Fourteenth Amendment. The Court explicitly rejected this argument, noting that because the Eleventh Amendment does not protect local governments, "[i]t would make no sense to consider constitutional violations on their part."[28]

Under the precedent, then, Congress should not be able to rely on evidence of discrimination by "society," by private parties, or by local governments, nor should it be allowed to extrapolate from such evidence to conclude that states must also be discriminating. But in *Hibbs*, the Court casually relied on just such evidence. The evidence cited by the Court included a 1990 Bureau of Labor Statistics study of private-sector employees and general testimony that the public and private sectors were similar.[29] The latter statements, however, were made not during hearings on the FMLA, but during 1986 hearings on a different bill, never enacted, which would have mandated parenting leave rather than leave to care for an ill family member. The Court cited no support for its bald declaration that evidence of parenting-leave discrimination was relevant to a finding on family-care leave because both "implicate the same stereotypes."[30] Nor did it explain why evidence from 1986 was sufficient to justify a different law enacted seven years later; this omission is particularly glaring in light of the fact that between 1986 and 1993 more than half the states had adopted some form of family-care leave.[31] Thus, the extrapolation from private-sector discrimination to public-sector discrimination was no more warranted when Congress passed the FMLA than when it enacted the ADEA or the ADA. Under the precedents, the Court should have demanded more direct evidence of state discrimination.

What kind of discrimination? The crux of *City of Boerne* was that the definition of the scope of constitutional protection—and thus of constitutional violations—was a task for the judiciary rather than the legislature. It was to guard against legislative redefinition of constitutional rights that the Court required Congress to document a widespread pattern of state transgressions against the Constitution. A showing of state behavior that Congress thinks repre-

[28] Id at 368.

[29] 123 S Ct at 1979 & n 3.

[30] Id at 1979 n 5.

[31] Id at 1989 (Kennedy dissenting).

hensible, but that is not unconstitutional, does not justify passage of legislation under Section 5. The Court has repeatedly emphasized, by word and deed, just how sharp this dividing line is.

In *City of Boerne* itself, the distinction between constitutional and statutory protection was the distinction between intentional religious discrimination and generally applicable policies with a disparate impact on religious observance. Shortly prior to the enactment of RFRA, the Court held in *Employment Division v Smith*[32] that, as a general rule, only statutes that intentionally target religious practices violate the Constitution. RFRA, on the other hand, required states to justify—by establishing a compelling interest—even neutral statutes with an incidental effect on religious practices. Congress heard evidence that many states had statutes and other policies with a disparate impact on religious practices. The Court, however, found such evidence insufficient to establish a pattern of constitutional violation: it demanded evidence that states were deliberately interfering with religious practices, whether by targeted statutes or by statutes whose generality was a mere pretext for religious hostility.[33] Evidence that states failed to exempt or accommodate religious believers who were affected by generally applicable laws was irrelevant because the failure to exempt or accommodate does not violate the Constitution.

City of Boerne is admittedly unusual: the enactment of RFRA was an obvious attempt by Congress to reverse the Supreme Court's holding in *Smith*. This threat to the Court's interpretive supremacy might have led it to overstate the limits on Section 5.[34] Subsequent cases, however, have continued to insist on the same narrow

[32] 494 US 872 (1990).

[33] 521 US at 530–31. The lack of evidence was an important factor in the Court's invalidation of RFRA. In *Boerne* the Court stated that the "lack of support in the legislative record . . . is not RFRA's most serious shortcoming," id at 532, and then focused on the lack of congruence and proportionality between the right and the remedy. By 2000, however, the Court had apparently refined its views of the nature of the *Boerne* requirements, noting that *Boerne* had rested on both grounds (without distinguishing between them in importance). *Kimel v Florida Board of Regents*, 528 US 62, 82 (2000). Later cases also tended to focus more on the question of congressional evidence of a pattern of state violations than on the issue of proportionality.

[34] Several commentators have noted that the Court seemed to view RFRA as deliberate defiance of the Court by Congress. See, for example, Robert C. Post and Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 Yale L J 441, 461 (2000); Michael C. Dorf and Barry Friedman, *Shared Constitutional Interpretation*, 2000 Supreme Court Review 61, 72.

reading of Congress's powers, even where Congress clearly meant no disrespect to the Court. Whether the Court would have developed the same rigid test had the Section 5 question first arisen in the context of an Eleventh Amendment case is a matter for speculation. But once the test was announced in *City of Boerne*, the Court apparently found no need to modify or relax it even in the absence of direct congressional challenges to the Court's authority.

Garrett, for example, provides confirmation that the difference between intentional discrimination and disparate impact is crucial in evaluating whether Congress has evidence of discrimination by the states. In concluding that the ADA would not be a proportional and congruent remedy even if Congress had found sufficient evidence of a pattern of unconstitutional discrimination against the disabled, the Court focused on the provision in the statute that forbids "'utilizing standards, criteria, or methods of administration' that disparately impact the disabled."[35] This provision, among others, was unwarranted in part because evidence of disparate impact "is insufficient [to establish a constitutional violation] even where the Fourteenth Amendment subjects state action to strict scrutiny."[36] Similarly, much of the evidence of state transgressions presented by Justice Breyer's dissent, but dismissed by the majority, involved state failures to make accommodations, a failure that essentially amounts to refusing to remedy a known disparate impact. Toleration of even a known disparate impact is insufficient to establish a constitutional violation, and thus cannot be used to support a congressional determination that states are violating the Constitution (unless Congress has evidence that the practice with a disparate impact was adopted *because of* rather than *in spite of* its impact—evidence that did not exist with regard to either the ADA or the FMLA).[37]

A somewhat different distinction between statutory and constitutional protection led to the invalidation of Congress's attempt to subject the states to suit for patent infringement. In *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank*,[38] the Court adopted a narrow definition of what constitutes unconstitu-

[35] 531 US at 372.

[36] Id at 373.

[37] *Washington v Davis*, 426 US 229 (1976).

[38] 527 US 627 (1999).

tional state action with regard to patent infringement. The Court has long held that a patent is a form of property protected by the Fourteenth Amendment. But in *Florida Prepaid*, the Court focused more specifically on whether the mere act of infringement is a taking. It held that since the amendment prohibits states from taking property only if they do so without due process, Congress could not abrogate state immunity from patent infringement suits unless it had evidence that states did not themselves provide adequate remedies for infringement. In the absence of such evidence the Court invalidated the abrogation.[39]

These cases make clear that the Court's Section 5 jurisprudence demands a detailed and specific identification of the state's unconstitutional conduct. Conduct that is merely similar or related to unconstitutional conduct is insufficient, lest Congress slip over the line into defining rather than enforcing constitutional rights. But in *Hibbs*, the Court was not only vague about the exact nature of the states' unconstitutional conduct, it also relied explicitly on evidence of state behavior that the Court has previously held to be *constitutional.*

In prior cases, the Court demanded that Congress identify precisely the constitutional violation it was attempting to remedy: "the first step" in determining the constitutionality of an abrogation of immunity "is to identify with some precision the scope of the constitutional right at issue."[40] In *Hibbs*, however, even the Court seemed unable to pin down exactly why existing state family-leave policies were unconstitutional. It might be because such policies sometimes discriminated against men by allowing women but not men to take family leave;[41] it might be because states relied on "invalid gender stereotypes";[42] it might be because the policies "perpetuated" such stereotypes;[43] it might be because the absence of an affirmative, gender-neutral family-leave policy gives employers an incentive to discriminate in hiring and promotion;[44] it might

[39] Concededly, in *Florida Prepaid* there was little evidence of *any* patent infringement by states. The Court nevertheless carefully explained that evidence of mere infringement would not be enough in any case.

[40] *Garrett*, 531 US at 365.

[41] 123 S Ct at 1979.

[42] Id.

[43] Id at 1981 n 10.

[44] Id at 1982–83.

be simply because more women than men desire family leave;[45] or it might be because the stereotypes "created a self-fulfilling cycle" that led more women than men to desire family-care leave.[46] For each of these descriptions, the Court cited a small amount of empirical evidence in support. Although I argue later that even added together this evidence should have been insufficient to show a widespread pattern, the Court's jumbling of what might be called different theories of the nature of gender discrimination is in stark contrast to its rigid refusal to credit subtle forms of discrimination against the aged or the disabled.[47]

Justice Kennedy's concurrence in *Garrett*, which was joined by Justice O'Connor, highlights this contrast. Justice Kennedy sensitively described the type of discrimination that the ADA was designed to remedy:

> Prejudice, we are beginning to understand, arises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different from ourselves. . . . There can be little doubt, then, that persons with mental or physical impairment are confronted with prejudice which can stem from indifference or insecurity as well as from malicious ill will.[48]

Despite this recognition that "discrimination" takes many forms, Justices Kennedy and O'Connor nevertheless joined the majority in holding that the ADA was not validly enacted under Section 5. The demands of state sovereignty impose a higher burden on Congress: "The failure of a State to revise policies now seen as incorrect . . . does not always constitute the purposeful and intentional action required to make out a violation of the Equal Protection Clause."[49] It is difficult to reconcile this insistence on a narrow definition of discrimination for Section 5 purposes—despite an awareness of its limitations—with the multiple descriptions of gen-

[45] Id at 1978 n 2, 1983.

[46] Id at 1982.

[47] One commentator finds "truly startling" the "extraordinarily generous account of the constitutional harm of sex discrimination" in *Hibbs*. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Courts, Culture, and Law*, 117 Harv L Rev 4, 17 (2003).

[48] 531 US at 374–75 (Kennedy concurring).

[49] Id at 375.

der discrimination in *Hibbs*.[50] Indeed, Justice Kennedy himself apparently recognized the inconsistency, dissenting in *Hibbs* on the ground that the FMLA was no more justified under Section 5 than was the ADA. Justice O'Connor, however, joined both Justice Kennedy's concurring opinion in *Garrett* and Chief Justice Rehnquist's majority opinion in *Hibbs*, creating a conflict difficult to explain.

Even more difficult to understand is why the *Hibbs* Court found some of the evidence relevant at all. The Court has consistently held that state practices or policies that have a disparate impact on women or minorities are neither facially unconstitutional, nor subject to heightened scrutiny, unless they were adopted intentionally to discriminate.[51] And the Court made clear in *Geduldig v Aiello*[52] and *General Electric Company v Gilbert*[53] that distinctions based on child*bearing* ability are not intentionally discriminatory but merely have a disparate impact. Drawing a distinction between "pregnant women and nonpregnant persons" is not gender discrimination, according to precedent.[54] One would think, therefore, that state employment practices that have a disparate impact on women because of societal patterns in child*rearing* (or other family care) are similarly constitutional.

Nevertheless, in *Hibbs* the Court relied heavily on evidence that inadequate family-leave policies have a disparate impact on women. The Court cited approvingly the FMLA's own definition of the "gender-based discrimination" it was designed to remedy: "'due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men.'"[55] The Court also

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[50] Compare Philip P. Frickey and Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 Yale L J 1707, 1726 (2002) (suggesting that the Court in *Garrett* "applied to the legislative history a time-honored lawyerly shredding technique, the piecemeal critique, in which the evidence was examined in segmented fashion rather than for its cumulative impact").

[51] See *Washington v Davis*, 426 US 229 (1976); *Personnel Administrator of Massachusetts v Feeney*, 442 US 256 (1979).

[52] 417 US 484 (1974).

[53] 429 US 125 (1976).

[54] *Geduldig*, 417 US at 497 n 20.

[55] 123 S Ct at 1978, quoting 29 USC § 2601(a)(5).

pointed to evidence that "12 States provided their employees no family leave . . . to care for a seriously ill child or family member," and "many States provided no statutorily guaranteed right to family leave."[56] It explained that an apparently gender-neutral policy of providing leave to *neither* men nor women "would exclude far more women than men from the workplace," because "[t]wo-thirds of the nonprofessional caregivers for older, chronically ill or disabled persons are women."[57] All of this evidence establishes only that a number of states adopted policies with a disparate impact on women. The Court did not suggest that any of these policies were deliberately intended to discriminate. In establishing a pattern of state constitutional violations, then, this evidence should have been irrelevant in the same way that evidence of state refusals to accommodate religious practices or disabilities was irrelevant to the validity of RFRA or the ADA. Evidence of failure to remedy a disparate impact is simply not enough, under the precedents, to conclude that states are violating the Constitution by intentionally discriminating.

A second limit on the type of discrimination that constitutes evidence of a state pattern is that it must be exactly the conduct for which Congress seeks to impose liability on the states. In *Garrett*, the Court insisted that Congress identify a pattern of state discrimination in employment, and rejected evidence of state discrimination in other areas.[58] *Hibbs* again ignored this limit, justifying the FMLA's family-leave policy by interchangeably citing evidence of general employment discrimination against women, evidence of discrimination in the availability of parental leave, and evidence of the availability of postpregnancy medical leaves of different lengths.

Under the precedents, then, much of the evidence that the Court relied on to find a pattern of unconstitutional action by the states should have been excluded. With or without this evidence, however, taking the approach of the earlier cases would suggest

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[56] Id at 1980–81. The Court includes statutory cites for only four states to support its statement that "many" states provided no guaranteed leave, id at 1981 n 8, and even this number is inflated because two of the states (Colorado and Kansas) were counted among the twelve that lacked any family-leave policies. Compare id at 1981 n 7 with id at 1981 n 8.

[57] Id at 1983.

[58] 531 US at 368, 372 n 7.

that there was insufficient evidence to find a *widespread pattern* of state violations in any case. I conclude this section by contrasting the amount of evidence found sufficient in *Hibbs* with the amount of evidence found insufficient in *Garrett* and *Kimel*.

How much evidence of discrimination? The question of the amount of evidence necessary to support a congressional exercise of power under Section 5 raises several issues. Presumably, there is some threshold below which the evidence does not support the finding of a "widespread" pattern of state constitutional violations. As noted above, there is also the question of which demonstrated instances of classification or distinction should count as examples of unconstitutional behavior. But before even reaching these questions, we must identify indicia of reliability sufficient to credit the evidence. Thus, in previous cases the Court has also concerned itself with the type of evidence heard by Congress.

The Court has consistently refused to accept "anecdotal" or "isolated" statements as proof of discrimination.[59] In *Garrett*, the Court dismissed "half a dozen examples" of arguably unconstitutional discrimination.[60] In *Florida Prepaid*, the Court found the dearth of actual lawsuits prior to the enactment of the statute to be evidence that states were not behaving unconstitutionally.[61] In *Hibbs*, by contrast, the Court's finding of discrimination beyond that documented by state law—discussed below—rested almost entirely on isolated statements in testimony that ranged over several years.[62] As far as the Court was concerned, moreover, not a single lawsuit challenging state policies was necessary to establish that states were rampantly violating the Constitution.

The more important question, however, is whether the evidence supports an inference of a "widespread pattern" of state violations. Two examples of patent infringement suits against the states (and eight such suits over 110 years) were insufficient to establish a pattern in *Florida Prepaid*.[63] Examples of arguably unconstitutional conduct in five states were insufficient in *Garrett*.[64] In *Kimel*, the Court

[59] See *City of Boerne*, 521 US at 531; *Kimel*, 528 US at 82, 89; *Garrett*, 531 US at 370.

[60] 531 US at 369. The Court then lists only five such examples, suggesting that "half a dozen" was a rough rounding.

[61] 527 US at 640.

[62] 123 S Ct at 1979–80.

[63] 527 US at 640.

[64] 531 US at 369–70.

held that proof of widespread unconstitutional action in California governmental agencies would not establish a pattern and thus "would have been insufficient to support Congress's 1974 extension of the ADEA to every State of the Union."[65] Similarly, in *City of Boerne* the Court made a point of contrasting the voting rights legislation upheld in *South Carolina v Katzenbach*,[66] which targeted only the limited number of jurisdictions in which constitutional violations "had been most flagrant."[67] At the time *Katzenbach* was decided, seven states and parts of four others were within the coverage of the statute.[68] The analysis in *City of Boerne* thus implies that violations by seven to eleven states are not sufficient to establish a widespread pattern justifying broad remedies, but only support limited congressional action targeted at the offending states.[69]

At the time the FMLA was adopted, somewhere between twenty-one and thirty states already had gender-neutral family-leave policies.[70] Of the remaining states, the *Hibbs* Court pointed to a total of fourteen that "provided their employees no family leave" and seven that had "childcare leave provisions that applied to women only."[71] As to the former, providing no family leave to either male or female employees, of course, is gender-neutral and constitutional, and so cannot provide evidence of a pattern of unconstitutional action by states. Of the seven that allegedly provided gender-based childcare leave, four in fact provided only *pregnancy disability* leave.[72] Providing leave for those who are disabled—whether by pregnancy and delivery or because of some other temporary medical condition—is not the same as providing childcare or family-care leave only to women; there is no suggestion that the four states failed to provide comparable leave to men who were temporarily disabled. Moreover, as noted earlier, the Court's own precedents hold that discrimination on the basis of pregnancy is

[65] 528 US at 90.

[66] 383 US 301 (1966).

[67] *City of Boerne*, 521 US at 532–33.

[68] See *Katzenbach*, 383 US at 318.

[69] Indeed, at least one article suggests that Congress will *never again* be able to amass the amount of evidence that it had when enacting the Voting Rights Act. Frickey and Smith, 111 Yale L J at 1723 (cited in note 50).

[70] See *Hibbs*, 123 S Ct at 1989 (Kennedy dissenting).

[71] Id at 1980–81 & nn 6–8 (majority).

[72] See id at 1980 n 6 (majority opinion), 1972 (Kennedy dissenting).

constitutionally permitted, so even if the four states had provided disability leave *only* to those employees whose temporary disability was caused by pregnancy, they cannot count toward the pattern of unconstitutional action.

That leaves exactly three states whose childcare-leave policies likely violated the Equal Protection Clause.[73] It is hard to see how constitutional transgressions by three states form a "widespread pattern" of unconstitutional state conduct, especially in light of the precedent and the large number of states with gender-neutral policies. Those three states, moreover, would not necessarily get a free ride. In addition to the possibility of direct constitutional challenges to their policies, *City of Boerne's* approval of *Katzenbach* shows that Congress could have imposed on the three offending states—but not on constitutionally innocent states—provisions identical to those of the FMLA. Even if we count official state policy more heavily than unsanctioned behavior by state actors—which the Court did not appear to do—three states is still a very small number. But it was enough for the *Hibbs* majority.

E

Some readers may remain unpersuaded that *Hibbs* cannot be reconciled with precedent. It is, one might contend, at the edge of the precedent but not beyond it.[74] Whether or not *Hibbs* is the case that stretches precedent to the breaking point hardly matters, however. The Court's rigid requirement that Congress find a widespread pattern of unconstitutional state action before exercising its powers under Section 5 will inevitably lead to a situation in which the Court upholds another statute that cannot possibly meet that test. Two possibilities are already working their way through the lower courts.

First, the Tenth Circuit has, since *Hibbs*, invalidated the congressional abrogation of immunity for suits brought under a different section of the FMLA. The court held that requiring employers to allow leave for an employee's own illness does not address gen-

[73] See id at 1980 n 6 (majority opinion), 1991 (Kennedy dissenting). As noted earlier, this still does not show that even these states discriminated, or were likely to discriminate, in the provision of family-care leave rather than parenting leave.

[74] An argument in favor of this position may be found in Post and Siegel, 112 Yale L J at 1972–80 (cited in note 34).

der discrimination and is therefore not a valid enactment under Section 5.[75] It would be difficult to reach a contrary result under the current doctrine, but allowing states to be sued for failing to provide family-care leave while protecting them from suits for failing to provide medical leave is not likely to be a satisfactory result for the Court that decided *Hibbs*.

Another abrogation, currently percolating through the federal courts, is also likely to pose difficulties under current doctrine. Under Title VII, employers can be sued for employment practices that have a disparate impact on racial minorities. Lower courts have, so far, consistently allowed disparate-impact suits against states despite claims of sovereign immunity.[76] Under the Court's precedents, however, this is a problematic abrogation. Since disparate impact itself does not violate the Equal Protection Clause, Congress would have needed evidence that states were using practices with a disparate impact as a pretext, in order to intentionally discriminate. In 1973, when Congress extended Title VII to the states, such evidence may or may not have existed; but even if it did, Congress did not find it necessary to include such evidence in the legislative record (in large part because, with *City of Boerne* some twenty years in the future, it didn't know it had to).[77] As in *Hibbs*, then, a Court resistant to immunizing states from Title VII suits alleging disparate impact would have a difficult time finding the requisite legislative justification. Nevertheless, it is hard to imagine that the Court would invalidate the abrogation: Title VII has played a prominent role in mitigating the shameful history of race relations in the United States, is popular with almost all segments of the population, and is virtually sacrosanct. Striking down the abrogation of immunity in that context would inevitably—and intolerably—be read as a holding that the government is allowed to discriminate on the basis of race. And given the Court's claim in *Hibbs* that it was simply applying precedent—and the fact that

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[75] *Brockman v Wyoming Dept of Family Servs*, 342 F3d 1159 (10th Cir 2003). This is the first case to be decided after *Hibbs*, but other courts invalidated this abrogation prior to *Hibbs*. See cases cited in id at 1165 & n 3.

[76] See *In re Employment Discrimination Litigation*, 198 F3d 1305 (11th Cir 1999); *Okrhulik v University of Arkansas*, 255 F3d 615 (8th Cir 2000).

[77] The lower courts that have rejected sovereign immunity arguments in disparate-impact cases point only to evidence that in 1973 states were using practices with a disparate impact, not evidence that they were intentionally discriminating. See cases cited in note 76.

lower courts rejecting sovereign-immunity arguments in disparate-impact cases have unsurprisingly claimed to be following pre-*Hibbs* Supreme Court precedent—it is likely that a Supreme Court decision upholding the Title VII abrogation would treat precedent similarly.

The problem remains then: whether in *Hibbs* or in some future case, the evidence the Court finds sufficient to uphold an abrogation will be no stronger in quality or quantity from that which led it to invalidate other statutes. What are we to make of the Court's attempt to portray its decision as simply an unproblematic application of precedent? It is to that question that I now turn.

II

The result in *Hibbs* may be considered laudable, depending on whether we prefer to protect employees caring for ill family members or to protect sovereign states when the two interests conflict. So let us assume that the FMLA (including the abrogation of immunity) is a statute that should, indeed, have been upheld by the Supreme Court. The question is whether that assumption justifies the Court's decision. What *should* the Court do when the result that it believes correct is foreclosed by precedent? Three other cases from the Court's 2002 Term offer some illuminating guidance about different Justices' answers to that question. I begin by briefly examining those three cases, and then apply their lessons to the issue of congressional abrogation of state immunity.

A

In some ways, one could not imagine a case further from *Hibbs* than *Demore v Kim*.[78] In *Kim*, the five Justices often labeled as conservative upheld the detention of a deportable alien, pending his deportation hearing, despite the absence of any determination that he was either dangerous or posed a flight risk. This result would be neither surprising nor problematic but for a case two years earlier: in June 2001, the Court in *Zadvydas v Davis*[79] held that the government could not indefinitely detain an alien whose legally

[78] 123 S Ct 1708 (2003).

[79] 533 US 678 (2001).

mandated deportation was foiled by the unwillingness of any country to accept him. While the two cases are distinguishable on their facts, they are utterly inconsistent in tone and approach. In *Zadvydas*, Justice Breyer's majority opinion held that "the Due Process Clause applies to all 'persons' within the United States, including aliens."[80] It explicitly rejected the dissent's suggestion that removable aliens are entitled only "to be free from detention that is arbitrary and capricious."[81] In *Kim*, by contrast, the Court deferred to Congress's decision not to utilize individualized hearings on dangerousness or risk of flight, noting that "when the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal."[82] Chief Justice Rehnquist's majority opinion further stated that "this Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens"—and cited in support Justice Kennedy's dissenting opinion in *Zadvydas*.[83] Indeed, the opinion in *Kim* cites Justice Kennedy's dissent in *Zadvydas* for legal support more than it cites the majority opinion. And, as with *Hibbs*, the Supreme Court's application of the precedent was unusual: four of the five Courts of Appeals that had reached the question had found the absence of a hearing for predeportation detention unconstitutional under *Zadvydas*; the only court upholding such detention had ruled before *Zadvydas* was decided.[84]

Does this mean that *Kim* was wrongly decided? No, no more than my critique of the opinion in *Hibbs* demonstrates that it was wrong. I simply suggest that *Kim* was a misapplication of precedent. The Court—in particular, Justice O'Connor, who was the only Justice to join the majority in both *Zadvydas* and *Kim*—had changed its mind about the scope of congressional authority over aliens. The reason for the change in views is not hard to fathom: between the June 2001 decision in *Zadvydas* and the January 2003

[80] Id at 693.

[81] Id at 694–95 (majority opinion), 721 (Kennedy dissenting).

[82] 123 S Ct at 1720.

[83] Id at 1717.

[84] See *Welch v Ashcroft*, 293 F3d 213 (4th Cir 2002); *Hoang v Comfort*, 282 F3d 1247 (10th Cir 2002); *Kim v Zigler*, 276 F3d 523 (9th Cir 2002), rev'd sub nom *Demore v Kim*, 123 S Ct 1708 (2003); *Patel v Zemski*, 287 F3d 299 (3d Cir 2001); but see *Parra v Perryman*, 172 F3d 954 (7th Cir 1999) (upholding detention before *Zadvydas*).

decision in *Kim*, America had become more sensitive to the dangers that aliens might pose. Nevertheless, the Court in *Kim* did not mention September 11, but instead pretended (as it had in *Hibbs*) that it was simply applying established precedent.

Like *Hibbs*, *Kim* illustrates the Court's misuse of precedent, but it does not offer any alternatives for a majority determined to reach a result foreclosed by precedent. In another case from the 2002 Term, Justice O'Connor's majority opinion exhibits the same problematic use of precedent as do *Hibbs* and *Kim*, but it can be contrasted with the opinions of several other Justices in the majority, hinting at an alternative approach to the question of what to do with unpleasant precedent.

In *Grutter v Bollinger*,[85] a slim majority upheld the University of Michigan Law School's affirmative action program. Purportedly applying strict scrutiny, the Court found that the program was narrowly tailored to accomplish a compelling state interest in obtaining a racially diverse law school class. While a detailed discussion of *Grutter* is beyond the scope of this article, even a cursory examination demonstrates that this is not the strict scrutiny that the Court has used in the past.

Justice O'Connor, in finding the program narrowly tailored, deferred to the law school's own determination of the benefits of a racially diverse student body, the lack of adequate alternative methods for obtaining a racially diverse student body, the detrimental effect alternative methods might have on the law school, and the temporary nature of the program.[86] Not since *Korematsu v United States*[87] has the Court upheld a racially discriminatory state policy under strict scrutiny, nor has it ever suggested that the challenged program is due any deference from the Court—instead it has always demanded that such programs be subjected to the most searching examination.[88]

The majority in *Grutter* also uncritically accepted the law school's representation that it was not seeking a fixed percentage

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[85] 123 S Ct 2325.

[86] See id at 2338, 2339–40, 2345, 2346.

[87] 323 US 214 (1944).

[88] See, for example, *Adarand Constructors, Inc. v Pena*, 515 US 200 (1995); *City of Richmond v J.A. Croson Co.*, 488 US 469 (1989); *Wygant v Jackson Board of Education*, 476 US 267 (1986).

of minority students (i.e., an unconstitutional quota), but rather a "critical mass" that would prevent minority students from feeling isolated.[89] That "critical mass," however, varied by racial group: for Native Americans the critical mass ranged from 13 to 19 students, for Hispanics it was 47 to 56, and for African Americans it was between 91 and 108.[90] This "critical mass" of each group was, in almost every year (of a six-year period), within half a point of the percentage of applicants of that racial group.[91] Further, the admissions director consulted daily reports on the percentage of minority applicants admitted during the months-long admissions process.[92] This evidence at least raises the question whether the law school was candid in its assertion that it was not imposing racial quotas, but the majority did not probe that assertion.

Four other Justices—Justices Stevens, Souter, Ginsburg, and Breyer—joined Justice O'Connor's opinion in *Grutter*. Their views on the precedent, however, apparently differed from hers. Justice Ginsburg wrote a dissenting opinion in a companion case, *Gratz v Bollinger*[93] (which invalidated the University of Michigan's undergraduate affirmative action program). Joined in relevant part by Justices Souter and Breyer, Justice Ginsburg took issue with the majority's insistence "that the same standard of review controls judicial inspection of all official race classifications."[94] Instead, she suggested, "[a]ctions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its after effects have been extirpated."[95] Justice Stevens has long advocated a similar approach, suggesting that Equal Protection challenges be resolved by using a sliding scale rather than the current regime of three independent levels of scrutiny.[96] These Justices, then, joined Justice O'Con-

[89] 123 S Ct at 2339, 2343.

[90] Id at 2366 (Rehnquist dissenting).

[91] Id at 2368.

[92] Id at 2343 (majority opinion), 2372 (Kennedy dissenting).

[93] 123 S Ct at 2411 (2003).

[94] Id at 2442 (Ginsburg dissenting).

[95] Id at 2444.

[96] See, for example, *Craig v Boren*, 429 US 190, 211–12 (1976) (Stevens concurring):

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not

nor in finding the law school's program constitutional, but did not need to assert that the program should survive strict scrutiny—which, under the precedent, it most certainly should not have.[97]

An illuminating contrast to *Hibbs*, *Grutter*, and *Kim* may be found in another of the Court's decisions during the 2002 Term. In *Lawrence v Texas*,[98] six Justices voted to invalidate Texas's law prohibiting homosexual (but not heterosexual) sodomy. Like the outcome in *Hibbs*, this is a result that many applaud. But unlike *Hibbs*, only one Justice tried to pretend that the decision was consistent with earlier precedent. Justice Kennedy's majority opinion instead forthrightly overruled the inconsistent precedent of *Bowers v Hardwick*.[99] Only Justice O'Connor, concurring in the judgment, distinguished *Hardwick*. A brief examination of both cases demonstrates that Justice O'Connor's (mis)treatment of precedent in *Lawrence* is similar to the (mis)treatment of precedent in her *Grutter* opinion and in Chief Justice Rehnquist's opinion in *Hibbs* (which she joined).

In *Hardwick*, Justice White's opinion for the Court (which Justice O'Connor also joined) upheld a Georgia statute that criminalized sodomy between consenting adults. Those challenging the law suggested that it lacked a rational basis because it was based solely on the Georgia legislature's view that homosexual conduct was immoral. The Court explicitly rejected this argument that "majority sentiments about the morality of homosexual conduct should be declared inadequate" to provide a rational basis for the law.[100] Moreover, in *Hardwick* the Court framed the issue as "whether the Federal Constitution confers a fundamental right

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describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.

See also *Adarand v Pena*, 515 US 200, 245–46 (1995) (Stevens dissenting) ("a single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of 'equal protection'").

[97] There is still the question why these four Justices joined Justice O'Connor's opinion rather than simply concurring in the result. The explanation is, I believe, institutional: a fractured case with no majority opinion would simply replicate *Regents of the University of California v Bakke*, 438 US 265 (1978), and all of the uncertainty it generated. However difficult to interpret and apply, Justice O'Connor's opinion in *Grutter* is at least an opinion for the Court.

[98] 123 S Ct 2472 (2003).

[99] 478 US 186 (1986), overruled in *Lawrence*, 123 S Ct at 2484.

[100] 478 US at 196.

upon *homosexuals* to engage in sodomy,"[101] suggesting that it focused on purely homosexual conduct despite the fact that the challenged Georgia statute prohibited all sodomy. Indeed, the Court explicitly declined to decide the constitutionality of the statute as applied to a married heterosexual couple.[102] Yet in *Lawrence*, Justice O'Connor found that distinguishing between heterosexual and homosexual sodomy lacked a rational basis.[103] If a majority of Georgia citizens can ban sodomy simply because they think homosexuality is immoral, and the Court in upholding the ban does not care whether it could constitutionally be applied to heterosexuals, it is hard to see how a morality-based ban on homosexual sodomy lacks a rational basis.

All eight of the other Justices agreed that adhering to *Hardwick* would require the Court to uphold the Texas statute. So the five Justices who found such a result intolerable under our Constitution refused to hide behind false distinctions, and instead bluntly declared *Hardwick* to be flawed and overruled it. (The other three dissented, and would have upheld the Texas statute.) Whether one agrees with the overruling or not, at least it confronts the precedent rather than distorting it.

In *Hibbs* and these three other high-profile cases, then, some Justices seemed determined to uphold precedent even when it required them to twist that precedent beyond recognition in order to reach particular results. In two of the cases, other Justices who reached the same results chose a different course, implicitly or explicitly rejecting the precedent. What might this phenomenon teach us about the Court's Section 5 jurisprudence?

B

I draw two inferences from *Hibbs* and these additional illustrative cases. The first is obvious: faced with uncomfortably constraining precedent, the Court has a choice between dissembling or forthrightly admitting error. Too often, some current Justices seem to prefer the former. This lack of candor is unfortunate for several reasons. To begin with, it undermines the normative legitimacy

[101] Id at 190 (emphasis added).

[102] Id at 188 n 2.

[103] 123 S Ct at 2484.

of courts. It transforms the rule of law into the rule of men by allowing judges to reach their preferred results without confronting doctrinal inconsistencies. In a democratic regime, dissembling by government actors also deprives the citizenry of information necessary for deliberation and decision making. Lack of candor is particularly dangerous in unelected judges, because for them visible rationality is a substitute for democratic accountability. Distortion of precedent thus exacerbates the tension between popular democracy and constitutional democracy by disguising the reasons for judicial decisions. At a more practical level, it creates great uncertainty by freeing courts, especially lower courts, from any real constraints that might be imposed by precedent. Moreover, a lack of constraints can make more problematic the judiciary's countermajoritarian aspect, and thus leave the courts more vulnerable to criticism.

The second inference from *Hibbs* is more subtle: the more apparent the dissembling—the easier it is to show that adherence to precedent demands a different result than that reached by the Court—the clearer the conclusion that the precedent itself is flawed. Every manifest distortion of precedent costs the Court in loss of legitimacy, and the expenditure is only justified when the course dictated by precedent is even more intolerable. If adherence to precedent demands an intolerable result, however, there must be something seriously wrong with the precedent.

Thus, what we learn from *Hibbs* is that the Court's sovereign immunity doctrine is a mistake. Combining the limits of *Seminole Tribe* and *City of Boerne* constrains Congress in ways that even some Justices most supportive of states' rights cannot stomach.

Two alternatives present themselves. The more radical is to overrule *Seminole Tribe*. The academic literature and the dissenting opinions in *Seminole Tribe* and *Alden v Maine* provide strong reasons in favor of that approach. Limiting Congress to its Section 5 powers in abrogating state sovereign immunity is a poor interpretation of the relevant constitutional provisions.[104] I have little to contribute here to that argument, although I think it is correct. However, it is an argument that has no chance of persuading the present Court.

[104] See *Alden v Maine*, 527 US 706, 762–808 (1999) (Souter dissenting); *Seminole Tribe of Florida v Florida*, 517 US 44, 101–85 (1996) (Souter dissenting); and literature cited in both cases.

If *Seminole Tribe* remains good law, then the alternative is to overrule or change current doctrine on Congress's Section 5 powers. Along those lines, others have criticized *City of Boerne* and its progeny. These critiques, however, are essentially all variants of one of two complaints: that the Court should not arrogate to itself the sole power to determine the meaning of the substantive provisions of the Fourteenth Amendment or that the Court should give more deference to Congress's determination that a particular law is necessary to prevent or remedy constitutional violations.[105] The persuasiveness of these critiques ultimately rests on one's view of judicial supremacy: to what extent should the Court be the final, authoritative, or sole interpreter of the Constitution, and when—if at all—should it defer to congressional judgments? Interesting as that debate may be, it appears to have had no effect on the Court itself; commentators have recently noted that the Court's self-aggrandizement actually appears to be increasing.[106]

I therefore propose instead to accept the premise that it is the Court's job, and not Congress's, to determine the boundaries of the substantive provisions of the Fourteenth Amendment (as well as of the rest of the Constitution), and that demanding close congruence between the perceived problem and the enacted remedy is the way to enforce that division of authority. But the *City of Boerne* test is not the only possible method of ensuring that Congress does not transgress constitutional bounds. The majority opinion in *Hibbs*, for all its flaws, can be used to craft a revised

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[105] See, for example, John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* (California, 2002); Post and Siegel, 112 Yale L J (cited in note 34); Robert C. Post and Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 Ind L J 1 (2003); Susan Bandes, *Fear and Degradation in Alabama: The Emotional Subtext of University of Alabama v. Garrett*, 5 U Pa J Const L 520, 532–34 (2003); Frickey and Smith, 111 Yale L J (cited in note 50); William W. Buzbee and Robert A. Schapiro, *Legislative Record Review*, 54 Stan L Rev 87 (2001); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan L Rev 1127 (2001); Ruth Colker and James J. Brudney, *Dissing Congress*, 100 Mich L Rev 80 (2001); Christopher Bryant and Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes*, 86 Cornell L Rev 328 (2001); Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court's "Strict Scrutiny" of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 Vill L Rev 1091 (2001). For a defense of the federalism principles underlying the Section 5 abrogation cases, see Lynn A. Baker and Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 Duke L J 75 (2001).

[106] See, for example, Larry D. Kramer, *Foreword: We the Court*, 115 Harv L Rev 5, 128–58 (2001).

test that keeps intact the results in the prior cases (with the possible partial exception of *Garrett*) but nevertheless upholds the FMLA as a valid exercise of Congress's Section 5 authority. Note again that the soundness of any of the decisions or of the underlying constitutional vision is beside the point; my quarrel with the Court here is not its results (or its interpretation of the Constitution) but its past and future use of precedent.

The key recognition lurking below the surface in *Hibbs* is that gender discrimination (and, by implication, race discrimination) is different from, and more invidious than, other types of discrimination.[107] The majority opinion dances around this question, and never quite admits that this distinction underlies its holding. The Court tries to use the fact that gender discrimination is subject to heightened scrutiny in order to shoehorn the FMLA into the structure established by the earlier cases without forcing its invalidation. As I argued above, this move fails. But the fact that gender discrimination is subject to heightened scrutiny also suggests that it is more problematic than other types of discrimination. The Court—rightly or wrongly—perceives age discrimination and disability discrimination, like practices with a disparate impact on minorities, women, or religious observers, as somehow not "real" problems.[108] Perhaps the cause for the different perceptions is the recentness of the American recognition that age or disability discrimination is a problem at all; perhaps it is that there is still controversy about the extent of the problem; perhaps it is that age and, especially, disability discrimination are more complex, in part because they are intertwined with questions of accommodation and allocation of resources rather than always arising from stereotypes

[107] See also Post and Siegel, 112 Yale L J at 1979–80 (cited in note 34) (predicting, prior to the decision in *Hibbs*, that "it is possible that the Court will decide the case on the basis of its attitude toward the substantive civil rights agenda advanced by the FMLA"); Bandes, 5 U Pa J Const L at 521 (cited in note 105) (characterizing *Garrett* as "animated by empathy for some actors and lack of empathy toward others"); Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 Yale L J 1141 (2002) (suggesting that Court views "traditional" antidiscrimination law as more justifiable than recent extensions); compare Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U Chi L Rev 429 (2002) (suggesting that inconsistencies in the Court's federalism doctrines are driven by an underlying conservative substantive agenda).

[108] I argue elsewhere that the Court has taken a similarly unconcerned approach to sexual orientation discrimination. See Suzanna Sherry, *Warning: Labeling Constitutions May Be Hazardous to Your Regime*, 67 L & Contemp Probs (forthcoming 2004).

or simple prejudice.[109] Whatever the source, the distortion of precedent in *Hibbs* reflects a different attitude toward gender discrimination than toward (some) other types of discrimination.[110]

But what if we were to take this insight and use it to revise the precedent rather than simply to drive results? *If* gender discrimination is worse than age discrimination, then we should be more willing to sacrifice the states' immunity from suit in the service of eradicating gender discrimination. This in turn implies that the Court should abandon its current rigid stance of requiring that *every* exercise of Congress's power under Section 5 be supported by a fixed quantum of evidence of particular state behaviors, and instead adopt a more flexible balancing test. The scope of Congress's Section 5 power should turn on some unquantifiable relationship between the need for the legislation and the harm it causes to states.[111] Where the Court finds that Congress is trampling on the states for little reason, it should invalidate the abrogation. Where the importance of the federal statute outweighs its detrimental effect on states, the abrogation should be upheld.[112]

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[109] For a wonderful exploration of the interaction between the Court and American culture as it plays out in the context of gender discrimination, see Post, 117 Harv L Rev at 11–41 (cited in note 47).

[110] Suggesting that the Court implicitly views gender discrimination as more problematic —particularly in the context of Section 5—raises questions about *United States v Morrison*, 529 US 598 (2000), in which the Court struck down a portion of the federal Violence Against Women Act (VAWA). The Court found that creating a federal civil remedy for gender-motivated violence exceeded Congress's authority under both the Commerce Clause and Section 5. But the puzzle is more apparent than real: the question in *Morrison* was whether Congress could regulate individual behavior—rather than state behavior—under Section 5; resolution of that question need not depend on how abhorrent the Court finds the individual behavior. Alternatively, one might speculate that the Court envisions a continuum of invidiousness, so that race discrimination justifies even greater congressional authority than does gender discrimination. This latter approach has the further advantage of reconciling *Morrison* with the apparently contrary result in *United States v Guest*, 383 US 745 (1966).

[111] One might argue that Justice Kennedy adopted such a test in his dissent in *Hibbs* by framing the question as whether "subjecting States and their treasuries to monetary liability at the insistence of private litigants is a congruent and proportional response to a demonstrated pattern of unconstitutional conduct by the States." 123 S Ct at 1986. See Post, Harv L Rev at 23 n 105 (cited in note 47).

[112] Although I suggest that such a flexible test should be applied to Congress's exercise of its Section 5 powers, an alternative argument might propose it as a measure of Congress's overall ability to abrogate state sovereign immunity, whether under Section 5 or under Article I. Such a reframing of my argument, however, would directly confront the holding in *Seminole Tribe*, which seems (especially after *Hibbs*) less vulnerable than *City of Boerne* and its progeny.

For those readers who blanch at the prospect of such an unconstrained approach, let me make two admissions and then point to an area in which just such a test has worked tolerably well. First, my test will predictably produce more unpredictable results than the Court's current test. But the Court's (mis)application of the current test managed to produce the surprising result in *Hibbs;* the only difference between the Court's approach and mine is that mine could produce the result in *Hibbs* without mangling the test itself. Second, to the extent that one disagrees with the Court's assessment of the problem Congress is addressing—that is, finds a particular kind of discrimination to be more or less problematic than the Court does—one will not be happy with the Court's decisions under my test. For readers afraid of that eventuality, let me ask you: are you happy now? Liberals are appalled by *Kimel* and *Garrett,* conservatives think *Hibbs* is a disaster, and, as far as I can tell, almost everybody dislikes *City of Boerne.*[113] So why not have the Court admit that it is drawing distinctions among types of discrimination and put its weighting of the interests out in the open?

In an analogous area, this kind of open-ended approach has worked very well. Of all the cases that come before the Supreme Court, the cases most similar to those raising federalism issues are those raising separation-of-powers questions.[114] Both separation of powers and federalism implicate basic structure, and both serve to balance power and check potential abuses. We recognize this affinity when we teach federalism and separation of powers in one course and individual rights in another. Indeed, sometimes is it difficult to tell the difference between a separation-of-powers question and a federalism question. The Section 5 cases are a good example of this overlap: *City of Boerne* was primarily about the allocation of authority between Congress and the courts, but in the

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[113] But see Marci A. Hamilton and David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment,* 21 Cardozo L Rev 469 (1999) (defense of *City of Boerne* by one of the City's attorneys); Ronald D. Rotunda, *The Powers of Congress Under Section 5 of the Fourteenth Amendment After City of Boerne v. Flores,* 32 Ind L Rev 163 (1998) (defending *City of Boerne*); Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right: Reflections on City of Boerne v. Flores,* 39 Wm & Mary L Rev 793 (1998) (partial defense of *City of Boerne*); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection, and Free Speech Concerns,* 56 Mont L Rev 227 (1995) (expressing doubts about RFRA's constitutionality before *City of Boerne*).

[114] Others have noted the relationship, especially in the context of congressional abrogation of state sovereign immunity. See, for example, Colker and Brudney, 100 Mich L Rev (cited in note 105).

context of abrogation of sovereign immunity the Section 5 jurisprudence serves mostly to protect the states from congressional overreaching.[115]

Thus, in searching for an alternative approach to defining the scope of congressional powers under Section 5, we might look to separation-of-powers cases. In particular, the Supreme Court has long struggled to determine what powers of adjudication Congress can confer on courts that do not meet the requirements of Article III. These courts, whose judges are not life-tenured, are sometimes called legislative courts. Examples include military courts, territorial courts and local courts for the District of Columbia, and most administrative agencies. Under what circumstances can an agency or other specialized body resolve disputes that might otherwise be decided by an Article III court? After briefly flirting with a rigid rule prohibiting legislative courts from deciding *any* matter that would be within the constitutional jurisdiction of Article III courts, the Supreme Court recognized that the jurisdiction of Article III courts and legislative courts might overlap.[116] The question then became defining the limits of legislative courts' jurisdiction.

Like determining the scope of congressional power under Section 5, defining the jurisdiction of legislative courts raises questions about how to allow Congress sufficient flexibility without abandoning judicially enforced constraints. Too few limits will allow Congress to undermine the independence of the judiciary or the sovereignty of states; too many limits will prevent Congress from enacting needed legislation. Facing such a situation in the context of legislative courts, the Court expressly eschewed bright-line rules: "Although such rules might lend a greater degree of coherence to this area of the law, they might also unduly constrict Congress's ability to take needed and innovative action pursuant to its Article I powers."[117] Instead, the Court has considered a number of factors, always with an eye to determining whether the danger

[115] Scholars vary in whether they treat the abrogation cases as raising primarily federalism questions or primarily separation-of-powers questions. Compare, for example, Fallon, 69 U Chi L Rev (cited in note 107) (federalism) with Post and Siegel, 112 Yale L J (cited in note 34) (separation of powers).

[116] See *Williams v United States*, 289 US 553 (1933) (no overlap permitted); *Glidden Co. v Zdanok*, 370 US 530 (1962) (overlap permitted); *Palmore v United States*, 411 US 389 (1973) (flexible test adopted).

[117] *Commodities Futures Trading Commission v Schor*, 478 US 833, 851 (1986).

of subverting judicial independence outweighs Congress's practical need to resort to a legislative court. In *Commodities Futures Trading Commission v Schor*,[118] for example, the Court upheld the allocation of a state-law counterclaim to a legislative court, but noted that Congress could not create "a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts . . . without evidence of valid and specific legislative necessities."[119] The danger of such a scheme, the Court recognized, was that Congress might be "'transfer[ing] jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts."[120] Ironically, Justice O'Connor—who has recently been applying rigid precedent in flexible ways—authored the majority opinion in *Schor*.

This flexible approach, ultimately policed by Article III courts, has allowed Congress to create myriad administrative agencies, local courts for the District of Columbia,[121] non-Article III courts with specialized subject matter jurisdiction,[122] and provisions that require certain disputes to be resolved by binding arbitration.[123] But the Court drew the line and invalidated Congress's attempt to confer on a set of non-Article III courts jurisdiction to decide *all* civil claims related to a bankruptcy proceeding, including the power to preside over jury trials and the authority to issue declaratory judgments, writs of habeas corpus, and any other order necessary for enforcement of their own judgments.[124]

Adopting a test used to define the boundaries of jurisdiction is especially apt in light of the Court's stated mission in its Section 5 cases. As many scholars have noted, the Court's careful scrutiny of congressional enactments under Section 5 is a way of ensuring that Congress does not use its enforcement powers as a pretext to surreptitiously redefine the substantive meaning of the Fourteenth

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[118] 478 US 833 (1986).

[119] Id at 855.

[120] Id at 850, quoting Chief Justice Vinson's dissenting opinion in *National Mutual Insurance Co. v Tidewater Co.*, 337 US 582, 644 (1949).

[121] *Palmore v United States*, 411 US 389 (1973).

[122] *Ex parte Bakelite Corp.*, 279 US 438 (1929).

[123] *Thomas v Union Carbide Agricultural Products Co.*, 473 US 568 (1985).

[124] *Northern Pipeline Construction Co. v Marathon Pipe Line Co.*, 458 US 50 (1982).

Amendment.[125] While such an illicit motive was arguably apparent on the surface of RFRA and its legislative history, it will not always be easy to tell the difference between an honest congressional attempt at prophylaxis and a statute passed to expand rather than enforce constitutional mandates. In evaluating Section 5 legislation, demanding a sufficient reason for congressional action serves to guard against hard-to-detect illicit motives. The balancing test used in the context of legislative courts serves an analogous purpose: it guards against intentional subversions of judicial independence masquerading as mere administrative rearranging.[126] To the extent that Congress assigns to non-Article III courts a broader range of cases than is practically necessary, we might suspect that it is doing so because it wishes to control the body making the decisions. And to the extent that Congress fashions an overinclusive statutory remedy to an underdocumented constitutional problem, we might suspect that Congress is more interested in creating rights than in enforcing them.[127]

An open-ended balancing approach would allow the Court to place as much weight as it wished on the need to protect states from suit, while still permitting Congress to abrogate immunity in the service of what the Court considers important goals. Evidence of unconstitutional state behavior would be one relevant factor but would not be dispositive. Additional factors could in-

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[125] See, for example, Post, 117 Harv L Rev at 12 (cited in note 47); Buzbee and Schapiro, 54 Stan L Rev at 136–39 (cited in note 105); Vicki C. Jackson, *Federalism and the Court: Congress as the Audience?* 574 Annals (AAPSS) 145, 150–51 (2001); Dorf and Friedman, 2000 Supreme Court Review at 93 (cited in note 34); Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 Harv L Rev 54, 131–32 (1997); but see Caminker, 53 Stan L Rev at 1166–68 (cited in note 105).

[126] The alternative approach to smoking out illicit motives—bright-line tests that purport to measure mechanically the congruence between means and ends—is reflected not only in the Section 5 cases but also in long-established equal protection doctrine. My argument in text is that separation-of-powers cases provide a better model than do individual-rights cases when, as in the Section 5 context, the Court is policing federalism and interbranch relations. For a critique of the Court's apparent equating of states to individual rights-holders, see Suzanna Sherry, *States Are People Too*, 75 Notre Dame L Rev 1121 (2000).

[127] There is, of course, still the question of whether the Court *ought* to distrust congressional motives in this context. For a variety of views on this question, see, for example, Suzanna Sherry, *Irresponsibility Breeds Contempt*, 6 Green Bag 2d 47 (2002); Colker and Brudney, 100 Mich L Rev (cited in note 105); Buzbee and Schapiro, 54 Stan L Rev. at 141–43 (cited in note 105); Caminker, 53 Stan L Rev at 1182–83 (cited in note 105); Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 Duke L J 435 (2001).

clude the breadth of the statute (currently encompassed by the "congruence and proportionality" part of the test) and the Court's own judgment about the importance of the statutory goal. But in contrast to the Court's decision in *Hibbs*, which tried to disguise the Court's valuation of the goal as the mechanical measuring of the quantum of evidence, under a balancing test the Court would have to discuss candidly the reasons it found the intrusion on state sovereignty more or less warranted than in prior cases.[128]

That candor, moreover, might have a salutary effect on the decisions themselves. A Court forced to confront head-on the clash between state sovereignty and the interests of the disabled, for example, could no longer hide behind a pretense that the ADA's flaws lie in the congressional record. Instead, the Court would have to choose between openly admitting that it finds discrimination against the disabled more tolerable than race or gender discrimination, or engaging in a more sensitive and nuanced discussion of the burdens that the ADA puts on states. One possible result of this more careful analysis might be a distinction between the pure antidiscrimination provisions and the accommodation provisions of the ADA, with abrogation upheld for the former but not the latter. Such a distinction makes sense on several levels. It recognizes the difference between prejudice and less invidious reasons underlying discrimination. It takes into account the greater burdens that accommodation requirements place on employers. It distinguishes between intentional discrimination and failure to remedy a known disparate impact. And, finally, it is pragmatically defensible under current Eleventh Amendment doctrines: individuals in need of an accommodation could still prevail by suing a state official for prospective relief, while individuals harmed by intentional discrimination would no longer be barred from obtaining back pay or other retrospective relief. But such a sensible scheme is virtually impossible under the Court's current rigid approach to Section 5.

Although a balancing test might thus lead to a partial overruling of *Garrett*, it is unlikely to affect the Court's other Eleventh

[128] For a similar plea for candor about a statute's actual impact on federalism, see Post and Siegel, 112 Yale L J at 2048–58 (cited in note 34). For an analogous argument in the context of administrative agencies, see Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 NYU L Rev 461 (2003).

Amendment precedents. Even a candid Court is likely to be willing to hold that the property interests at stake in patent or trademark cases, or the need to protect individuals over forty from discrimination by their (often older) employers, or even a desire to compensate overtime work at a higher rate, do not outweigh state sovereignty concerns.

Here, then, is the bottom line. The primary advantage of a bright-line rule, such as the one the Court purports to follow in its Section 5 cases, is that it is supposed to constrain the discretion of judges. The decision in *Hibbs*, however, shows that at least *this* bright-line rule is not a constraint. If the rule does not serve its intended purpose, and adherence to the rule demands an intolerable level of precedential manipulation, then it is time to abandon the rule. Indeed, in the context of the scope of Congress's Section 5 authority, *no* bright-line rule will work, because the balance of power among Congress, the Court, and the states is too complex and fluid. Only a test that gives the Court flexibility but forces it to justify its choices has any hope of succeeding.[129]

C

There is one last notable aspect of my discussion of the interrelationships among precedent, candor, and the choice between bright-line rules and flexible balancing tests: Justice O'Connor appears to play a pivotal role. Her application of precedent was unique in all the cases other than *Hibbs*, and was shared only by Chief Justice Rehnquist in *Hibbs* itself. She authored the majority opinion in *Grutter*, and was one of only two Justices (the other was Justice Breyer) in the majority in both *Grutter* and *Gratz*. Even more intriguing, she was the primary modern architect of the balancing test used in the legislative courts context, and has previously exhibited a distaste for bright-line rules.[130]

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[129] There is, of course, a lively literature on whether this is true beyond Section 5: constitutional scholars debate endlessly the relative virtues of rules and standards, categorization and balancing, and theory-driven and pragmatist judging. This article is not the place to rehash that debate, although it is intended as a (minor) contribution to it.

[130] Besides the legislative courts cases, there are other indications the Justice O'Connor favors multifactor balancing tests over bright lines. Her concurrence in *Employment Division v Smith* argued that the same result could be reached by using a balancing test. 494 US 872, 903–07. See also Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 Va L Rev 543, 604–13 (1986).

Based on my analysis, one might argue that recently Justice O'Connor seems to be professing an adherence to mechanical rules but actually applying the more flexible standards she has traditionally favored. This article has suggested that both *Hibbs* and *Grutter* exhibit this pattern. Her votes in *Grutter* and *Gratz* are even more interesting at a deeper level. The primary difference between the affirmative action program upheld in *Grutter* and the one invalidated in *Gratz* was that the latter applied a rigid formula while the former required individualized consideration of all applicants. One might therefore argue that Justice O'Connor is instructing universities to use her preferred method of decision making.[131]

But the legislative courts cases—as well as others—suggest that sometimes Justice O'Connor has been open about her application of more flexible tests. Why not last Term? Resolving that puzzle is beyond the scope of this article, but I offer a few possibilities. Perhaps she is afraid that candor in cases involving some type of discrimination might have adverse consequences. Perhaps she has been influenced by Justice Scalia, who has argued at various times for rigid rules, visible constraints, and judicial lack of candor.[132] Perhaps long tenure, especially during times of political change or turmoil, affects judges' outlook. Whatever the reason, the consequences are troubling.

Conclusion

Despite some appearances to the contrary, precedent is not infinitely malleable. In this article, I have tried to identify the most egregious distortions of precedent from the 2002 Term, and conclude that this Court—especially Justice O'Connor—seems particularly inclined to maintain a facade of adhering to precedent rather than straightforwardly acknowledging its limitations or weaknesses. Nowhere is that more apparent than in the Court's evalua-

[131] A final irony, however, is that the likely effect of the two affirmative action cases will be to force universities with large applicant pools to disguise the use of rigid mechanical formulae, pretending that they are instead engaged in individualized consideration. Universities will thus be engaging in the same dissembling that characterizes Justice O'Connor's recent decisions—but in reverse.

[132] See Daniel A. Farber and Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Search for Constitutional Foundations* 29–54 (Chicago, 2002).

tion of the constitutionality of federal statutes enacted under Section 5 of the Fourteenth Amendment. The Court's need to distort precedent to uphold the FMLA in *Nevada Department of Human Services v Hibbs* illustrates the weaknesses of the Court's current Section 5 doctrine. My proposed replacement for that doctrine builds on *Hibbs* and has the added benefit of forcing the Court to confront openly the issues that led it to distort precedent. Thus, while my test may produce results that are neither better nor more predictable than the results under the Court's test, it will at least produce greater candor.

This Term, Justice Scalia accused the majority of playing fast and loose with stare decisis.[133] But a candid overruling is still better than pretending that the Court is following precedent when it is not. Ultimately, then, the decision in *Hibbs* tells us a great deal more about the integrity of the Court and the soundness of current doctrine than it does about the constitutionality of the FMLA.

[133] *Lawrence v Texas*, 123 S Ct 2472, 2487–91 (2003) (Scalia dissenting).