Constitutional Law—The Family and Medical Leave Act: Abrogation of States' Immunity from Suit—*Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003)

The Fourteenth Amendment guarantees "equal protection of the laws" and grants Congress enforcement power through "appropriate legislation."[1] The Supreme Court has said that this grant includes the power to abrogate the states' immunity from suit provided in the Eleventh Amendment.[2] In *Nevada Department of Human Resources v. Hibbs*,[3] the Supreme Court considered whether Congress' abrogation of state immunity in the Family and Medical Leave Act of 1993 (FMLA) was constitutional.[4] The Court concluded that the FMLA's abrogation is a valid act of Congress pursuant to Section 5 of the Fourteenth Amendment (Section 5).[5]

In early 1997, William Hibbs, an employee of the Nevada Department of Human Resources (Department), requested FMLA leave to care for his wife.[6] The Department granted up to twelve weeks of leave as needed between May and December 1997.[7] In October 1997, the Department informed Hibbs that he had used all of his FMLA leave and, because no further leave was approved, requested that he return to work.[8] Hibbs did not comply, and the Department terminated him.[9]

Hibbs sued the Department for FMLA violations in the United States District Court for the District of Nevada.[10] The district court granted the

1. U.S. CONST. amend. XIV, § 1 (guaranteeing equal protection); *id.* at § 5 (granting enforcement power through appropriate legislation).

2. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (concluding Section 5 of Fourteenth Amendment limits Eleventh Amendment); *see also* U.S. CONST. amend. XI (allowing Congress power to enforce amendments).

3. 538 U.S. 721 (2003).

4. *Id.* at 726-27 (stating issue before Court). Though the case had multiple facets, the Court acknowledged that its holding would turn on whether Congress' abrogation in the FMLA was implemented within its constitutional authority. *Id.*

5. *Id.* at 725 (concluding abrogation constitutional). In declaring the FMLA's abrogation a valid act of Congress, the Court held that state employees can recover money damages if employers violate the family leave provisions of the FMLA. *Id.*

6. *Id.* (describing Hibbs' application for FMLA leave). Hibbs' wife was recovering from an automobile accident and neck surgery. *Id.*

7. 538 U.S. at 725; *see infra* note 25 and accompanying text (defining applicable provisions of FMLA).

8. 538 U.S. at 725 (explaining Department's treatment of Hibbs); *see also* Hibbs v. Dept. of Human Res., 273 F.3d 844, 848-49 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003). Hibbs last attended work on August 5, 1997. 538 U.S. at 725. Although he submitted requests for additional leave, the Department denied those requests. *Id.*

9. *Id.* (describing Hibbs' termination).

10. *Id.* (specifying 29 U.S.C. § 2612(a)(1)(C) violations as basis for damages and injunctive and declaratory relief); *see also* Hibbs v. Dept. of Human Res., 273 F.3d 844, 849 (9th Cir. 2001) (noting

Department summary judgment based on Eleventh Amendment immunity.[11] The Ninth Circuit Court of Appeals reversed, deciding that Congress validly abrogated the states' immunity in the FMLA under the authority of Section 5.[12] The Supreme Court granted certiorari to resolve a split among the circuits on the issue of immunity.[13] The Court affirmed the Ninth Circuit's decision, concluding the FMLA's abrogation of state immunity is a constitutional remedy for gender discrimination.[14]

The Eleventh Amendment provides that federal jurisdiction does not extend to suits over nonconsenting states.[15] Section 5, however, limits the Eleventh Amendment by granting Congress the power to enforce substantive provisions of the Fourteenth Amendment such as equal protection.[16] This limitation includes the authority to abrogate the states' immunity from lawsuit.[17] Legislation constitutionally abrogates immunity if the intent to abrogate is unmistakably clear in the text of the statute and, if in enactment, Congress acted pursuant to a valid exercise of Section 5 power.[18] The authority of

Fourteenth Amendment Due Process Clause and state law as additional bases for claims), *aff'd*, 538 U.S. 721 (2003).

11. 538 U.S. at 725 (granting of summary judgment in district court). The district court concluded that, although the Eleventh Amendment barred Hibbs' FMLA claims against Nevada, there was no violation of his Fourteenth Amendment rights. *Id.* After granting the Department summary judgment on all federal claims, the district court also declined to exercise supplemental jurisdiction over Hibbs' state claims and dismissed them without prejudice. Hibbs v. Dept. of Human Res., 273 F.3d 844, 849 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003).

12. Hibbs v. Dept. of Human Res., 273 F.3d 844, 871 (9th Cir. 2001) (reversing district court grant of summary judgment and vacating dismissal of state law claims), *aff'd*, 538 U.S. 721 (2003). The Ninth Circuit Court of Appeals concluded that Congress' intent to abrogate was clear in the text of the FMLA, and that it constitutionally exercised its Section 5 powers. *Id.*; *see also infra* note 18 and accompanying text (addressing two requirements for valid abrogation of immunity).

13. 538 U.S. at 725 (granting certiorari).

14. *Id.* at 740 (affirming Ninth Circuit Court of Appeals); *see also infra* notes 31-36 and accompanying text (detailing Court's holding and reasoning).

15. U.S. CONST. amend. XI; *see, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001) (recognizing extension of Eleventh Amendment to suits against states by citizens of same); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000) (stating Constitution does not allow federal jurisdiction over suits against nonconsenting states); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 634-35 (1999) (citing historical consistency in Court's Eleventh Amendment immunity jurisprudence).

16. U.S. CONST. amend. XIV, § 5 (granting Congress power to enforce provisions by "appropriate legislation"); *see* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (limiting Eleventh Amendment through Fourteenth Amendment authority); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001) (stating Section 5 power of enforcement limits state sovereignty provided by Eleventh Amendment); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80 (2000) (affirming Section 5 power to abrogate state sovereign immunity).

17. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (declaring Congress may, through appropriate legislation, allow private suits against states).

18. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 55 (1996). The Court confirmed that Congress' intent to abrogate must be unquestionably clear. *Id.* at 55; *see* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (asserting necessity of Congressional clarity). As to the second requirement, the Court clarified that a valid exercise of power must be pursuant to Section 5 of the Fourteenth Amendment. *Seminole,* 517 U.S. at 59. In doing so, it overturned precedent that allowed abrogation pursuant to Article I powers. *Id.* at 72-73.

Section 5 is limited to remedial measures; Congress may not employ it to change the substance of the law.[19] In order to justify remedial steps, Congress' action must be a response to recurrent state violation.[20]

Section 5 legislation is properly characterized as a "remedy" when there is "congruence and proportionality" between the violation requiring remedy and Congress' corrective measure.[21] The congruence and proportionality test examines both the scope of the constitutional right at issue and the legislative record of unconstitutional state behavior.[22] Any state measure that differentiates by gender is subject to heightened scrutiny, and therefore presumed unconstitutional unless the state can show an "important governmental objective" and means that "substantially relate" to that end.[23]

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19. City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (extending Section 5 power solely to enforcing Fourteenth Amendment and describing power as "remedial"). The Court stressed that there is a line between remedial measures and those that would be considered substantive redefinition of the law, the latter of which is invalid under Section 5. *Id.* at 519-20; *see* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) (focusing attention on line between remedy and substantive redefinition).

20. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (requiring pattern of state discrimination warranting remedy); *see also* Brian Garner, Note, *Enforcing Civil Rights Against the States: An Analysis of the Pregnancy Discrimination Act of 1978 Under the Court's Section 5 Jurisprudence*, 22 REV. LITIG. 711, 736 (2003) (describing legislative record as indicative of whether Congress' action considered remedial); Katherine K. Seegers, Note, Kimel *and Beyond: Fifth Circuit Tackles Sovereign Immunity and the Family and Medical Leave Act in* Kazmier v. Widmann, 54 SMU L. REV. 453, 455-56 (2001) (noting mere invocation of sex discrimination insufficient to support validity of Section 5 legislation).

21. City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (characterizing legislation lacking congruence and proportionality as "substantive"). The Court recognized the fine line between "remedy" and "substantive redefinition," but confirmed that Congress has the freedom to pass remedial legislation that satisfies the congruence and proportionality test. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000). It is the responsibility of the Court, however, to apply the principles of that test to ensure that legislation remains remedial. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001); *see also* Christopher P. Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 462 (2003) (arguing congruence and proportionality test makes it harder for Congress to pass Section 5 legislation); Stephanie C. Bovee, Note, *The Family Medical Leave Act: State Sovereignty and the Narrowing of Fourteenth Amendment Protection*, 7 WM. & MARY J. WOMEN & L. 1011, 1026 (2001) (characterizing congruence and proportionality test as higher standard of judicial review). *Compare* J. Randy Beck, *The Heart of Federalism: Pretext Review of Means-Ends Relationships*, 36 U. CAL. DAVIS L. REV. 407, 440 (2003) (suggesting congruence and proportionality test guards against pretext for nonremedial laws), *with* Kimberly E. Dean, Note, *In Light of the Evil Presented: What Kind of Prophylactic Antidiscrimination Legislation Can Congress Enact After* Garrett*?*, 43 B.C. L. REV. 697, 725 (2002) (characterizing congruence and proportionality test as undue restriction on Congress' ends and means).

22. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365-68 (2001) (defining two steps of congruence and proportionality test); *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-83 (2000) (applying test to Age Discrimination in Employment Act of 1967); City of Boerne v. Flores, 521 U.S. 507, 531 (1997) (declaring Religious Freedom Restoration Act of 1993 unconstitutional given lack of congressional evidence of discrimination). *But see* Cherry v. Univ. Wis. Sys. Bd. of Regents, 265 F.3d 541, 551 (7th Cir. 2001) (upholding abrogation even though Equal Pay Act lacking "explicit findings" of gender discrimination); Kovacevich v. Kent State Univ., 224 F.3d 806, 821 (6th Cir. 2000) (characterizing lack of extensive legislative findings as "untroubl[ing]"); Varner v. Ill. State Univ., 226 F.3d 927, 935 (7th Cir. 2000) (relying on Congress' "clear understanding" in lieu of explicit findings in legislative record); Lewis v. Smith, 255 F. Supp. 2d 1054, 1066 (D. Ariz. 2003) (finding examination of legislative record unnecessary due to presumption of unconstitutionality of gender classification).

23. Craig v. Boren, 429 U.S. 190, 197 (1976) (applying heightened scrutiny to gender-based difference in

Congress can remedy such discrimination with prophylactic legislation, which prohibits conduct that would otherwise be constitutional in order to deter unconstitutional conduct, so long as the legislation satisfies the congruence and proportionality test.[24]

The FMLA aims to eliminate gender discrimination in the workplace by granting all eligible employees up to twelve weeks of unpaid leave annually in the event of a serious health condition of the employee's spouse, child, or parent.[25] Failure to comply with the family leave provisions exposes the states to liability to its employees.[26] When previously challenged, lower courts ruled that the abrogation of Eleventh Amendment immunity in the FMLA was an unconstitutional exercise of Congress' Section 5 power.[27]

In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court

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legal age for alcohol consumption); *see* United States v. Virginia, 518 U.S. 515, 533 (1996) (invalidating Virginia Military Institute's single-sex admissions policy with application of heightened scrutiny); *see also* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (reflecting current Court trend requiring states show "exceedingly persuasive justification" for gender classifications). Laws subject to heightened scrutiny are presumed unconstitutional, and therefore the burden of proof is reallocated from Congress to the states to rebut the presumption and establish the constitutionality of its programs. Hibbs v. Dept. of Human Res., 273 F.3d 844, 857 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003); *see also* Cherry v. Univ. Wis. Sys. Bd. of Regents, 265 F.3d 541, 551 (7th Cir. 2001) (defining heightened scrutiny with presumption of unconstitutionality against states); Lewis v. Smith, 255 F. Supp. 2d 1054, 1065 (D. Ariz. 2003) (presuming "state-sponsored" gender discrimination unconstitutional); *cf.* Banks, *supra* note 21, at 464 (crediting reallocation of burden of proof as controlling outcome of gender classification cases); John Alan Doran & Christopher Michael Mason, *Disproportionate Incongruity: State Sovereign Immunity and the Future of Federal Employment Discrimination Law*, 2003 L. REV. MICH. ST. UNIV. DET. C.L. 1, 28 (2003) (arguing presumption of unconstitutionality invites overreaching by placing onus on state to "prove Congress wrong").

24. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000). "Congress' power 'to enforce' includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Id.*; *see also* City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (generally allowing prohibition of constitutional conduct in order to remedy other unconstitutional conduct); Katzenbach v. Morgan, 384 U.S. 641, 658 (1966) (prohibiting requirement of literacy test imposed on right to vote due to equal protection violation).

25. 29 U.S.C. § 2612(a)(1)(C) (2000). The FMLA grants leave only to employees who have worked for the employer at least one year and have worked a minimum of 1,250 hours within the prior year. *Id.* § 2611(2)(A). High-ranking employees and state elected officials, their staff, and policymakers are ineligible for the leave. *Id.* § 2611(2)(B)(i)-(3). The stated purposes of the FMLA are to minimize gender discrimination in the workplace and to advance equal employment opportunity while balancing the needs of employers with those of the family. *Id.* § 2601(b)(1)-(5).

26. 29 U.S.C. § 2617(a)(2) (2000). Liability is limited to actual loss and equitable relief. *Id.* § 2617(A)(i)-(iii). In the event of FMLA violation, the employee must institute the action within two years of the alleged violation, or within three years for willful violations. *Id.* § 2617(c)(1)-(2).

27. Kazmier v. Widmann, 225 F.3d 519, 526 (5th Cir. 2000) (citing failed congruence and proportionality test for deficient discriminative pattern in legislative history), *overruled by*, Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); *cf.* Christopher E. Sherer, *The Resurgence of Federalism: State Employees and the Eleventh Amendment*, 23 HAMLINE J. PUB. L. & POL'Y 1, 26 (2001) (emphasizing majority of FMLA cases ruled against abrogation validity); Bovee, *supra* note 21, at 1026 (anticipating curtailed ability of Congress to enforce Fourteenth Amendment and remedy gender discrimination); Brent W. Landau, Note, *State Employees and Sovereign Immunity: Alternatives and Strategies for Enforcing Federal Employment Laws*, 39 HARV. J. ON LEGIS. 169, 181 (2002) (asserting recent Supreme Court decisions will preclude state employees from suing employers under FMLA).

reviewed the Ninth Circuit's ruling that the FMLA constituted a valid abrogation of the states' immunity.[28] The Court focused on whether Congress acted within its Section 5 authority because the clarity of a congressional intent to abrogate was not at issue.[29] The Court concluded that a prophylactic remedy enacted pursuant to Section 5 was necessary in light of the history of state laws restricting employment opportunities for women, as well as the FMLA's legislative record indicating both facial and de facto discrimination in state leave policies.[30] The Court noted that it was comparatively easy for Congress to show that the states had acted unconstitutionally because a heightened standard of scrutiny is applied in cases of gender discrimination.[31]

To ensure that the FMLA is a remedy and not a substantive redefinition of states' obligations, the Court applied the congruence and proportionality test.[32] History revealed that the scope of the right at issue, equal protection, is considerable enough to have warranted previous remedial statutes, albeit unsuccessful ones.[33] Furthermore, the FMLA's legislative record attested to gender discrimination in state leave policies.[34] The Court superimposed the family leave provisions onto the evidence of discrimination and reasoned that Congress proportionally limited the scope of the FMLA.[35] Having concluded, therefore, that the family leave provisions are congruent and proportional to gender discrimination in state leave policies, the Court affirmed that the FMLA constitutionally abrogates states' immunity from suit.[36]

Despite the fact that the Supreme Court applied the congruence and proportionality test within precedential parameters, it failed to recognize that the test is undermined in the context of heightened scrutiny.[37] The second

28. 538 U.S. at 725. *Compare* Hibbs v. Dept. of Human Res., 273 F.3d 844, 871 (9th Cir. 2001) (concluding FMLA abrogation of immunity constitutional), *aff'd*, 538 U.S. 721 (2003), *with* Kazmier v. Widmann, 225 F.3d 519, 529 (5th Cir. 2000) (rejecting FMLA abrogation as unconstitutional act of Congress), *overruled by*, Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003).

29. 538 U.S. at 726 (focusing issue on proper exercise of Congressional authority).

30. *Id.* at 735 (describing record of state sex discrimination in leave policies as "weighty"). *But see id.* at 745 (Kennedy, J., dissenting) (highlighting majority's inability to show state pattern of discrimination and characterizing approach as "superficial").

31. *Id.* at 736 (examining Congress' burden in light of heightened scrutiny).

32. *Id.* at 739-40 (linking congruence and proportionality of FMLA to remedial nature).

33. 538 U.S. at 729 (citing Title VII of Civil Rights Act of 1964 as previous attempt to remedy longstanding discrimination).

34. *Id.* at 730-34 (expounding on state leave policies ranging from complete employer discretion to maternity leave only).

35. *Id.* at 738 (describing FMLA as "narrowly targeted"). Limitations on eligibility and restrictions on the cause of action were indicative of the appropriate scope of the FMLA. *Id.* at 738-39; *see also supra* notes 25-26 and accompanying text (outlining eligibility requirements and confines of cause of action).

36. 538 U.S. at 740 (concluding FMLA abrogation constitutional).

37. *Id.* at 740 (determining outcome of congruence and proportionality test). Until this case, the Court applied the congruence and proportionality test only to cases of discrimination based on age and disability, both of which are subject to rational basis review. *Id.* at 735-36; *see* Hibbs v. Dept. of Human Res., 273 F.3d 844, 853 (9th Cir. 2001) (emphasizing all previous Supreme Court analyses dependant on level of scrutiny other than heightened scrutiny), *aff'd*, 538 U.S. 721 (2003); *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531

prong of the congruence and proportionality test places the burden on Congress to prove a pattern of unconstitutional state action.[38] Under heightened scrutiny, however, state action is presumed unconstitutional, thereby reallocating the burden of proof *to the states* to show that their conduct does not establish a pattern of discrimination.[39] In this case, therefore, the states bear the burden to prove that their family leave policies are not based on gender stereotypes.[40] The application of heightened scrutiny makes this task arduous.[41]

Notwithstanding the reallocation of the burden of proof to the states in gender cases, the Supreme Court analyzed the congruence and proportionality test by asking whether *Congress* met its burden to show a pattern of state discrimination.[42] In fact, the conflict between Chief Justice Rehnquist's majority and Justice Kennedy's dissent is based on a disagreement over whether Congress met that burden.[43] The dissent wanted to see "far more specific" evidence, while the majority considered Congress' evidence "weighty enough" to establish the congruence and proportionality of the FMLA.[44] The conflict between the majority and dissent, however, ignores the fact that heightened scrutiny presumes unconstitutionality.[45] Thus, although the congruence and proportionality test burdens Congress to prove a pattern of unconstitutional state action, heightened scrutiny, by definition, renders that burden an illusion by presupposing the unconstitutionality of states' conduct.[46]

U.S. 356, 367 (2001) (emphasizing rational basis scrutiny for disability classifications); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) (using levels of scrutiny to distinguish age classifications from those of gender). According to *Garrett*, classifications subject to rational basis review "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." 531 U.S. at 367 (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)).

38. *See supra* note 22 and accompanying text (explaining two parts of congruence and proportionality test).

39. Hibbs v. Dept. of Human Res., 273 F.3d 844, 855 (9th Cir. 2001) (presuming unconstitutionality unless "substantially related" to important governmental objective), *aff'd*, 538 U.S. 721 (2003); *supra* note 23 and accompanying text (expounding on presumption of unconstitutionality and reallocation of burden of proof).

40. Hibbs v. Dept. of Human Res., 273 F.3d 844, 858 (9th Cir. 2001) (citing Department's failure to show lack of discriminatory pattern), *aff'd*, 538 U.S. 721 (2003).

41. 538 U.S. at 736 (commenting on burden of heightened scrutiny). The states' burden of rebuttal is heavy in that, "[b]ecause state-sponsored gender discrimination is presumptively unconstitutional, Section 5 legislation that is intended to remedy or prevent [it] is presumptively constitutional." Hibbs v. Dept. of Human Res., 273 F.3d 844, 857 (9th Cir. 2001), *aff'd*, 538 U.S. 721 (2003).

42. 538 U.S. at 729-34 (weighing Congress' evidence of state discriminatory conduct); *id.* at 745-46 (Kennedy, J., dissenting) (demanding more evidence from Congress of discrimination in state policies).

43. *Id.* at 746 (Kennedy, J., dissenting) (noting failure of Congress to "make the requisite showing"). *Compare id.* at 735 (basing conclusion on "weighty" evidence of state discrimination), *with id.* at 746 (Kennedy, J., dissenting) (referring to Congress' evidence as only recitation of "general history" of gender discrimination).

44. *Supra* note 43 and accompanying text (describing conflict between majority and dissent).

45. *Supra* notes 23, 39-40 and accompanying text (discussing presumption and reallocation of burden of proof to states).

46. *Supra* note 22 and accompanying text (discussing need for congressional evidence to pass congruence and proportionality test); *supra* notes 23, 39-40 and accompanying text (highlighting heightened scrutiny's reallocation of burden of proof).

Legislation protecting a class subject to heightened scrutiny will always pass the congruence and proportionality test because the presumption inevitably establishes the pattern of unconstitutional conduct.[47] The only way for legislation to fail the test in the context of heightened scrutiny is through effective rebuttal of the presumption, a hurdle admittedly difficult for states to overcome.[48] The presumed discrimination, which compelled correction in the first place, now attests to the remedial characteristic required of Congress' means.[49] Thus, any prophylactic legislation subject to heightened scrutiny, including the FMLA, will pass the congruence and proportionality test, and a court will have to allow abrogation of Eleventh Amendment immunity.[50] In heightened scrutiny cases, the reallocation of the burden of proof and presumption of unconstitutional conduct render the congruence and proportionality test effectively irrelevant.[51]

In *Nevada Department of Human Resources v. Hibbs*, the Supreme Court examined whether the FMLA's abrogation of states' Eleventh Amendment immunity is a valid exercise of Congress' Section 5 power by applying the congruence and proportionality test. The Court held that the FMLA is "appropriate legislation" to remedy gender discrimination, but did not adequately consider the effect of reallocating the burden of proof in heightened scrutiny cases. Nevertheless, the decision furthers equal protection of the law regardless of gender.

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47. *See supra* notes 23, 39-41 and accompanying text (explaining presupposition of unconstitutional state action and resulting presumption of constitutionality regarding congressional acts).

48. *See supra* note 41 and accompanying text (attesting to difficulty of states' burden of rebuttal).

49. *See supra* note 19 and accompanying text (authorizing only remedial powers under Section 5).

50. *See supra* note 21 and accompanying text (allowing abrogation if remedial law passes congruence and proportionality test).

51. *See supra* note 23 and accompanying text (allocating burden of proof from Congress to states in heightened scrutiny).