The Family Medical Leave Act: State Sovereignty and the Narrowing of Fourteenth Amendment Protection

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As many Americans struggled to balance the demands of both work and family life, President Clinton signed the Family Medical Leave Act (FMLA) into law in 1993. The FMLA was the culmination of several years of debate about family policy. As more women entered the workforce, the traditional role of women as the sole caretakers of the home and children began to erode, making it increasingly difficult for married couples to balance the demands of work and family. Women disproportionately bear family responsibilities because of historical stereotypes. Policy-makers intended the FMLA to remedy this problem by mandating a family leave policy that treated men and women equally with respect to family obligations.

The FMLA attempts to facilitate women's success in the workplace by mandating that employers grant medical leave to employees who need to care for a sick relative or child. Although the Act applies to men as well as women, it recognizes that women are often hindered in their careers due to the fact that society places more of the burden of caring for the family on women. Consequently, women more frequently need an extended leave period to care for a newborn, an adopted child or an elderly relative.

4. See infra text accompanying notes 26-33.
5. See infra text accompanying notes 59-72.
6. See 29 U.S.C. § 2601(b)(4) (1994) (stating that the purpose of the FMLA is to "minimize the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons").
7. Id. § 2612.
9. COMM’N ON FAMILY AND MED. LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY MEDICAL LEAVE POLICIES 149 (1996) [hereinafter A WORKABLE BALANCE].
Recent Supreme Court decisions use the doctrine of sovereign immunity to limit the ability of private plaintiffs to sue state governments, jeopardizing the ability of state employees to sue their employers for FMLA violations. The sovereign immunity doctrine asserts that a citizen cannot sue a state government for damages without its consent. Until recently, Congress had authority to abrogate state immunity with legislation passed pursuant to either the Commerce Clause or the Fourteenth Amendment. In Seminole Tribe v. Florida, however, the Supreme Court limited Congress’ authority to abrogate state immunity under legislation passed pursuant to the Fourteenth Amendment.

10. E.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) ("[W]e hold that the ADEA is not a valid exercise of Congress’s power under § 5 of the Fourteenth Amendment. The ADEA’s purported abrogation of the states’ sovereign immunity is accordingly invalid."); Alden v. Maine, 527 U.S. 706, 712 (1999) ("We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."); Seminole Tribe v. Florida, 517 U.S. 44, 76 (1996) ("The Eleventh Amendment prohibits Congress from making the State of Florida capable of being sued in federal court.").

11. A state employee may have a “right” to take family leave under a state law similar to the FMLA. Cf Kimel, 528 U.S. at 91-93 (noting that most states have laws prohibiting discrimination based on age). In this sense, the issue of state sovereignty is really about federalism: a state government may choose to enact a law granting its employees the same rights conferred by the FMLA. This issue is more than academic because it limits the ability of Congress, and the federal government in general, to determine what legislation is necessary to enforce the civil rights guarantees of the Fourteenth Amendment. Kimel, 528 U.S. at 81 ("The ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch."); see also Robert C. Post & Reva Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel, 110 YALE L.J. 441, 508 (2000) (noting the importance of Congress’ role in enacting anti-discrimination legislation to the overall civil rights movement).

12. See Alden, 527 U.S. at 711-31 (explaining the history and purpose of the doctrine of sovereign immunity).


Amendment. Since the Seminole decision, the Supreme Court has re-examined what is meant by legislation passed pursuant to Congress' authority under section five of the Fourteenth Amendment. Consequently, the doctrine of sovereign immunity has become the impetus to limit congress' ability to enforce the equal protection clause.

It is uncontested that Congress has the authority to abrogate states' sovereign immunity with legislation passed pursuant to the Fourteenth Amendment. Consequently, the pivotal issue is determining what is Fourteenth Amendment legislation. Despite Congress' intent to use the FMLA to remedy gender discrimination, the majority of courts have held that the FMLA is not Fourteenth Amendment legislation. If the FMLA was not passed pursuant to the Fourteenth Amendment, Congress does not have the authority to abrogate state immunity under the FMLA, limiting the ability of Congress to enforce equal protection

16. Id. at 64-66.
17. U.S. CONST. amend. XIV, § 5 (“The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.”); City of Boerne v. Flores, 521 U.S. 507, 516-36 (1997) (holding that the Religious Freedom Restoration Act (RFRA) was an unconstitutional exercise of Congress' Fourteenth Amendment enforcement powers because it was “substantive” and not “remedial”); see also Roger C. Hartley, The New Federalism and the ADA- State Sovereign Immunity from Private Damage Suits After Boerne, 24 N.Y.U. REV. L. & SOC. CHANGE 481, 489-502 (1998) (“[The Boerne Court introduced what is now called the 'congruence and proportionality' test. [It] permits the Court to probe more deeply the telic relationship between the legislation that regulates constitutional conduct by the states and the Fourteenth Amendment violations to be prevented or remedied.”). The Boerne decision "contains all the analytic tools needed to put real teeth into Seminole Tribe's constriction of Congress's [sic] authority to abrogate the states' Eleventh Amendment immunity from suit in federal court." Id. at 496. The Boerne decision, however, was an incomplete analysis. See Post & Siegel, supra note 11, at 458 (calling Boerne ambiguous because it did "not specify what should count as equal protection violations for purposes of applying the test"). The most important implication of Boerne has been highlighted in subsequent interpretations that narrowly construe the congruence and proportionality test. See Hartley, supra, at 501; Post & Seigel, supra note 11, at 459 (criticizing the Court in Kimel for "harshly" misconstruing the Boerne decision).

18. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (“We think that Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.”).
19. James Leonard, The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act, 52 ALA. L. REV. 91, 99-100 (2000); see also Post & Siegel, supra note 11, at 459 (“To determine whether Section 5 legislation is congruent and proportional to the goal of remedying or deterring violations of the Fourteenth Amendment, one must first identify the class of violations that Congress is empowered to remedy or deter.”).
21. See infra text accompanying notes 137-49.
guarantees for women. A minority of courts have recognized that the FMLA is a valid exercise of Congress' Fourteenth Amendment powers. These courts have held that Congress has the authority to abrogate immunity, thereby providing a private cause of action under the FMLA for damages sustained by state employees.

This Note argues that Congress has the authority to abrogate state immunity for FMLA causes of action because the FMLA directly remedies gender discrimination. The first part of this Note looks at the history of women in the workforce and the policies behind the enactment of the FMLA. The second part examines the development of Eleventh Amendment jurisprudence and the doctrine of sovereign immunity. The third part examines how these developments have caused courts to re-examine the scope of Fourteenth Amendment protection for state employees. The fourth section examines cases in which states invoked Eleventh Amendment defenses to FMLA actions and analyzes the arguments over whether the FMLA is passed pursuant to the Fourteenth Amendment. This section also analyzes the impact Kimel v. Florida Board of Regents has had in the determination of whether the FMLA is Fourteenth Amendment legislation. Finally, this Note concludes by arguing that the FMLA is passed pursuant to the Fourteenth Amendment because it remedies past gender discrimination. This Note also concludes that to hold that the FMLA is not Fourteenth Amendment legislation would eviscerate the civil rights advances women have made because it alters the scope of what is understood to remedy gender discrimination.

THE FAMILY MEDICAL LEAVE ACT: HISTORY AND POLICY

Women and Family: Experiences of Women Entering the Workforce

The entrance of women into the workforce has forced society to re-examine how both men and women value and balance the demands of work and family. Although certain groups of women have worked outside the home in some capacity throughout

22. See infra text accompanying notes 137-49.
23. See infra text accompanying notes 150, 167.
24. See infra note 150 and accompanying text.
26. See generally HOCHSCHILD & MACHUNG, supra note 8 (describing how families with two working parents struggle to cope with family obligations).
history, historical gender roles dictate that women bear most of the domestic responsibilities for the family. This historical role has made it difficult for women to achieve full equality in the workplace.

The ability to balance work and family or, alternately, to be forced to choose between work and family, was characterized exclusively as a “women’s issue.” If the workplace fails to accommodate family demands, it will adversely impact women. Men have families too, but social pressure pushes women into assuming more responsibility for family life. When workplaces do not accommodate family responsibilities such as childcare or caring for an ill relative, historical gender roles mean that women are the default caretakers.

The legacy of gender roles require that, in order for women to achieve true equality in the workplace, the workplace must adjust to family needs. This requires not treating family problems as a women’s issue by adopting a gender-neutral leave policy. This is
precisely the solution Congress adopted with the FMLA.\textsuperscript{36} As the next section demonstrates, the FMLA was not Congress' first attempt to legislatively remedy gender discrimination in the workplace. Rather, it was the culmination of several other failed attempts to deal with the inextricably linked problems of gender inequality and family leave policy.

\textit{Development of Gender Discrimination Legislation}

Beginning in the 1960s, Congress and the Supreme Court worked in tandem to chip away at gender discrimination. In 1964, Congress passed Title VII of the Civil Rights Act prohibiting discrimination based on sex.\textsuperscript{37} In the 1970s, the Supreme Court declared classifications based on gender unconstitutional under the Fourteenth Amendment’s equal protection guarantees.\textsuperscript{38} The Supreme Court found laws and policies that treated men and women differently unconstitutional,\textsuperscript{39} but still upheld pregnancy-based classifications.\textsuperscript{40} In ruling that an insurance program that did not cover pregnancy did not violate the Fourteenth Amendment, the Court reasoned that the program "does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities."\textsuperscript{41} The Court linked pregnancy-based classifications to a disability classification, requiring only rational basis review.\textsuperscript{42} In essence, "the courts removed equal protection as the basis of discrimination claims based on pregnancy."\textsuperscript{43} These decisions left women vulnerable to discrimination in the workplace based on biological differences and social tradition.\textsuperscript{44}

In an attempt to deal with the biological differences and stereotypes that create workplace disparity, Congress amended Title VII in 1978 with the Pregnancy Discrimination Act.\textsuperscript{45} The Act

\begin{itemize}
\item \textsuperscript{36} The Act specifies that an "employee" may take leave and never distinguishes between men and women. 29 U.S.C. § 2612 (1994).
\item \textsuperscript{38} See generally \textit{Frontiero v. Richardson}, 411 U.S. 677 (1973) (holding as unconstitutional a statutory classification based on sex); \textit{Reed v. Reed}, 404 U.S. 71 (1971) (same); \textit{Phillips v. Martin Marietta Corp.}, 400 U.S. 542 (1971) (same).
\item \textsuperscript{39} \textit{E.g.}, \textit{Frontiero}, 411 U.S. at 688-90.
\item \textsuperscript{40} \textit{See Geduldig v. Aiello}, 417 U.S. 484, 495-97 (1974) (upholding a California disability insurance program that excluded pregnancy).
\item \textsuperscript{41} \textit{Id.} at 496 n.20.
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} Caplan, \textit{supra} note 34, at 75.
\item \textsuperscript{44} \textit{See Geduldig}, 417 U.S. at 501 (Brennan, J., dissenting).
\item \textsuperscript{45} 42 U.S.C. § 2000e (1994).
\end{itemize}
stated that pregnant women should be treated the same as employees with medical disabilities. The Pregnancy Discrimination Act prevented employers from discriminating against women because of the condition of pregnancy.

Although the Pregnancy Discrimination Act improved the availability of benefit coverage for women, it did not protect women from the full range of gender discrimination. One major shortcoming was that it attempted to treat pregnancy as if it were "gender neutral." All it required was that employers treat pregnant women as they would employees with medical disabilities. By bringing pregnancy under the range of Title VII protected groups, the Pregnancy Discrimination Act effectively required employers to ignore the fact that pregnancy, and its "cultural baggage," is unique to women. Pregnancy, and even the ability to become pregnant, is the basis of many preconceived roles and ingrained cultural expectations about the proper role of women. "While social and demographic changes of the last thirty years have transformed the U.S. workforce, traditional attitudes and stereotypes about gender roles persist at the juncture of employment and family . . . ." The Pregnancy Discrimination Act attempted to treat pregnancy as just another forbidden basis of discrimination without addressing the greater problem: that women

46. Id.
47. Id.
50. Finley, supra note 48, at 1125.
51. Historically, pregnant women were seen as incapable of working, even if they wished to work. Id. at 1124 n.20 (noting that in the 1940s the U.S. Department of Labor recommended that pregnant women refrain from working six weeks before delivery of a child and for two months afterward).
52. See, e.g., ROSANNA HERTZ, MORE EQUAL THAN OTHERS: WOMEN AND MEN IN DUAL-CAREER MARRIAGES 124-31 (1986) (describing the difficulty career women face at work as a result of pregnancy).
53. See, e.g., id. at 122.
Parents, older relatives, and influential traditionalists hold expectations about women's behavior toward children and childrearing that tend to push women in the opposite direction. The traditional attitude that investments in family and children should predominate over career investments and the general cultural milieu in which many couples were raised weigh heavily on women as they ponder their decisions about children.

Id.; see also Finley, supra note 48, at 1131-35 (describing stereotypes about pregnant women).
bear the majority of family responsibilities, of which pregnancy is only one element.  

The fact that the Pregnancy Discrimination Act addressed only one kind of family obligation was its second shortcoming. It did not address other family obligations such as caring for a sick child, an elderly parent or a spouse. This meant that, although employers could not discriminate on the status of pregnancy, there was no requirement that employers grant leave for the time required to care for children. The Pregnancy Discrimination Act did not mandate that employers grant any leave at all. Thus, employers were free to discharge women on the basis of time commitments that having children necessitated—not just from the birth of a child, but from caring for the child throughout childhood. For these reasons, the Pregnancy Disability Act failed to rectify workplace disparity between men and women.

The FMLA addresses the historical role of women as the family caretaker by treating family leave as a gender neutral issue. It does so by covering many different kinds of family obligations and by mandating leave for both men and women.

The FMLA: *The Act, the Rationale and the Effect*

The FMLA was adopted in an attempt to balance the competing demands of work and family. As the workforce dramatically changed over the past several decades, the demands of family life

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55. See generally HOCHSCHILD & MACHUNG, supra note 8 (describing domestic responsibilities women face).
56. Finley, supra note 48, at 1125.
57. Id. at 1126-27.
58. Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 36-37 (1986) (arguing that the Pregnancy Discrimination Act was unlikely to eradicate sex-based discrimination because it did not grant any job security to women who took leave). Professor Kay was responding to concerns that then Professor Ruth Bader Ginsburg had raised earlier. Ruth Bader Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 CONN. L. REV. 813, 826 (1978).

If Congress is genuinely committed to eradication of sex-based discrimination and promotion of equal opportunity for women it will . . . provide[ ] firm legislative direction assuring job security, health insurance coverage, and income maintenance for childbearing women. Women will remain more restricted than men in their options so long as this problem is brushed under the rug by the Nation's lawmakers.

Id.

60. *See A WORKABLE BALANCE*, supra note 9, at v (reprinting a letter written by then Secretary of Labor, Robert Reich).
remained the same.\textsuperscript{62} The major reason for the enactment of the FMLA was a recognition that the absence of adequate policies allowing for extended family leave inhibited women's roles in the workforce.\textsuperscript{63}

The FMLA allows employees to take a total of twelve weeks of leave during any twelve-month period for any of the following reasons: the birth or adoption of a child, placement of a child for foster care, to care for an employee's spouse, child or parent with a serious health condition or for an employee's serious health condition that renders him/her unable to perform the functions of his/her job.\textsuperscript{64} Instead of barring "employers from penalizing women either because they are women or because they suffer from the physical limitations of pregnancy, the FMLA bars employers from penalizing workers of either gender for taking time to spend with a new child or to care for sick family members."\textsuperscript{65} The Act is an extension of past policies because it includes more than maternity leave.\textsuperscript{66} The FMLA promotes gender equality not only by mandating leave for the birth of a child, but by allowing men to take leave for family responsibilities.\textsuperscript{67} It encourages fathers to participate more in family life, thereby relieving family burdens from women and reducing stereotypical assumptions that only women are able to care for sick and young family members.\textsuperscript{68} The FMLA combats gender discrimination in its mandate that employers treat men and women alike in an area in which men and women historically have been treated differently.\textsuperscript{69} The FMLA reduces past discrimination

\textsuperscript{62}See generally HOCHSCHILD & MACHUNG, supra note 8 (describing the difficulties families with two working parents have meeting family demands).

\textsuperscript{63}See Martin Malin, Fathers and Parental Leave, 72 Tex. L. Rev. 1047, 1047 (1994).

\textsuperscript{64}29 U.S.C. § 2601 (1994).

\textsuperscript{65}See Cockey & Jeon, supra note 49, at 229; see also A WORKABLE BALANCE, supra note 9, at 150-55 (profiling several men and women who have taken leave available under the FMLA for a variety of reasons).

\textsuperscript{66}See 29 U.S.C. § 2601.

\textsuperscript{67}The FMLA is gender-neutral; it applies equally to men and women. Evidence has shown that 41.8% of all leave-takers are men. See A WORKABLE BALANCE, supra note 9, at 149. The fact that women take slightly more leave than men is "partly because men do not bear children and partly because women are somewhat more likely to care for infants or seriously ill family members than are men." Id. at 149-50.

\textsuperscript{68}See Cockey & Jeon, supra note 49, at 228.

\textsuperscript{69}See HERZ, supra note 52, at 125-31 (discussing how some kinds of family problems tend to fall on women); see also GAREY, supra note 27, at 5-9 (discussing how women are viewed as either work-oriented or family-oriented). The implication is that women cannot blend work and family responsibilities because these obligations cannot coexist, whereas traditionally, part of a man's family obligation was to provide financially for his family. Id. The FMLA eliminates this dichotomy by making family care a national issue, not a women's
caused by gender stereotypes by granting a right to take twelve weeks of leave, regardless of gender. 70

As women began to enter the workforce, the struggle to eradicate gender discrimination became inextricably linked with how employers chose to treat pregnancy and other family issues. 71

In response to the failure of the Pregnancy Discrimination Act to adequately cope with gender discrimination problems inherent in pregnancy, Congress enacted the FMLA. 72 As the Supreme Court developed the doctrine of sovereign immunity, it potentially narrowed the scope of what is considered to be gender discrimination legislation. 73 The next section explores the development of Eleventh Amendment jurisprudence, emphasizing the subsequent limiting of what can be considered an exercise of Congress' Fourteenth Amendment enforcement power. It is this restriction on the ability of Congress to enforce the Fourteenth Amendment that jeopardizes women's rights.

SOVEREIGN IMMUNITY: THE RECENT DEVELOPMENT OF ELEVENTH AMENDMENT JURISPRUDENCE

The Eleventh Amendment Prior to Seminole Tribe v. Florida 74

The Eleventh Amendment states that "the Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State or by citizens or Subjects of any Foreign State." 75 The Eleventh Amendment has been interpreted to

issue.

70. The ability of both men and women to take leave does not necessarily mean that the stigma associated with taking time off work for family caregiving would dissipate. See Mossman, supra note 30, at 298-99. Instead of a "mommmy track" there might be a "parenting track." This phenomenon would mean that, as a society, we would have to change how we value work and family.

71. See Ginsburg, supra note 58, at 825-27 (describing the difficulty the Supreme Court had in grappling with gender discrimination cases involving pregnancy); Kay, supra note 58, at 8-10 (discussing the enactment of the Pregnancy Discrimination Act as a response to the failure of the Supreme Court to adequately confront gender discrimination and pregnancy).

72. Kay, supra note 58, at 9 (noting that a problem with the Pregnancy Discrimination Act is that it does not mandate leave). All the Pregnancy Discrimination Act required was that pregnant women be treated similarly to all disabled employees. Id. It did not require that any employer have a leave policy. Id.

73. See Post & Siegel, supra note 11, at 466-72 (discussing the federalism and separation of powers issues underlying the doctrine of sovereign immunity).


75. U.S. CONST. amend. XI.
recognize immunity from suit as an aspect of state sovereignty. Historically, this amendment has barred lawsuits brought by citizens of a foreign state or country against a state or arm of the state, as well as lawsuits brought by a citizen of a state against his/her own state government.

Eleventh Amendment analysis is fraught with issues of federalism and separation of powers. At the heart of the debate is the role of the federal government in enforcing individual rights. Recent challenges to federal statutes under the Eleventh Amendment, echoing the states’ rights sentiments expressed by Tenth Amendment challenges to federal laws, threaten the

76. See, e.g., Rubenstein, supra note 11, at 632 (introducing Eleventh Amendment jurisprudence). This is how the Court has interpreted the Eleventh Amendment; however, some scholars have rejected this concept outright. See Akil Reed Amar, Of Sovereignty and Federalism, 96 YALE L.J. 1425, 1481-84 (1987) (arguing that the Eleventh Amendment embodies no general principle of sovereign immunity).

77. See Rubenstein, supra note 12, at 632.

78. E.g., Post & Siegel, supra note 11, at 456-59 (arguing that Kimel limits Congress’ ability to enforce the Fourteenth Amendment and reasserts the role of the Court in determining the substantive guarantees of the Fourteenth Amendment); Jeffery G. Homrig, Note, Alden v. Maine: A New Genre of Federalism Shifts the Balance of Power, 89 CAL. L. REV. 183, 184 (2001) (arguing that the way the court has interpreted sovereign immunity “enables states to undercut power properly delegated to the federal government by the Constitution”).

79. E.g., Amar, supra note 78, at 1426-27 (“The Constitution’s political structure of federalism and sovereignty is designed to protect, not defeat, its legal substance of individual rights. I seek to counter the Supreme Court’s version of federalism and sovereignty with the framers’ version [and] . . . to replace . . . government sovereignty with popular sovereignty.”); Homrig, supra note 78, at 184 (“Alden also disenfranchises individuals by placing the right to enforce federal law against the states solely in the hands of the federal government. Thus, this decision will likely frustrate the expectations of those individuals who rely on the protections of federal law by denying them redress for a state’s invasion of their rights.”).


81. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

82. See Rubenstein, supra note 11, at 627 (noting that to “better appreciate the current Eleventh Amendment challenges to federal employment laws as applied to the states,” a review of Tenth Amendment challenges is helpful). For example, when Congress extended the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1994), to state employees in 1974, a coalition of cities, states and intergovernmental bodies challenged its constitutionality under the Tenth Amendment, Nat’l League of Cities v. Usery, 426 U.S. 833, 851 (1976), arguing that this extension usurped traditional governmental functions. Id.; see also Rubenstein, supra note 11, at 628-29 (summarizing the “traditional government functions” argument). The Court in National League of Cities agreed that the extension of the Fair Labor Standards Act (FLSA) to state employees violated the Tenth Amendment. Nat’l League of Cities, 426 U.S. at 852. However, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), overturned National League of Cities. In determining whether San Antonio’s transit authority was subject to FLSA requirements the majority rejected the traditional/nontraditional distinction of National League of Cities. Garcia, 426 U.S. at 556-57. Instead, the limitations
ability of the federal government to enforce individual civil rights—such as women's rights—through congressional legislation. State immunity from lawsuits has never been absolute. Historically, there have been "two sources of constitutional power that allow Congress to abrogate the states' Eleventh Amendment immunity: the Fourteenth Amendment and the Commerce Clause." Abrogating state immunity with Fourteenth Amendment legislation is uncontested because the Fourteenth Amendment was created to deliberately alter the balance of power between state governments and the federal government. Although the enforcement section of the Fourteenth Amendment is silent about its relationship to the Eleventh Amendment, "the Eleventh Amendment, and the principle of state sovereignty which it embodies ... are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." In Fitzpatrick v. Bitzer, the Court held that the language of the enforcement provision of the Fourteenth Amendment grants Congress the authority to enforce the Amendment by appropriate legislation. The Court further held that the Fourteenth Amendment gives Congress the ability to authorize private suits against state governments. The Court's rationale was that the Fourteenth Amendment contains an express grant of congressional authority to legislate in areas that had been previously constitutionally prohibited: enforcing civil rights.

on the federal government's exercise of Commerce Clause power can be found in the structure of the government: states can lobby Congress if they feel their sovereignty is being infringed. Garcia, 469 U.S. at 550. As National League of Cities and Garcia demonstrate, states have failed to avoid the reach of federal labor laws by invoking the Tenth Amendment. See Rubenstein, supra note 12, at 627-32. The Eleventh Amendment is a natural extension of the on-going debate about federalism.

33. Post & Siegel, supra note 11, at 503-09 (emphasizing the role of the federal government in enforcing civil rights and the erosion of this ability in light of the Court's decisions in Morrison and Kimel).

34. E.g., Philbrick v. Univ. of Conn., 90 F. Supp. 2d 195, 197 (D. Conn. 2000) ("[T]here are two ways in which a state may be divested of its immunity under the Eleventh Amendment.") (citing Close v. New York, 125 F. 3d 31 (2d Cir. 1997)). Congress can abrogate immunity through statutes or a state can waive immunity. Id. This Note focuses on the authority of Congress to abrogate immunity and will not address waiver.

35. Rubenstein, supra note 11, at 621.

36. See Fitzpatrick v. Bitzer, 427 U.S. 445, 454 (1976) ("The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce ... Such enforcement is no invasion of State sovereignty," (quoting Ex Parte Virginia, 100 U.S. 339, 346 (1880)).

37. Fitzpatrick, 427 U.S. at 456 (citation omitted).


39. Id.

40. Id.

41. Id.
Prior to Seminole, it was thought that Congress also had the authority to abrogate immunity with legislation passed pursuant to the Commerce Clause.\textsuperscript{92} The rationale was that:

By giving Congress plenary authority to regulate commerce, the States relinquished their immunity where Congress finds it necessary, in exercising this authority to render them liable. Since the commerce power can displace state regulation, a conclusion that Congress may not create a damages remedy against the States would sometimes mean that no one can do so.\textsuperscript{93}

In other words, by ratifying the part of the Constitution that gives Congress the power to regulate commerce, states surrendered a portion of their immunity from suit.\textsuperscript{94}

Justice Scalia wrote a vigorous dissent in Pennsylvania v. Union Gas,\textsuperscript{95} arguing that Congress had no authority to set aside state immunity with Commerce Clause legislation.\textsuperscript{96} He stated:

As suggested above, if the Article I commerce power enables abrogation of state sovereign immunity, so do all the other Article I powers. An interpretation of the original Constitution which permits Congress to eliminate sovereign immunity only if it wants to renders the doctrine a practical nullity and is therefore unreasonable.\textsuperscript{97}

Although the Court was divided as to whether Congress had the authority to abrogate state immunity under the Commerce Clause, there was no disagreement as to the Fourteenth Amendment.\textsuperscript{98}

The Supreme Court overruled Pennsylvania v. Union Gas in 1996 with Seminole Tribe v. Florida.\textsuperscript{99} The Seminole decision represents the beginning of a shift in Eleventh Amendment analysis.\textsuperscript{100} The Seminole decision’s potential effect on federal

\textsuperscript{93} Id. at 3.
\textsuperscript{94} Id.
\textsuperscript{95} Id. at 29 (Scalia, J., dissenting).
\textsuperscript{96} Id. at 42.
\textsuperscript{97} Id.
\textsuperscript{98} Id. ("The Fourteenth Amendment, on the other hand, was avowedly directed against the power of the States, and permits abrogation of their sovereign immunity.").
\textsuperscript{100} E.g., Carlos Manuel Vázquez, What Is Eleventh Amendment Immunity?, 106 YALE L.J. 1683, 1717 (1997) (arguing that Seminole shifted the focus of Eleventh Amendment immunity to "immunity from liability, not just from federal jurisdiction"). The implication of this shift
legislation is the subject of many scholarly articles. Although scholars disagree on the scope of its impact, Seminole limits the options available to private plaintiffs bringing suits against state governments for violations of federal law. Since Seminole, there has been a wave of lawsuits in which state governments have successfully invoked Eleventh Amendment immunity.

In Seminole, the Court held that Congress has no authority to abrogate state immunity under statues passed pursuant to the Commerce Clause. Congress only has that authority under legislation enacted pursuant to the Enforcement Clause of the Fourteenth Amendment. "[T]he Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." Seminole acknowledged that the Fourteenth Amendment represents a unique shift in federalism in that it grants the federal government more power than is found in the rest of the Constitution. The Court rejected the Union Gas rationale that when the states ratified the Constitution they automatically gave up a portion of their immunity under the Commerce Clause.

in focus is that the concept of immunity changes from being a question of whether federal court has jurisdiction under Article III, to immunity from the actual suit. Id.


102. See Seminole, 517 U.S. at 72-73 n.16 (criticizing Justice Stevens' dissenting opinion that noted that the impact of Seminole would be to prohibit federal jurisdiction over a wide range of suits in which the federal government has exclusive authority to legislate, (i.e. copyright), as "exaggerated both in its substance and in its significance").


104. See Seminole, 517 U.S. at 76.

105. See id. at 59.

106. See id. at 65-66.

107. Id.

108. See id. at 66.
In *Seminole*, the Court announced a two-part test to determine if Congress can abrogate state immunity: (1) whether Congress expressed a clear legislative intent to abrogate state immunity, and (2) whether Congress acted under proper constitutional authority.\(^{109}\) Congress can amend a statute to provide legislative intent to abrogate immunity, thereby satisfying the first prong of the test. Consequently, the most important aspect of the *Seminole* test is to determine whether Congress acted under the appropriate authority.\(^{110}\) After all, no matter how much Congress intends to abrogate immunity, if it is unconstitutional to do so, intent is irrelevant.

It is clear that *Seminole* opened the door for a wide range of suits from states invoking immunity and limited the enforcement capabilities of the federal government.\(^{111}\) In his dissent in *Seminole*, Justice Stevens claimed that the potential effect of the Court's decision could not be overemphasized because "it prevents Congress from providing a federal forum for a broad range of actions against States . . . [including] regulation of our vast national economy."\(^{112}\) Justice Stevens feared that Congress would be precluded from providing "a private federal cause of action against a State or its Governor, for the violation of a federal right."\(^{113}\)

Since *Seminole*, the Court has reaffirmed its central holding that state governments are immune from lawsuits for violation of laws passed pursuant to Congress' Commerce Clause authority.\(^{114}\) The crucial question is what legislation is within Congress' Fourteenth Amendment enforcement authority? The next section describes the Court's narrowing interpretation of what constitutes Fourteenth Amendment legislation.

THE FOURTEENTH AMENDMENT AND STATE SOVEREIGNTY

The Court's decision in *Seminole* placed renewed emphasis on the meaning of Fourteenth Amendment legislation. A series of

109. See id. at 55-58.
110. See Melanie Hochberg, Note, Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers to Pass Title IX, 74 N.Y.U. L. Rev. 235, 261 (1999) ("[T]he inquiry into what power Congress used to enact a law becomes extremely important and often dispositive to the question of abrogation.").
111. Vázquez, supra note 100, at 1720-22.
112. *Seminole*, 517 U.S. at 77 (Stevens, J., dissenting).
113. See id. (citation omitted).
cases were decided in an attempt to clarify what legislation is passed pursuant to the Fourteenth Amendment. In doing so, the Court is narrowing Congress’ ability to enforce the Fourteenth Amendment and remedy gender discrimination.

City of Boerne v. Flores

Boerne involved the constitutionality of the Religious Freedom Restoration Act (RFRA) of 1993. The Court held that Congress exceeded its Fourteenth Amendment enforcement powers because RFRA was not remedial in nature and created additional substantive rights. In doing so Boerne developed the “congruence and proportionality” test, which considers whether the remedy in the legislation is congruent and proportional to the perceived harm.

The Court in Boerne departed from previous interpretations of the Fourteenth Amendment by giving less deference to Congress when it “proscribes constitutional state behavior as a means of deterring or preventing Fourteenth Amendment violations.” Prior cases such as Katzenbach v. Morgan, were much more deferential to Congress’ ability to exercise its section five discretion. Boerne’s congruence and proportionality test created a higher standard of judicial review of federal laws. The impact of the Boerne approach

116. Id. at 512.
117. Id. at 536. The Court emphasized the remedial nature of the Fourteenth Amendment. Id. at 520 (“The Fourteenth Amendment’s history confirms the remedial, rather than substantive, nature of the Enforcement Clause.”). This again reflects the on-going separation of powers debate. The Court is reserving for itself the role of determining the substance of the Fourteenth Amendment. See Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) (“The ultimate interpretation and determination of the Fourteenth Amendment’s substantive meaning remains the province of the Judicial Branch.”) (citing Boerne, 521 U.S. at 536). But see id. at 93 (Stevens, J., dissenting) (arguing that the framers did not intend the Judicial Branch to determine substantive law).
118. Boerne, 521 U.S. at 530 (“While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.”).
119. Hartley, supra note 17, at 493; see also Boerne, 521 U.S. at 524 (“The remedial and preventive nature of Congress’ enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment.”) (emphasis added).
120. 384 U.S. 641 (1966) (evaluating whether the Voting Rights Act was appropriate Fourteenth Amendment legislation).
121. Id. at 651 (“Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”); see also Hartley, supra note 17, at 493-94 (discussing Katzenbach’s deference to Congress).
122. See Hartley, supra note 17, at 495 (“Boerne’s) approach is more demanding than the rational basis test. The ‘congruence and proportionality’ test permits the Court to probe more deeply the telic relationship between the legislation that regulates constitutional conduct by
is that it gives the courts a mechanism by which to enforce Seminole's holding.\textsuperscript{123} Boerne's higher standard of congruency and proportionality limits Congress' ability to create a private right of action against a state government with legislation that is not deemed within the scope of the Fourteenth Amendment.\textsuperscript{124} The implication for legislation such as the FMLA is that Boerne puts the judicial system in the role of scrutinizing Congress' purpose in enacting the legislation.\textsuperscript{125} This limits congressional ability to enact anti-discrimination legislation because it essentially turns Congress into a fact-finding body by requiring it to prove, through the legislative record, that the legislation was enacted in response to a violation of equal protection rights.\textsuperscript{126} This is a higher level of judicial scrutiny, which limits Congress' ability to determine what kind of legislation is necessary to enforce equal protection rights for women.

\textit{Post-Boerne: Further Development of the Meaning of Congruence and Proportionality}

Despite Boerne's potential to limit congressional authority to enact anti-discrimination legislation, the congruence and proportionality test is vague as applied.\textsuperscript{127} The extent to which the Court intended to prevent Congress from enacting legislation that remedies conduct that would not be unconstitutional by its own

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\item The states and the Fourteenth Amendment violations to be prevented or remedied.\textsuperscript{123} (footnotes omitted).

\item Id. at 496 ("[Boerne] contains all the analytical tools needed to put real teeth in Seminole Tribe's constriction of Congress's authority to abrogate the states' Eleventh Amendment immunity from suit in federal court.").

\item E.g., Post & Siegel, supra note 11, at 522 ("[J]udicial applications of the Boerne test alter the terms in which Congress can participate in the antidiscrimination tradition inaugurated by the Civil Rights Act of 1964."). Post and Siegel discuss at length the role of Congress in enforcing the Fourteenth Amendment, particularly sex discrimination. Id. at 520-21.

\item E.g., Sims v. Univ. of Cincinnati, 219 F. 3d 559, 563-65 (6th Cir. 2000) (examining legislative history of the FMLA to determine congressional intent); see also A. Christopher Bryant & Timothy J. Simeone, Remanding to Congress: The Supreme Court's New "On the Record" Constitutional Review of Federal Statutes, 86 CORNELL L. REV. 328, 348-53 (2001) (arguing that the current Court's interpretation of Boerne virtually requires Congress to engage in specific fact finding in order to enact Fourteenth Amendment legislation).

\item See Bryant & Simeone, supra note 125, at 348-53.

\item E.g., Kazmier v. Widmann, 225 F.3d 519, 533-39 (5th Cir. 2000) (Dennis, J., dissenting) (disagreeing with the majority's application of the Boerne test to the FMLA); see also Post & Siegel, supra note 12, at 522 (noting that the tendency of courts to apply the Boerne test narrowly "is actually a tool for restraining Congress whenever the Court is indifferent or hostile to the constitutional values at stake").

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section one analysis is unclear. Post-Boerne decisions such as Kimel v. Florida Board of Regents and Board of Trustees of the University of Alabama v. Garrett, imply that the Court is following a narrow reading of Boerne, limiting Congress to enacting legislation under its Fourteenth Amendment authority that is tied to the Court’s own interpretation of equal protection. Although both Kimel and Garrett acknowledge that Congress can pass legislation that remedies and deters a broader “swath of conduct, including that which is not itself forbidden by the Amendment’s text,” the lower court’s application of Boerne indicates a narrower conception of Congress’ section five enforcement authority. To read Boerne and Kimel as limiting congressional authority to remedy only conduct by state governments that is already unconstitutional points toward a finding that the FMLA is not a valid exercise of Congress’ Fourteenth Amendment authority. The FMLA reduces gender discrimination by not distinguishing between men and women and by providing a positive grant of leave. This covers a broader range of activities than would otherwise be

128. Section one of the Fourteenth Amendment gives the judicial system the authority to review state legislation that discriminates on the basis of gender. See cases cited, supra, note 38. The confusion is over to what extent Congress can prevent discrimination beyond that which is already unconstitutional. For example, in Kazmier v. Widmann, 225 F.3d 519 (6th Cir. 2000), the majority, ruling that the FMLA is not Fourteenth Amendment legislation, interpreted Boerne and Kimel to mean that “Congress’s potential authority to enact prophylactic legislation is directly linked to the level of scrutiny that we apply in assessing the validity of discriminatory classifications of the targeted type.” Id. at 524. In other words, Congress’ authority is limited by the Court’s own equal protection analysis. In contrast, the dissent in Kazmier argued that neither Boerne nor Kimel require Congress to remain in the range of judicially-enforced equal protection classifications in designing anti-discrimination legislation. Id. at 534-35 (Dennis, J., dissenting).

130. 121 S. Ct. 955 (2001).
131. E.g., Garrett, 121 S. Ct. at 958-95 (reviewing the Court’s decisions holding that discrimination against the disabled is subject only to a rational basis review). Consequently, the Court held that the Americans with Disabilities Act (ADA), provided protection above “rational basis review and was, therefore, a substantive rewriting of the Fourteenth Amendment.” Id. at 968. “[T]o uphold the Act’s application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court in Cleburne [holding that discrimination against the disabled is subject to rational basis review]. Section 5 does not so broadly enlarge congressional authority.” Id. at 968 (footnote omitted); see also Kimel, 528 U.S. at 81 (“Congress cannot ‘decree the substance of the Fourteenth Amendment’s restrictions on the States…. It has been given the power “to enforce” not the power to determine what constitutes a constitutional violation.’”) (quoting City of Boerne v. Flores, 521 U.S. 507, 519 (1997)).
132. Kimel, 528 U.S. at 81; see also Garrett, 121 S. Ct. at 963 (“Congress is not limited to mere legislative repetition of this Court’s constitutional jurisprudence.”).
133. Post & Siegel, supra note 11, at 521.
considered violative of the Fourteenth Amendment. *Boerne* and *Kimel* ought not be read so narrowly.

The application of *Boerne*, and later *Kimel*, to the FMLA has created some confusion among lower courts. As the next section discusses, most courts—both before and after *Kimel*—have concluded that the FMLA is not a valid exercise of Congress' Fourteenth Amendment enforcement powers. Prior to *Kimel*, a majority of courts held that the FMLA's remedy (twelve weeks of leave) was not congruent and proportional to remedying gender discrimination because it conferred a substantive right. After *Kimel*, courts have elaborated on *Boerne*’s test by more closely examining both the right to be remedied and the legislative record indicating a history of discrimination. Post- *Kimel* courts have defined the right to be remedied as something other than gender discrimination, thereby avoiding the heightened scrutiny gender discrimination carries, which grants Congress broad remedial authority. This Note argues that this approach is erroneous because it mischaracterizes the purpose and the legislative history of the FMLA and misconstrues Congress’ authority to remedy gender discrimination and enforce the equal protection clause in a meaningful way for women.

**THE CASES: THE FMLA AND THE FOURTEENTH AMENDMENT**

The shift in Eleventh Amendment doctrine affects the efficacy of the FMLA because state governments are large employers. From state universities and the state police to the myriad other branches of state government agencies, state governments employ numerous people. If the FMLA is not considered a law enacted pursuant to the Fourteenth Amendment, everyone working for state governments would be without a cause of action against their employers for violations of the FMLA. State immunity denies a private cause of action for damages.134 If a person is fired for taking a significant amount of time off of work to care for a sick relative or child, the injury to his/her family is monetary. If state governments are immune from private suits for many damages, that family is without an adequate remedy.

Furthermore, to hold that the FMLA is not Fourteenth Amendment legislation impedes the progress of women's rights because it reduces Congress' ability to draft effective anti-discrimination

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134. See supra text accompanying notes 76-77.
As discussed above, Congress developed the FMLA after years of failed attempts by both itself and the Supreme Court to develop a workable solution to the problem of gender discrimination and family obligations in the workplace. A majority of the courts that have considered whether the FMLA is Fourteenth Amendment legislation have concluded that it is not. These courts misconstrued both the group of people the FMLA was designed to help and the remedial purpose of the Act.

The Application of Fourteenth Amendment Analysis to the FMLA: Pre-Kimel

The majority of the cases addressing Eleventh Amendment challenges to the FMLA held that Congress did not abrogate state immunity. In general, prior to the Court's decision in Kimel, most courts concluded that the FMLA confers a substantive right, altering the guarantees of the Fourteenth Amendment. Kilvitis v. County of Luzerne exemplifies this approach. In determining whether the FMLA was validly enacted pursuant to the Fourteenth Amendment, the court applied a three-part test developed thirty years ago in Katzenbach v. Morgan. "(1) whether the statute may
be regarded as an enactment to enforce the Equal Protection Clause of the Fourteenth Amendment; (2) whether the statute is plainly adapted to its enforcement goal; and (3) whether the statute is consistent with the Constitution.”

Kilvitis found congressional intent to invoke the Equal Protection Clause in the statute itself; it did not examine the legislative history. Applying Boerne's congruent and portionality test to the second prong of Katzenbach's analysis, Kilvitis found that the FMLA was not Fourteenth Amendment legislation. The court reasoned that the FMLA's grant of twelve weeks of leave creates an economic entitlement and is, therefore, a substantive alteration of the Fourteenth Amendment. The court stated that “[t]he FMLA does not add anything to the existing prohibitions against gender discrimination, except to the extent that it creates a statutory entitlement to 12 weeks of leave.” The court did not examine the “existing prohibitions” (i.e. constitutional or legislative), nor did it examine the extent to which Congress can legislatively cover a wider range of discriminatory conduct than is already protected by the courts.

The court ended its inquiry at the fact that leave is “substantive” because it confers a benefit and did not examine the extent to which a “benefit” may actually serve a remedial purpose. Under the FMLA, the purpose of the “benefit” of leave is to remedy the fact that women historically bear a disproportionate amount of family responsibilities.

Prior to Kimel, a handful of courts decided that the FMLA was enacted pursuant to the Fourteenth Amendment. None of the

141. Kilvitis, 52 F. Supp. 2d at 408 (citing Katzenbach, 384 U.S. at 651).
142. Id. (citing McGregor, 18 F. Supp. 2d at 207 (citing 29 U.S.C. §§ 2601(b)(4) & (5) (1994))). Other courts that examined this issue at the same time were consistent with Kilvitis' line of reasoning. E.g., Driesse, 26 F. Supp. 2d at 1332; McGregor, 18 F. Supp. 2d at 207.
143. The only case prior to Kimel that examined the legislative history was the Eleventh Circuit in Garrett v. University of Alabama Board of Trustees., 193 F.3d 1214, 1220 (11th Cir. 1999). The Eleventh Circuit seemed to anticipate the arguments in Kimel and frequently cited the circuit court opinion. Id. at 1219. Garrett concluded that the FMLA's legislative history was “insufficient to indicate Congress had identified particular unconstitutional actions by the states.” Id. at 1220.
144. Kilvitis, 52 F. Supp. 2d at 408-09.
145. Id. at 409-10.
146. Id. at 410.
147. See supra notes 128-33 and accompanying text.
149. See supra notes 58-72 and accompanying text.
150. Jolliffe v. Mitchel, 986 F. Supp. 339, 343 (W.D. Va. 1997); Biddlecome v. Univ. of Tex., No. 96-1872, 1997 WL 124220, at *3 (S.D. Tex. Mar. 13, 1997); see also Knusaman v. Maryland, 935 F. Supp. 659, 663 (D. Md. 1998) (finding intent to abrogate, but declining to decide if the FMLA was validly enacted pursuant to the Fourteenth Amendment because the issue was not raised by counsel).
courts developed their rationales to the same extent as the majority approach, but all recognized that Congress intended the FMLA to remedy workplace gender disparity pursuant to the Fourteenth Amendment. On this point, the minority position did not differ from the majority: both approaches found congressional intent to invoke the Fourteenth Amendment. Where the opinions differed was that none of the courts that found that the FMLA was enacted pursuant to the Fourteenth Amendment applied the Katzenbach test or Boerne’s congruence and proportionality test. Consequently, the minority approach did not examine whether the FMLA could be enacted pursuant to Congress’ section five enforcement powers.

The result was that by the time the Supreme Court decided Kimel, elaborating on Boerne’s test, the only courts that had applied Boerne found that the FMLA was not Fourteenth Amendment legislation. This does not mean that Boerne’s analysis dictates that one must find that the FMLA is not Fourteenth Amendment legislation. Particularly when addressing race or gender discrimination, Congress has the “ability to enact broad prophylactic legislation.” Nothing in Boerne requires that the legislation be limited to remedying what would already be unconstitutional under section one of the Fourteenth Amendment. If that were the case, section five would be useless because one could already seek a remedy under section one in the courts. Consequently, the fact that the FMLA grants a right to take leave to both men and women ought not defeat the legislation because Congress’ remedial powers

151. Jolliffe, 986 F. Supp. at 342. Consistent with its concern about inequality in the work place, Congress explained that the purpose of the FMLA is to achieve a balance between the needs of the workplace “in a manner that, consistent with the Equal Protection Clause of the Fourteenth Amendment, minimizes the potential for employment discrimination on the basis of sex by ensuring generally that leave is available for eligible medical reasons.

152. In fact, the court in Biddlecome v. University of Texas, No. 96-1872, 1997 WL 124220 (S.D. Tex. Mar. 13, 1997), went further than the statute itself and looked to the legislative history of the FMLA: stating “[t]he legislative history of the FMLA states that it ‘is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment.” Id. at *3 (quoting S. REP. No. 103-3, at 18 (1993)).

153. See Post & Siegel, supra note 11, at 521-22 (discussing the tendency of lower courts to narrowly construe Boerne’s holding).


155. Id. at 541-42 (citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-17, at 959-60 (3d ed. 1999)); see also Post & Siegel, supra note 12, at 522 (“[i]t is clear that concerns about preserving the Court’s interpretive authority do not require the Court to impose narrow tailoring or antidiscrimination legislation to ensure that it closely conforms to the terms of the Court’s own Section 1 jurisprudence.”).
under section five for race and gender discrimination can cover a wider range of conduct, including a positive right to take leave.

**Application of Fourteenth Amendment Analysis to the FMLA: Post-Kimel**

Since *Kimel*, lower courts have developed a more nuanced approach to the issue of whether the FMLA was validly enacted pursuant to the Fourteenth Amendment. *Kimel* elaborated upon *Boerne*'s congruence and proportionality test. *Kimel* has been interpreted as asking: (1) what the constitutional problem is that Congress is trying to remedy and (2) whether there has been a demonstrated history and pattern of discrimination by state governments. The Court then asked whether the remedy in the legislation was congruent and proportional to the constitutional right identified by looking at the legislative history. All of the circuit courts have held, in applying this test, that the FMLA is not Fourteenth Amendment legislation. As this section will demonstrate, *Kimel*'s interpretation of the congruence and proportionality test need not dictate that the FMLA is not validly enacted pursuant to the Fourteenth Amendment. In fact, an honest examination of the reasons Congress passed the FMLA, as well as an understanding of the linked nature of gender discrimination and workplace leave lead to the conclusion, under *Kimel*, that the FMLA is valid Fourteenth Amendment legislation.

The first element of *Kimel*'s analysis asks the court to “identify the constitutional evil that Congress sought to remedy with the FMLA.” This element has allowed some courts to characterize the FMLA as something other than gender discrimination legislation. For example, the Fifth Circuit, in *Kazmier v. Widmann*, characterized the section in the FMLA that allows a person to take

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156. See, e.g., Post & Siegel, supra note 11, at 521-22.
157. E.g., *Kazmier*, 225 F.3d at 524-25. The Supreme Court solidified this two-part test in *Board of Trustees of the University of Alabama v. Garrett*, 121 S. Ct. 955, 963-65 (2001), by asking first what unconstitutional conduct Congress is trying to remedy, and second, whether there have been legislative findings demonstrating a history of constitutional discrimination by state governments.
158. E.g., *Chittister v. Dep't of Cmty. & Econ. Dev.*, 226 F.3d 223, 228-29 (3d Cir. 2000).
159. Id. at 229; *Kazmier v. Widmann*, 225 F.3d 519, 528 (5th Cir. 2000); *Sims v. Univ. of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61, 69 (2d Cir. 2000); *Townsel v. Missouri*, 233 F.3d 1094, 1096 (8th Cir. 2000).
160. See Issacharoff & Rosenblum, supra note 2, at 2159-92 (overviewing the difficulty in addressing gender-based discrimination that involves working women and maternity).
162. 225 F.3d 519 (5th Cir. 2000).
time off of work for his/her own illness as discrimination based on pregnancy, not on sex. 163 This choice of phrasing is important because the Supreme Court has held that pregnancy is a permissible basis for discrimination. 164 By choosing not to describe the constitutional violation being remedied as sex discrimination, the court makes the constitutional right at stake less alarming. The means chosen must be congruent and proportional to the right at stake; if the right at stake does not have heightened constitutional scrutiny, the remedy cannot be as drastic because it would no longer be congruent and proportional. 165 To characterize the FMLA as something other than gender discrimination allows the court to avoid the fact that gender carries with it heightened constitutional review. 166

The fact that gender carries heightened review distinguishes the FMLA cases from Kimel and Garrett. The cases upon which courts such as Kazmier rely involve constitutional rights in which Congress does not have recognized broad remedial powers. In fact, the only court to hold that the FMLA can be distinguished from the cases involving the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA) did so on this ground. In Serafin v. Connecticut Department of Mental Health and Addiction Services, 167 on a motion to rehear the case in light of Kimel, the court distinguished Kimel stating that "[g]ender discrimination also triggers greater authority for congressional legislation under the Fourteenth Amendment than age discrimination based upon sex." 168 To answer the court's question, making it mandatory for employers to provide leave with job security to either gender takes the focus off of pregnancy. Only women can become pregnant; therefore, not requiring employers to provide leave at all, or only requiring them to provide leave to pregnant women, is fraught with discrimination problems. See Finley, supra note 48, at 1141-42. The Pregnancy Discrimination Act was not as successful as it could have been because it provided no positive grant of leave. See supra text accompanying notes 46-59. The FMLA's grant of leave to people for their own health problems remedies gender discrimination because it makes family issues, including health problems, not just women's issues but people issues.

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163. Id. at 527 ("As an initial matter, we reject the notion that subsection (D) targets sex discrimination. The legislative record demonstrates that Congress was concerned with discrimination on the basis of pregnancy, which is not the same thing as broad based discrimination on the basis of sex.").


165. Kazmier, 225 P.3d at 527. The court also stated that even if the discrimination addressed was discrimination based upon sex, "it [was] virtually impossible to conceive how requiring employers to permit employees to take 12 weeks of leave for serious health conditions could possibly have the effect of preventing sex discrimination." Id. at 528. To answer the court's question, making it mandatory for employers to provide leave with job security to either gender takes the focus off of pregnancy. Only women can become pregnant; therefore, not requiring employers to provide leave at all, or only requiring them to provide leave to pregnant women, is fraught with discrimination problems. See Finley, supra note 48, at 1141-42. The Pregnancy Discrimination Act was not as successful as it could have been because it provided no positive grant of leave. See supra text accompanying notes 46-59. The FMLA's grant of leave to people for their own health problems remedies gender discrimination because it makes family issues, including health problems, not just women's issues but people issues.

166. See cases cited supra note 38.

discrimination." It is for this reason that the proper characterization of the FMLA as gender discrimination legislation is crucial: it is well established that Congress has greater remedial authority when the constitutional violation triggers heightened scrutiny, such as gender discrimination. The second element of Kimel's analysis is an examination of the legislative history for evidence of discrimination. The Fifth Circuit interpreted this to mean that "[b]road, prophylactic legislation must be congruent with and proportional to actual, identified constitutional violations by the states." This is an extremely narrow interpretation of Congress' remedial capabilities. It is also a departure from earlier decisions, which looked no further than the statement in the act itself that says the FMLA is intended to remedy gender discrimination. This examination of the legislative history further hinders Congress' ability and discretion to enact legislation that remedies gender discrimination because it

168. Id. at 277. This is the only case after Kimel that finds that the FMLA is validly enacted pursuant to the Fourteenth Amendment. Id. at 278.

169. The Court in both Garrett and Kimel placed a great deal of emphasis on the fact that the groups in question (the elderly in Kimel and the disabled in Garrett) require only rational basis review. Bd. of Trs. of the Univ. of Ala. v. Garrett, 121 S. Ct. 955, 964 (2001) ("States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational."). Consequently, the ADA was not congruent and proportional because it substantively altered the Fourteenth Amendment. Id. at 968. Likewise in Kimel, the Court used the same rationale stating that "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82 (2000).

170. It is not altogether clear whether this is actually required by Kimel. Justice Dennis' dissenting opinion in Kazmier v. Widman, 225 F.3d 519, 533 (5th Cir. 2000) argues that it is not.

[N]othing in Kimel restricts Congress' freedom to choose whether to take evidence, conduct hearings, seek experts' opinions, or to rely on history, experience with previous legislation, notice of legislative facts, common knowledge, common sense, or a combination of such factors. The court has not and cannot legitimately impose any standard form of judicially made procedures, standards, or quantum of evidence requirements upon Congress.

Id. at 537. To read Kimel to require legislative fact finding for Fourteenth Amendment legislation may raise separation of powers issues. See Bryant & Simeone, supra note 125, at 348-53. Nonetheless, Justice Rehnquist's opinion in Garrett, 121 S. Ct. at 455, emphasizes that the legislative history of the ADA contains no evidence of discrimination against disabled people committed by state governments. Id. at 964. An inference can be made that this requires Congress to engage in legislative fact finding. However, a full discussion of this issue is beyond the scope of this Note.

171. Kazmier, 225 F.3d. at 526. Justice Rehnquist reiterated this point in Garrett stating the "legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." Garrett, 121 S. Ct. at 965.

requires Congress to demonstrate a history of gender discrimination by state governments in order to be able to abrogate state immunity. Nothing in either the doctrine of sovereign immunity or the history of Congress' ability to enact Fourteenth Amendment legislation, supports this requirement.

The reason lower courts are interpreting *Kimel* to require evidence this specific is uncertain because it is unclear on what qualitative grounds public employers are distinguished from private employers. In other words, if Congress has identified persistent problems of gender discrimination in the workforce that are inextricably linked with family responsibilities, why are public employers immune from the same prejudices? It makes no sense to recognize a problem of gender discrimination in the society at large, but to refuse to allow Congress to impute those findings to state governments as employers.

Courts applying the *Kimel* analysis have been more reluctant than before to find that the FMLA is validly enacted pursuant to the Fourteenth Amendment. However, this interpretation of *Kimel* or *Boerne* is inconsistent with Congress' role in enacting gender anti-discrimination legislation. This interpretation does not accurately characterize the FMLA as gender discrimination legislation. Congress clearly intended the FMLA to remedy gender discrimination. The fact that the Act deals with family leave ought not defeat Congress' explicit purpose. Classifying family leave as a medical disability, harkens back to the state of gender discrimination in the 1970s, and revives all of the gender equity problems that the Pregnancy Discrimination Act was unable to fix. The FMLA remedies gender equality because it changes the debate about family issues from being a women's issue, to everybody's issue. The refusal of courts to classify the FMLA as gender discrimination legislation allows courts to avoid the issue of Congress' broader authority to remedy gender discrimination, compared to disability or age discrimination.

**CONCLUSION**

Congress enacted the FMLA in an attempt to remedy problems of gender discrimination in the workplace that result from anachronistic stereotypes about the role of women within the family. By taking a gender-neutral approach, and by requiring that

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173. See supra notes 26-35 and accompanying text.
leave be available to both genders, Congress remedied gender discrimination by making issues of work and family no longer exclusively "women's issues."

The revival of the Eleventh Amendment, and the resultant focus on the scope of the Fourteenth Amendment, threatens Congress' ability to enforce the equal protection guarantees of the Constitution for women. The Eleventh Amendment has been turned into an axe with which the Supreme Court chipped away the federal governments' role in enforcing civil rights. The denial of Congress' ability to abrogate states' sovereign immunity with legislation such as the FMLA prevents Congress from drafting legislation that is a thoughtful response to past problems in enforcing civil rights for women. It also denies an adequate remedy to the many people employed by state governments.

The FMLA ought to be considered as being enacted pursuant to the Fourteenth Amendment because it remedies past discrimination that women have experienced in the workforce. The courts that refuse to so characterize it, not only misapply Fourteenth Amendment precedent, but also misconstrue the nature of the Act. The FMLA is a necessary remedy for women to achieve equality in the workplace.

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