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VANGUARD STATES, LAGGARD STATES: FEDERALISM AND CONSTITUTIONAL RIGHTS

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INTRODUCTION

Justice Louis Brandeis famously characterized the states as laboratories of democracy.¹ The most appealing reason for courts to enforce limits on Congress and to preserve the role of autonomous states is the prediction that states will in fact experiment with new policies, looking for new ways to serve the public good, putting new ideas into

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¹ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments . . .”).

practice, and producing evidence about the effectiveness and workability of new programs, to be followed, improved upon, or avoided by the rest of the states, who can look upon one state's experiment and learn. There are times for the national government to stand back and let policies emerge at a lower level of decision making, and times for it to deprive local government of the option to be different. Is it better to deprive local government of the option to be different from the start, if a patchwork approach to policymaking will plainly do more harm than no regulation at all?² Even where disuniform regulation is tolerable, it may be better to substitute national uniformity at some later point when the best approach to policy has become so clear that the states that maintain their own approach to a matter no longer appear to be making a positive contribution to any process of experimentation or to be serving distinctive local conditions and preferences. At that point, the states have begun to appear as laggards, no longer serving any beneficial purpose by maintaining their differences, but only depriving their citizens of the greater good.

In the experimentation model of federalism, we might classify states as the vanguard and the laggards. Attempts to sort the states into these two categories will (and should) produce great disputes over where the vanguard is and who the laggards are. For example, what do we think of Harvey Milk High School?³ In this Article, I will

² This concept is reflected in the dormant commerce clause and foreign affairs doctrines. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (holding an Oregon statute, creating conditions for property inheritance by foreign heirs, unconstitutional as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress" (citation omitted)); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 527-29 (1959) (discussing a situation in which a local highway safety measure, although nondiscriminatory, placed an unconstitutional burden on interstate commerce by interfering with the need for national uniformity in such regulations); see also *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 45 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (addressing Massachusetts' "Burma Law," which bars state agencies from buying goods or services from companies doing business with Burma, in light of exclusive federal foreign commerce power and foreign affairs power).

³ One newspaper, covering a recent plan to establish a separate high school in New York City for gay teens, quoted the leader of a gay-rights youth advocacy group who favors the school as stating, "It's misleading to say this is an issue of segregation . . . Kids have fled their home schools to get to us. They need a safe haven . . . For [one student], suicide was not a mental health issue . . . [h]e was being harassed at his school" and headlined that "clergy" were the real opposition. Cynthia Needham & Luis Perez, *Gay School Divide Grows; City Council Backs Harvey Milk as Clergy Threaten Suit*, *NEWSDAY*, Aug. 1, 2003, at A42. Another newspaper, with a nod to "good intentions," editorialized against the school: "The city should never suggest that the solution to problems of discrimination and persecution of students who are perceived

maintain that it is worth engaging in these disputes, for they form the foundation of opinions and doctrines about federalism. I also will hold out the possibility that laggards are, at least some of the time, part of good federalism. The entire vanguard/laggard distinction creates a somewhat false, or at least sometimes false, picture of progress, depicting one right answer waiting for us in the future with the only task being to discover it and put the answer into action—policy science, as depicted by Brandeis. There is also an important argument for placing tradition, and not innovation, at the center of analysis,⁴ either as a good in itself or in the interest of preserving the cultural diversity from which new forms emerge. Maybe the laggard should be called the traditionalist and valued—at least some of the time.

With these reservations in mind, let us explore the vanguard and the laggards and the corresponding role of Congress. States operating autonomously may—as Brandeis would have it—generate evidence that can be used by other government entities in shaping their own policies. But states operating autonomously may also be producing evidence that can be characterized as violating constitutional rights. Violations of constitutional rights lay the groundwork for federal statutes depriving the states of autonomy. The Court has interpreted Section 5 of the Fourteenth Amendment⁵ to allow Congress to remedy violations of constitutional rights by regulating a “broader swath” of behavior than the Section 1⁶ rights alone would reach.⁷ To tap this power, Congress must act upon evidence that there is in fact a “widespread pattern”⁸ of constitutional rights violations and respond

as different is to segregate them from the rest of the population. . . . [H]istory has taught us the best way to fight discrimination is to dismantle it where it occurs.” Editorial, *The Harvey Milk High School*, N. Y. TIMES, Aug. 3, 2003, § 4, at 10.

⁴ This is a position strongly associated with Justice Scalia. See *infra* text accompanying notes 121-34 (discussing Justice Scalia’s tradition-based analysis in *United States v. Virginia*).

⁵ See U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).

⁶ See *id.* § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .”).

⁷ See, e.g., *Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1977 (2003) (stating that Congress may enact “prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct”).

⁸ See *City of Boerne v. Flores*, 521 U.S. 507, 531 (1997) (noting the absence of evidence documenting “some widespread pattern of religious discrimination in this country”); see also *infra* text accompanying notes 193-266 (describing the Court’s later applications of the “widespread pattern” doctrine).

with a “congruent and proportional”⁹ remedy. Thus, there are two ways of looking at the autonomous activities of the states: we might see them in a positive light, as Brandeisian experimenters, deserving to be left alone to contribute new ideas about what good policy is; or we might instead see them in a negative light, as rights violators, deserving to be intruded upon and controlled by federal legislation. To what extent can and does Section 5 doctrine define a role for Congress that enables it to control the laggard states while preserving the benefits the vanguard states have to offer? This Article will attempt to answer that question.

Part I of this Article examines the concept of the states as laboratories. It considers Justice Brandeis’s dissenting opinion in *New State Ice v. Liebmann*¹⁰ and the various purposes for which the venerable passage has been mobilized. Brandeis’s opinion and its diverse applications over the years have, as we shall see, generated a useful collection of judicial ideas about federalism. This Part pays close attention to the two most recent uses of the Brandeis quote, both from Justice Stevens, in *United States v. Oakland Cannabis Buyers’ Cooperative*¹¹ and *Boy Scouts of America v. Dale*.¹² Finally, this Part focuses on *United States v. Virginia*,¹³ a case that not only includes an invocation of the *New State Ice* dissent but also provides a key advancement of the Court’s sex discrimination jurisprudence.

Part II of this Article shows the development of the Court’s Section 5 doctrine, beginning with *City of Boerne v. Flores*¹⁴ in 1997, and becoming especially important after *Seminole Tribe v. Florida*,¹⁵ which held that Congress could not use its Article I powers to abrogate state

⁹ *Id.* at 519-20; see also *infra* text accompanying notes 193-266 (describing the Court’s later applications of the “congruent and proportional” doctrine).

¹⁰ 285 U.S. 262 (1932) (Brandeis, J., dissenting).

¹¹ 532 U.S. 483, 486 (2001) (finding that federal statutory law preempts state authorization of the medical use of marijuana).

¹² 530 U.S. 640, 644 (2000) (enforcing a First Amendment limitation on a state ban on discrimination based on sexual orientation).

¹³ 518 U.S. 515, 519 (1996) (finding that the Equal Protection Clause precluded the state from maintaining a “unique” educational institution for males). This case proves especially important with respect to the Court’s most recent Section 5 case, *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003), upon which Part III of the Article focuses in depth.

¹⁴ 521 U.S. 507, 511 (1997) (holding the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (2000), unconstitutional because it exceeded the enforcement powers of Congress).

¹⁵ 517 U.S. 44, 45 (1996) (“The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”).

sovereign immunity. This Part then looks at the key cases—*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,¹⁶ *United States v. Morrison*,¹⁷ *Kimel v. Florida Board of Regents*,¹⁸ and *Board of Trustees of the University of Alabama v. Garrett*¹⁹—that applied the *City of Boerne* doctrine and created the impression that it had become quite difficult for Congress to tap the Section 5 power.²⁰ This Part contemplates whether these cases reflect judicial ideas about the states as valuable policy experimenters, likely to generate good solutions to real problems, in the Brandeisian vanguard, then fields a few questions from critics of these cases and notes the extent to which the critics perceive the states as laggards, deserving federal statutory solutions to the problems they generate.

Part III of this Article focuses on the newest Section 5 case, *Nevada Department of Human Resources v. Hibbs*,²¹ which dispelled the impression that the Court was fiercely restricting the scope of the Section 5 power.²² *Hibbs* dealt with the Family and Medical Leave Act of 1993 (FMLA),²³ which guarantees most employees, including state employees, an annual leave of up to twelve weeks to attend to the serious health needs of family members. Before Congress enacted the FMLA,

¹⁶ 527 U.S. 627, 630 (1999) (finding a lack of congressional authority to abrogate state sovereign immunity for patent infringement claims).

¹⁷ 529 U.S. 598, 627 (2000) (holding that Congress did not have the power to enact a section of the Violence Against Women Act of 1994, 42 U.S.C. § 13981 (2000), under either the Commerce Clause or Section 5).

¹⁸ 528 U.S. 62, 66-67 (2000) (holding that the Section 5 abrogation of state sovereign immunity intended by the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2000), exceeded Congress's Section 5 authority).

¹⁹ 531 U.S. 356 (2001) (holding that sections 42 U.S.C. §§ 12111-12117 (2000) of the Americans with Disabilities Act were not an appropriate exercise of Congress's Section 5 powers).

²⁰ See, e.g., William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 89 (2001) (noting that, "[i]n applying legislative record review, *Garrett* and its recent antecedents constitute a significant break with Supreme Court jurisprudence stretching back half a century and beyond"); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 131 (2001) (expressing the suspicion that "no amount of factfinding by Congress" will satisfy the Court's Section 5 analysis); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 477 (2000) (criticizing the limitations on congressional power imposed by *Morrison* and *Kimel*).

²¹ 123 S. Ct. 1972 (2003).

²² For commentary anticipating that *Hibbs* would reject Section 5 as a basis for congressional power, see Christopher P. Banks, *The Constitutional Politics of Interpreting Section 5 of the Fourteenth Amendment*, 36 AKRON L. REV. 425, 463-65 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1947-49 (2003).

²³ 29 U.S.C. §§ 2601-2654; 5 U.S.C. §§ 6381-6387 (2000).

states were performing experiments with family leave.²⁴ Were they in the vanguard, beneficially left alone? Are we sure we know where the vanguard is with respect to family leave? We may feel quite confident that ending discrimination against women in the workplace is the only acceptable direction for state experimentation, but what about the details? If a state accommodates new mothers with generous maternity leaves, is it experimenting with a new idea that might work well to enable woman to compete in the workplace or is it reinforcing a traditional stereotype? To the dissenting Justice Kennedy, the states had been in the vanguard, but to Chief Justice Rehnquist, writing for the majority, the states were contributing to the problem of sex discrimination. Was the uniform standard of a twelve-week leave an inappropriate denial of room to the states to experiment with various approaches to balancing work and family or was it needed to thwart subtle discrimination in the workplace? This Article explores these questions in depth, concluding that, despite the majority's attempt to explain *Hibbs* entirely in terms of the heightened scrutiny given sex classifications, the case really has deviated from the approach taken in the earlier cases in the *City of Boerne* line. The Article considers the extent to which ideas about vanguard and laggard states account for the different approach.

I. INVOKING AND EXTENDING THE IMAGE OF BRANDEIS'S LABORATORIES

A. *What Did Brandeis Really Say in His New State Ice Dissent?*

Consider the statement Justice Brandeis made about state experimentation in his dissenting opinion in *New State Ice*. Referring to the problems of the Great Depression, he wrote:

Some people assert that our present plight is due, in part, to the limitations set by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the

²⁴ See *Hibbs*, 123 S. Ct. at 1989 (Kennedy, J., dissenting) (“[T]he States appear to have been ahead of Congress in providing gender-neutral family leave benefits. Thirty States, the District of Columbia, and Puerto Rico had adopted some form of family-care leave in the years preceding the [FMLA]’s adoption.”).

power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. *It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.* This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.²⁵

Justice Brandeis does not appear to view “experimentation” as a metaphor. His government policymakers operate “in the fields of social and economic *science*.”²⁶ Justice Brandeis sought to unleash not only the state government scientists, but also the federal ones. He favored experimentation not only in matters of commerce, but also “in things social and economic.”²⁷ He cautioned courts to resist interfering with the process of experimentation: Judges have a “grave responsibility” when they exercise the power they have “to prevent an experiment.”²⁸

That Justice Brandeis urges both restraint and boldness should not be seen as an inconsistency. For Brandeis, boldness comes in the form of trusting government experimenters with their “novel” ideas and refraining from serving mere “prejudices”—as opposed to true “principles”—which the “high power” of review judges have designed for themselves. Substantive due process rights were a powerful tool, capable of “stay[ing] experimentation,” but according to Brandeis, because of the benefits that might come from innovative policymakers, especially in dire times, the courts needed to be careful not to fall into the lazy practice of seeing their own preconceptions as fundamental liberties. He repeats the idea of bravery: Judges should be bold enough to allow the “single courageous State” to design new

²⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting) (footnote omitted) (emphasis added). The italicized sentence is the portion of this passage that is usually quoted.

²⁶ *Id.* at 311 (emphasis added).

²⁷ *Id.* Note that Brandeis repeated the phrase “social and economic” four times in the passage. *Id.* at 310-11.

²⁸ *Id.*

programs and policies.²⁹ Judicial bravery manifests itself as the restraint that permits activism on the part of the brave policy scientists. There is “risk,” for sure, but at least in a system of federalism, where the bold experiment comes from the state, the risk is confined to one state.³⁰ Of course, Brandeis saw the national government as conducting experiments that ought to inspire judicial restraint as well, but readers are left to make their own inferences about how much restraint Brandeis expected from judges when the experiment is not confined to one state.

B. *Adventures in New State Ice Rhetoric*

The Supreme Court Justices have cited the *New State Ice* dissent many times over the years. It has been mobilized not only to justify interpreting constitutional rights narrowly and permitting a state law to stand, as in the original case, but also to justify avoiding the creation of new rights. The theory is that the state democratic processes might operate upon the same field and produce similar solutions, policies that function as better-crafted versions of the rights the courts might otherwise have designed. For example, in a concurring opinion in *Washington v. Glucksberg*,³¹ Justice O’Connor referred to *New State Ice* as she rejected the idea of a due process right to physician-assisted suicide: that the states were in fact “undertaking extensive and serious evaluation”³² in this area inspired her to refrain from attempting to clutter experimentation with a judicially designed solution.³³

²⁹ *Id.* at 311. Although most of the passage discusses the states as experimenters, Brandeis refers to the need for “power in the States *and the Nation* to remould, through experimentation.” *Id.* (emphasis added). The interest in minimizing the limitations of substantive due process rights is in play with respect to policymaking at all levels of government, though Brandeis understandably concentrates on the states because the case deals with state law.

³⁰ *Id.*

³¹ 521 U.S. 702 (1997).

³² *Id.* at 737 (citing *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 292 (1990) (O’Connor, J., concurring) (quoting *New State Ice Co.*, 285 U.S. at 311)).

³³ Development has continued at the state level, with one state, Oregon, having adopted physician-assisted suicide by statute and a number of states experimenting with alternatives like strengthening hospice care, guaranteeing rights to pain treatment, and educating the public and medical students about end-of-life care. See Stephen Kiernan, *Debate on Assisted Suicide Comes to Vermont*, BURLINGTON FREE PRESS, July 1, 2002, at 6A (describing the current political debate about whether to legalize physician-assisted suicide in Vermont between proponents, such as The Hemlock Society and Death with Dignity, and opponents, such as the Roman Catholic Church and a

The *New State Ice* dissent has been used by the Supreme Court to justify self-restraint to make room for other courts to play a role in the process of articulating constitutional law. In *Johnson v. Louisiana*,³⁴ Justice Powell, concurring in an opinion that accepted nonunanimous jury verdicts in state criminal cases, acknowledged that “the Civil War Amendments altered substantially the balance of federalism,” but rejected the notion that “they were intended to deprive the States of all freedom to experiment with variations in jury-trial procedure.”³⁵ Noting the importance of “empirical study . . . as a foundation for decisionmaking,” he invoked *New State Ice*:

One of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a “laboratory” and to experiment with a range of trial and procedural alternatives. Although the need for the innovations that grow out of diversity has always been great, imagination unimpeded by unwarranted demands for national uniformity is of special importance at a time when serious doubt exists as to the adequacy of our criminal justice system. The same diversity of local legislative responsiveness that marked the development of economic and social reforms in this country, if not barred by an unduly restrictive application of the Due Process Clause, might well lead to valuable innovations with respect to determining—fairly and more expeditiously—the guilt or innocence of the accused.³⁶

Doubt about the criminal justice system could have been provided as a reason to expand the requirements of constitutional law, but Justice Powell uses doubt as a reason to keep the experimentation going, in order to generate evidence about what the best answer is. Powell thought the Court should refrain from “drawing [the] difficult lines”

physician-led group that advocates improved palliative treatment). Oregon’s experiment, the 1994 Oregon Death with Dignity Act (commonly referred to as “Oregon Act”), OR. REV. STAT. §§ 127.800-.897 (2001), led to a power struggle with the federal government when Attorney General John Ashcroft issued a directive stating that assisting suicide is not a “legitimate medical purpose” for a schedule II drug under the Controlled Substances Act (CSA), 21 U.S.C. §§ 801–904 (2000). *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1078 (D. Or. 2002). Judge Robert E. Jones granted summary judgment for the state and chided the Attorney General for trying “to stifle an ongoing ‘earnest and profound debate’ in the various states concerning physician-assisted suicide.” *Id.* at 1079 (quoting *Glucksberg*, 521 U.S. at 735). Relying on a narrow interpretation of the CSA, the district court judge avoided the question of whether a federalism-based argument could have succeeded in the face of a clearly preemptive federal statute. *See id.* at 1081 n.6 (noting two recent failed attempts to pass such statutes).

³⁴ 406 U.S. 356 (1972) (Powell, J., concurring).

³⁵ *Id.* at 376.

³⁶ *Id.* (footnote omitted). In his concurrence, Justice Powell noted that Brandeis “detail[ed] the stultifying potential of the substantive due process doctrine.” *Id.* at 376 n.16.

needed to define constitutional rights and for now approve of one state's approach to nonunanimous verdicts. Later, in "a different context" and with the aid of information produced through state experimentation, the Court would be in a better position to "find[] the required balance" needed to perform the difficult task of defining the scope of constitutional due process.³⁷

Similarly, in *Globe Newspaper Co. v. Superior Court*,³⁸ Chief Justice Burger, joined by then-Justice Rehnquist, wrote about the importance of empowering state courts to experiment with ways to protect young victim-witnesses in rape trials. The Chief Justice criticized the majority for requiring empirical proof that the state's mandatory closure rule would lead to increased reporting of sex crimes. Citing the *New State Ice* dissent, he wrote: "It makes no sense to criticize the Commonwealth for its failure to offer empirical data in support of its rule; only by allowing state experimentation may such empirical evidence be produced."³⁹

Justice Marshall has raised an important criticism of this kind of deference.⁴⁰ He criticized his fellow Justices who, even at the behest of a rights claimant facing a death sentence, embraced the notion that the "Court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem."⁴¹ He commented on the expansion of Brandeis's concept:

When Justice Brandeis originally analogized the States to laboratories in need of freedom to experiment, he was dissenting from a decision by the Court applying a now-discredited interpretation of the Due Process Clause to strike down an Oklahoma statute regulating the sale and distribution of ice. As Justice Brandeis recognized, an overly protective view of substantive due process unnecessarily stifles public welfare legislation at the state level. Since then, however, the power of the States-as-laboratories metaphor has propelled Justice Brandeis' concept far beyond the sphere of social and economic regulation. Now we find the metaphor employed to justify this Court's abstention from reaching an

³⁷ *Id.* at 377. *Cf.* *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring) (expounding a theory of judicial restraint and detailing the many judicial devices for avoiding questions of constitutional law).

³⁸ 457 U.S. 596, 612 (1982) (Burger, J., dissenting).

³⁹ *Id.* at 617 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

⁴⁰ *Gillard v. Mississippi*, 464 U.S. 867 (1983) (Marshall, J., dissenting from denial of certiorari) (citations omitted).

⁴¹ *Id.* at 869.

important issue involving the rights of individual defendants under the Federal Constitution.⁴²

New State Ice has also been offered as a justification for striking down federal statutes to preserve room for the free play of state policies. The oldest invocation of Brandeis's laboratories concept to argue against federal legislative power instead of the scope of individual constitutional rights appears in Justice Jackson's dissent in *Federal Power Commission v. East Ohio Gas Co.*,⁴³ a case in which the majority determined that Congress had authorized the Federal Power Commission to regulate the accounting method used by an intrastate gas company.⁴⁴ Adopting a narrower reading of the statute, Justice Jackson dissented. He attributed Brandeisian notions about experimentation to Congress:

Congress may well have believed that diversity of experimentation in the field of regulation has values which centralization and uniformity destroy. As Mr. Justice Brandeis said, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." Long before the Federal Government could be stirred to regulate utilities, courageous states took the initiative and almost the whole body of utility practice has resulted from their experiences.

....

... If now and then some state does not regulate its utilities according to the federal standard, it may be a small price to pay for preserving the state initiative which gave us utilities regulation far in advance of federal initiative.⁴⁵

Justice Jackson's deference to the states paid respect to their role in the vanguard of utilities regulation. Contributing to that deference is a sense that there may be no right answers, at least in some areas, such as the accounting methods at issue in that case: "We must not forget that regulatory measures are temporary expedients, not eternal verities—if indeed they are verities at all."⁴⁶ Preserving state autonomy in such areas, according to Jackson, could help the vanguard continue to advance:

⁴² *Id.* (footnote omitted).

⁴³ 338 U.S. 464 (1950).

⁴⁴ *Id.* at 476 (Jackson, J., dissenting).

⁴⁵ *Id.* at 488-89 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

⁴⁶ *Id.* at 489.

Certainly one of the matters on which the states might well be indulged—the right to an opinion of their own—is as to the accounting methods of a utility whose whole property and business being accounted for is within the state. Out of their diversity of practice and experience emerge pragmatic tests. What the Federal Power Commission seeks to require of this Ohio gas company, for example, is to revert by accounting methods to emphasis on original cost, a basis which William Jennings Bryan for an earlier generation of progressives eloquently urged this Court to reject in the field of railroad rate-making. . . . It must be remembered that closer than any federal agency to those they regulate and to their customers are the state authorities, whose mechanisms are less cumbersome and whose principles can much more quickly be adjusted to the changing times.⁴⁷

Note that Jackson’s “indulge[nce]” toward the states is supported by the fact that the Federal Power Commission had not endorsed what he considered to be the progressive position and by his faith, inspired by the states’ history of past progressivism, in their potential to arrive at good solutions to real problems. Yet, while projecting this prudence and faith onto Congress, Jackson simultaneously forswore judicial activism: “We should not utilize the centralizing powers of the federal judiciary to destroy diversities between states which Congress has been scrupulous to protect.”⁴⁸

An important recent invocation of *New State Ice* to support the invalidation of a federal statute appears in Justice Kennedy’s concurring opinion striking down the Gun-Free School Zones Act of 1990⁴⁹ in *United States v. Lopez*.⁵⁰ Justice Kennedy, joined by Justice O’Connor,

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 18 U.S.C. § 922(q)(1)(A) (2000).

⁵⁰ 514 U.S. 549, 568 (1995) (Kennedy, J., concurring). A similar use of *New State Ice* appears in *EEOC v. Wyoming*, 460 U.S. 226 (1983), in which the majority during the reign of *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), permitted the 1974 amendment to the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2000), to reach state and local government law enforcement officials. The majority in *EEOC* opined that the law did not “directly impair” the “structur[ing of] integral operations in areas of traditional governmental functions.” 460 U.S. at 237 (citations omitted). Chief Justice Burger, joined by Justices Powell, Rehnquist, and O’Connor, dissented, asserting that the majority had betrayed “Justice Brandeis’ classic conception of the states as laboratories.” *Id.* at 264 (Burger, C.J., dissenting). Emphasizing Congress’s institutional limitations and the values of federalism, Chief Justice Burger wrote:

[E]ven if Congress had infinite factfinding means at its disposal, conditions in various parts of the country are too diverse to be susceptible to a uniformly applicable solution. Wyoming is a State with large sparsely populated areas, where law enforcement often requires substantial physical stamina; the same conditions are not always encountered by law enforcement officers in Rhode

took note of various state and local approaches to eradicating violence in schools and the uncertainty about how best to solve the problem. Justice Kennedy wrote:

While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.⁵¹

It has been argued that the existence of a federal law imposing strict prison terms for the gun possession in schools does not detract from the states' ability to experiment with other solutions to the same problem.⁵² This is not so: a state or locality that would like to experiment with parental responsibility or with gun-exchange programs⁵³ is looking for an *alternative* to harsh imprisonment. Sweeping youths into lengthy prison sentences undercuts these experiments despite the fact that the federal government handles the prosecution and runs the prisons.⁵⁴

Island, which has far less land area, no mountains, and no wilderness. Problems confronting law enforcement officers in Alaska or Maine may be unlike those encountered in Hawaii and Florida. Barring states from making employment decisions tailored to meet specific local needs undermines the flexibility that has long allowed industrial states to live under the same flag as rural states, and small, densely populated states to coexist with large, sparsely populated ones.

Id.

⁵¹ 514 U.S. at 581 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973)); *New State Ice*, 285 U.S. at 311 (1932) (Brandeis, J., dissenting)).

⁵² See Robert Jerome Glennon, *Federalism as a Regional Issue*, 38 ARIZ. L. REV. 829, 833 (1996) (arguing that “[p]arallel federal criminal jurisdiction . . . does not prevent states from enforcing their own criminal provisions”).

⁵³ See *Lopez*, 514 U.S. at 581-82 (Kennedy, J., concurring) (discussing various means of ridding schools of guns).

⁵⁴ See Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 818-20 (1996) (arguing that uniformity for its own sake should not be allowed to edge out superior state solutions to national problems); see also *Jones v. United States*, 529 U.S. 848, 850 (2000) (interpreting the federal arson statute, 18 U.S.C. § 844(i) (Supp. IV 1994), which applied to “property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce,” so as not to apply to arson of an owner-occupied residence). In *Jones*, Justice Stevens, joined by Justice Thomas, wrote separately to call attention to the large disparity between the penalty given under the federal statute (35 years) and the maximum sentence for arson under the relevant state statute (10 years) and contended that this disparity “illustrates how a criminal law like this may effectively *displace a policy choice* made by the State.” *Id.* at 859 (Stevens, J., concurring) (emphasis added). Even though both levels

New State Ice has also been used to withdraw protection of state autonomy and to empower Congress to impose on the state, as was seen in the majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*.⁵⁵ *Garcia* is the high water mark in the recognition of federal legislative power over the states, so the opinion's use of Brandeis's *New State Ice* dissent might seem puzzling at first, but here Justice Blackmun wielded elegant—if not entirely convincing—rhetoric:

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else—including the judiciary—deems state involvement to be. Any rule of state immunity that looks to the “traditional,” “integral,” or “necessary” nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. “The science of government . . . is the science of experiment,” and the States cannot serve as laboratories for social and economic experiment, if they must pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands.⁵⁶

That is to say, the good thing about state autonomy is freedom to innovate. It is the vanguard state that Justice Brandeis wanted to promote, so he would see *National League of Cities v. Usery*'s protection of “traditional [state] governmental functions” as exactly backward.⁵⁷ Why it would protect the laggards, the states working the *traditional*

of government viewed arson as a very serious crime and even though the federal government would handle the prosecution and punishment, the federal law was still portrayed as interfering with state autonomy. *Id.* Like Justice Jackson in *East Ohio Gas Co.*, *supra* text accompanying notes 43-48, Justice Stevens attributed this vision of federalism to Congress and, like the rest of the Court in *Jones*, relied on statutory interpretation to carve out a role for the state in addressing problems of national import. *Jones*, 529 U.S. at 859 (Stevens, J., concurring).

⁵⁵ 469 U.S. at 546.

⁵⁶ *Id.* (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821), and citing *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting)). Justice Powell, joined by Chief Justice Burger and Justices Rehnquist and O'Connor, took issue with the *Garcia* majority's use of *New State Ice*:

Apparently the Court believes that when “an unelected federal judiciary” makes decisions as to whether a particular function is one for the Federal or State Governments, the States no longer may engage in “social and economic experiment.” The Court does not explain how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as “laboratories.”

469 U.S. at 567 n.13 (citation omitted) (Powell, J., dissenting).

⁵⁷ 426 U.S. 833, 852 (1976).

field—Justice Blackmun seems to say⁵⁸—while leaving the vanguard states open to regulation! He therefore perceives nothing worth protecting at the state level and opts to give a free hand to Congress, which seems to be the institution undertaking innovation. It is innovation, after all, that inspires judicial boldness, in the Brandeisian model, so, according to Justice Blackmun, the Court should unleash Congress rather than make a protected sphere for the states.

C. New State Ice *Protects the Vanguard in Oakland Cannabis and Boy Scouts of America*

The two most recent citations to the *New State Ice* dissent⁵⁹ have come from Justice Stevens, who looked with favor at two states that generated progressive experiments: California, which authorized the medical use of marijuana, and New Jersey, which banned discrimination based on sexual orientation. In the California case, *United States v. Oakland Cannabis Buyers' Cooperative*,⁶⁰ Justice Stevens concurred with the majority that the federal criminal law preempted the state law,⁶¹ but faulted the majority for ruling out any defense based on “medical

⁵⁸ Yet, surely a state working in a traditional field such as education might still innovate. Failure to take account of the ability to innovate within traditional areas is one reason why Blackmun's rhetoric is not entirely convincing. The most obvious problem is that the purported concern for state autonomy serves only as leverage to empower Congress to intrude further on the states.

⁵⁹ *New State Ice* is, however, implicitly referred to in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), which approved the use of affirmative action in student admissions at the University of Michigan Law School. See *infra* note 116 (comparing the use of diversity justification in *Grutter* with the Court's treatment of the rationale in a sex discrimination case). The *Grutter* opinion praises the states as “laboratories of democracy,” citing Justice Kennedy's *Lopez* concurrence, which cited *New State Ice*. See *supra* text accompanying notes 49-54 (relating Justice Kennedy's citation of *New State Ice*). To find explicit citations to *New State Ice* predating *Boy Scouts of America v. Dale* and *United States v. Oakland Cannabis Buyers' Cooperative*, one needs to go back to 1997 to two cases that rejected a right to physician-assisted suicide. See *Vacco v. Quill*, 521 U.S. 793, 809 (1997) (referring to O'Connor's concurrence in *Washington v. Glucksberg*, 521 U.S. 702 (1997), in which she cites *New State Ice*); *Glucksberg*, 521 U.S. at 737 (citing *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 292 (1990) (O'Connor, J., concurring), citing *New State Ice*, 285 U.S. at 311 (1932) (Brandeis, J., dissenting)). Justice O'Connor's role is notable: she wrote the *Grutter* opinion, she joined Kennedy's *Lopez* concurrence, and she wrote the *Cruzan* opinion as well as *Glucksberg*. O'Connor's earliest citation to *New State Ice* appeared in one of her first opinions, her influential dissent in *Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 788 (1982).

⁶⁰ 532 U.S. 483 (2001).

⁶¹ The Court found that the Controlled Substances Act, 21 U.S.C. §§ 801-971 (2000), preempted California's Compassionate Use Act of 1996, CAL. HEALTH & SAFETY CODE § 11362.5 (West Supp. 2004).

necessity.”⁶² He suggested that, perhaps, a little room for state experimentation could be created by reading the federal statute more narrowly.

[T]he importance of showing respect for the sovereign States that compose our Federal Union . . . imposes a duty on federal courts, whenever possible, to avoid or minimize conflict between federal and state law, particularly in situations in which the citizens of a State have chosen to “serve as a laboratory” in the trial of “novel social and economic experiments without risk to the rest of the country.”⁶³

At least within some confined area that does not threaten other states, or upon some stronger showing, California could have been seen as offering to conduct a pilot program that would yield helpful information about both the benefits and detriments of this form of marijuana use.⁶⁴

In the New Jersey case, *Boy Scouts of America v. Dale*,⁶⁵ Justice Stevens in his dissent invoked *New State Ice* as he credited the state for positioning itself in the forefront of moral progress: “New Jersey ‘prides itself on judging each individual by his or her merits’ and on being ‘in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society.’”⁶⁶ He criticized the majority for failing to “accord this ‘courageous State’ the respect that is its due.”⁶⁷ Chief Justice Rehnquist, writing for the majority, took Justice Stevens to task for misusing the venerable quotation: Justice Brandeis was “a champion of state experimentation in the economic realm,” not “a champion of state experimentation in the suppression of free

⁶² *Oakland Cannabis*, 532 U.S. at 499. The majority, in an opinion written by Justice Thomas, took the position that the federal law represented a conclusive rejection of any exceptions for medical necessity. *Id.* Justice Stevens sought to restrict the Court’s holding to the manufacture and sale of marijuana. *Id.* at 499-500 (Stevens, J., concurring). He chided the majority for expansively rejecting the necessity defense even with respect to a more compelling case, such as “a seriously ill patient for whom there is no alternative means of avoiding starvation or extraordinary suffering” and for “gratuitously cast[ing] doubt” on the defense with respect to all federal criminal statutes. *Id.* at 501 (Stevens, J., concurring).

⁶³ *Id.* at 502 (quoting *New State Ice*, 285 U.S. at 311 (Brandeis, J., dissenting)).

⁶⁴ The majority, however, saw the state as falling away from the federal norm—the appropriate uniformity—which in fact makes a good deal of sense considering the difficulty of controlling commerce in marijuana.

⁶⁵ 530 U.S. 640 (2001).

⁶⁶ *Id.* at 663 (Stevens, J., dissenting) (quoting *Peper v. Princeton Univ. Bd. of Trs.*, 389 A.2d 465, 478 (N.J. 1978)).

⁶⁷ *Id.* at 664.

speech.”⁶⁸ Referring to Brandeis’s concurring opinion in *Whitney v. California*,⁶⁹ the Chief Justice located the process of searching for the good at the level of individual interaction, not within government.⁷⁰ According to Brandeis, the “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”⁷¹

In *Whitney*, as in *New State Ice*, Brandeis placed his trust in the human capacity to reason. Unfettered speech—creating a marketplace of ideas—would allow individuals to reason and discover what is good. In *New State Ice*, Brandeis urged judges to “guide by the light of reason” by refraining from seeing mere “prejudices” as rights.⁷² In both settings, Justice Brandeis expressed faith in the capacity of human beings to use their mental powers to reach the best answers. In *New State Ice*, he would free government policymakers, while in *Whitney*, he would free the individual or the private association. *Dale* presents a nice puzzle for thinking about levels of decision making and the advisability of leaving room for innovation. There is nothing about the dueling Brandeis quotes that tells us how to choose which level of decision making to empower—the government, which concluded that groups like the Boy Scouts should not discriminate based on sexual orientation, or the private association, which decided that Scout leaders should present heterosexual role models.⁷³ It is tempting to say that New Jersey is in the vanguard and that protecting gay rights is at the cutting edge of innovation, so courts should stand back and permit that experiment to take place; the Boy Scouts are laggards, stuck in the past, and not deserving of protection from New Jersey’s limited experiment. The degree of confidence about where the vanguard is

⁶⁸ *Id.* at 660. Note the friction between this rejection of *New State Ice* when faced with First Amendment rights and its invocation in Chief Justice Burger’s dissent in *Globe Newspaper*, which then-Justice Rehnquist joined. See *supra* text accompanying notes 38-39 (discussing Justice Burger’s citation of *New State Ice* in criticizing the majority in *Globe Newspaper* for requiring empirical proof in support of the state’s rule to close rape trials to protect young victim-witnesses).

⁶⁹ 274 U.S. 357 (1927).

⁷⁰ *Dale*, 530 U.S. 660-61 (quoting *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)).

⁷¹ *Whitney*, 274 U.S. at 375.

⁷² *New State Ice*, 285 U.S. at 311.

⁷³ Cf. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34-35 (1959) (concluding that there is no principled way to choose between the right of association and the antidiscrimination right confronted in the school desegregation cases).

and who the laggards are can powerfully influence a decision maker to expand or contract rights.⁷⁴

Justice Stevens would vigorously empower the vanguard state: “[E]very state law prohibiting discrimination is designed to replace prejudice with principle,” so “Justice Brandeis’ comment on the States’ right to experiment with ‘things social’ is directly applicable to this case.”⁷⁵ That muddles Brandeis’s statement. Brandeis wrote that courts, in wielding their great power to label things rights, need to be careful that they do not call something a right when all they are seeing is their own prejudice. Thus, it was wrong, according to Brandeis, to view the requirement of a license to deliver ice as a violation of a right to be free of such restrictions.⁷⁶ In *Dale*, New Jersey’s law was designed not to relieve judges of a prejudice about what rights are, but to force entities like the Boy Scouts to abandon leadership criteria that the state perceived as prejudice-ridden. If the Court thought that the right of association permitted the Scouts autonomy to choose only leaders who express the group’s own values, to say that the Court was “erect[ing] [its] prejudices into legal principles,” one would need to say it is mere prejudice to believe the Boy Scouts have a right to make decisions about their leaders’ self-expression.⁷⁷ Yet surely, the belief in expressive association is not prejudice simply because it would protect prejudiced speech!⁷⁸

Undoubtedly, Justice Stevens would back away from the boldness that comes in the form of judicial restraint at some point, with respect to some claims of constitutional right. The trick is in saying what the rights are. Which comes first for these decision makers, the right or the analysis of when state experimentation is good? In *New State Ice*, Justice Brandeis was battling the old substantive due process doctrine and accused the majority of imagining rights to exist where they believed government should not act.⁷⁹ Put another way, where one sees

⁷⁴ Justice Scalia offers one solution to this puzzle in his dissenting opinion in *United States v. Virginia*, 518 U.S. 515 (1998). See *supra* text accompanying notes 100-34 (discussing the Court’s analysis of sex discrimination in *United States v. Virginia*).

⁷⁵ *Dale*, 530 U.S. at 664 (Stevens, J., dissenting).

⁷⁶ *New State Ice*, 285 U.S. at 311.

⁷⁷ *Id.*

⁷⁸ See *Dale*, 530 U.S. at 701 (Souter, J., dissenting) (“Whether the group appears to this Court to be in the vanguard or rearguard of social thinking is irrelevant to the group’s rights.”).

⁷⁹ The *New State Ice* majority countered:

[I]t is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that Amendment merely by calling them

experimentation with various policies as a benefit, one ought to “be bold” and look to puncturing the illusion that a right stands in the way of what the vanguard state would like to do. But when is the right only an illusion, only a prejudice that the judge boldly casts aside, and when is the judge cravenly failing to recognize a right? When should an individual right stand in the way of something the state would like to do?

Drawing on Brandeis’s conception, one might suggest that rights ought to obstruct state policy when the rights themselves operate in the service of progress—one ought to see rights when they function to force the laggard state to abandon the old ways that persist only because of prejudice.⁸⁰ But whether this suggestion is appealing will depend (in part) on one’s confidence in the ability of judges to find the vanguard and identify the laggards.⁸¹ What an exquisite paradox occurs when this confidence takes the form of judicial restraint, the proud passivity of not seeing a right!⁸²

experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the federal Constitution.

285 U.S. at 279-80. This is essentially the same argument Chief Justice Rehnquist made in response to Justice Stevens in *Dale*.

⁸⁰ This suggestion would seem to describe the motivation underlying the majority and concurring opinions in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). Justice Kennedy, writing for the majority, finding that the state’s law banning same-sex sodomy violated substantive due process, faulted Texas for its laggard position on the road of progress. Justifying adapting the Constitution to modern times, he characterized the Court as “search[ing] for greater freedom” and acquiring greater insight into which “laws once thought necessary and proper in fact serve only to oppress.” *Id.* at 2484. Similarly, Justice O’Connor, writing in concurrence and finding a violation of equal protection, faulted the state for its law expressing “mere moral disapproval of an excluded group.” *Id.* at 2488 (O’Connor, J., concurring).

⁸¹ This suggestion will also be unappealing to anyone who objects to the normative form of structural analysis. There is always the alternative of attempting to restrict oneself to textual, historical, and doctrinal analysis. Nevertheless, I believe that normative, structural concerns will continue to play a role in the analysis. See Ann Althouse, *Why Talking About “States’ Rights” Cannot Avoid the Need for Normative Federalism Analysis: A Response to Professors Baker and Young*, 51 DUKE L.J. 363, 364 (2001) (concluding “that there is no escape from the normative question” in analyzing federalism). For this reason, I am deliberately writing in terms that I believe describe real decision-making processes, even though I realize some readers will prefer a more austere formality, at least with respect to the written work of judges.

⁸² See *supra* text accompanying notes 40-42 (noting Justice Marshall’s criticism of the Court for undervaluing rights in order to permit the states to continue to experiment).

D. *Sex Discrimination and New State Ice: The VMI Case*

Let us begin to focus on the issue of sex discrimination, the basis for the Section 5 power the Court found for the FMLA in *Hibbs*. *Hibbs*, which Part III discusses in depth, does not directly discuss *New State Ice*, but as we shall see, it raises many of the *New State Ice* concerns. The most recent sex discrimination case to discuss *New State Ice* directly is *United States v. Virginia*⁸³ (commonly referred to as the VMI case), which used the right to equal protection to deprive the state of its ability to maintain a single-sex military academy, the Virginia Military Institute (VMI). Because the VMI case is also the key sex discrimination case relied on in *Hibbs*, it deserves special attention here.⁸⁴

Virginia wanted to preserve (or should we say continue experimenting with?) a type of education that it deemed suitable only for males. It sought to produce “citizen-soldiers” by using “an adversative, or doubting, model of education,” defined by “physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values.”⁸⁵ Using the heightened scrutiny applicable to sex classifications, the majority, in an opinion written by Justice Ginsburg, found that Virginia’s male-only policy was not “substantially related” to an “important state policy.”⁸⁶ Ginsburg emphasized that, because Virginia had failed to show that admitting a woman would necessarily destroy the “adversative” system,⁸⁷ its policy rested only on generalizations about women’s

⁸³ 518 U.S. 515 (1996).

⁸⁴ The Court’s commentary on the nature of sex discrimination may be especially useful in that it was written in the same year that the FMLA was enacted.

⁸⁵ *Virginia*, 518 U.S. at 522 (quoting *United States v. Virginia*, 766 F. Supp. 1407, 1421 (W.D. Va. 1991)).

⁸⁶ *Id.* at 557-58; *see also id.* (“There is no reason to believe that the admission of women . . . would destroy the Institute rather than enhance its capacity to serve the ‘more perfect Union.’”).

⁸⁷ *See id.* at 540-43 (“The notion that admission of women would . . . destroy the adversative system . . . is a judgment hardly proved . . .”). Here, Virginia had argued that the distinctive adversative method would have to be changed if any women were admitted, thus depriving men of a “unique” benefit without offering a new benefit to women, who could already attend a public, coeducational school in Virginia. *Id.* at 535-36. But even if most women would not voluntarily undergo this method of education, as the Court assumed, that assumption was a stereotype, insufficient to justify excluding individuals merely because they belonged to a group for which the stereotype was generally true. Moreover, it was a stereotype—that women prefer nurturing, supportive treatment—that, the Court showed, had been wielded frequently over time to exclude women from all sorts of endeavors. *Id.* at 543-45. Unlike the majority, Justice Scalia, in dissent, agreed with the district court’s conclusion “that if Virginia were to include women in VMI, the school ‘would eventually find it necessary to drop the

capacities and preferences.⁸⁸ In the view of the majority, that left Virginia with no valid argument against admitting an individual woman who chose to undertake the adversative form of training and was capable of enduring it.

The heightened scrutiny test applied in the VMI case traced back to *Craig v. Boren*,⁸⁹ which rejected a state's differential drinking ages for males and females. In *Craig*, the Court deprived the states of the option to use gender as a proxy for "archaic and overbroad" generalizations.⁹⁰ That is, states relying on sex classifications were essentially making two mistakes. First, they were stuck in the past, thinking about gender in a way that had not kept up with societal changes and using "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas.'"⁹¹ Second, they were treating a person as a member of a group rather than as an individual. Even if it were true that most men or most women had particular characteristics, it would still be wrong to assume that any given individual had these characteristics.

These are two distinct problems: one calls upon the state to readjust its generalizations to keep up with changes in the real world. This problem requires fact-finding, and since conditions vary geographically, it may be worthwhile to allow the states to operate with at least some autonomy. In some states, perhaps large proportions of women have moved out of the traditional role, while, in other states, traditional roles may have remained deeply entrenched. There is, inevitably, some interweaving between what women in a particular place have actually done and what the culture of a particular place values. It is one thing to say that a state should be permitted to make an assumption about what women do or what women prefer because, in that state, though not in others, the assumption is quite accurate as a generality. It is another thing to say that a state should be able to make a particular assumption about women because, in that state, though not in others, that is what people tend to believe women *should* do. So actual practices and embedded values vary from place

adversative system altogether." *Id.* at 578 (Scalia, J., dissenting) (quoting *Virginia*, 766 F. Supp. at 1413).

⁸⁸ See *id.* at 541 (indicating that Virginia's expert witnesses asserted views regarding "typically female tendencies" (quoting *Virginia*, 766 F. Supp. at 1434)).

⁸⁹ 429 U.S. 190 (1976).

⁹⁰ *Id.* at 198 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 508 (1975)).

⁹¹ *Id.* at 198-99 (quoting *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975) (alteration in *Craig*)).

to place, and the first concern expressed in *Craig*, that gender not be used as a proxy for “archaic . . . generalizations,” is susceptible to state-by-state variation.⁹² Importantly, the variation in majority *values* is a distinct facet of this problem.⁹³

The second concern expressed in *Craig* is a universal principle: do not treat an individual as a member of a group.⁹⁴ Even if all but one woman would abhor VMI’s “adversative training” and even if nearly everyone in Virginia believed that women belonged in the bosom of the family, excluding that one woman would still violate the principle that human beings deserve to be treated as individuals and not as members of groups. Yet in the end, *Craig* does not go so far as to demand that sort of individual treatment without regard to sex: it accepted, as an alternative to gender-neutrality, “identifying those instances where the sex-centered generalization actually comported with fact.”⁹⁵ That is, the problem was not simply in generalizing, but rather in inaccurate, prejudice-ridden generalizing.

It is notable that Justice Rehnquist dissented in *Craig*, for he would, nearly thirty years later, write the majority opinion in *Hibbs* relying heavily on the heightened scrutiny announced in *Craig*.⁹⁶ In his *Craig* dissent, he accused the majority of pulling the standard “out of thin air”⁹⁷ and particularly objected to using heightened scrutiny to strike down a state law that disadvantaged only young men, given the complete absence of evidence that they have suffered any historical discrimination or needed any “special solicitude from the courts.”⁹⁸ Moreover, according to Rehnquist, the proposed heightened scrutiny formula assigned courts the work of deciding which government objectives are “important,” the one task most sensibly left to democratic decision making.⁹⁹

⁹² *Id.* at 198.

⁹³ See *infra* text accompanying notes 121-34 (discussing Justice Scalia’s opinion favoring state autonomy to preserve the traditional values of the majority).

⁹⁴ See 429 U.S. at 208-09 (noting that “the principles embodied in the Equal Protection Clause are not to be rendered inapplicable [for individuals] by . . . loose-fitting generalities concerning . . . aggregate groups”).

⁹⁵ *Id.* at 199.

⁹⁶ *Hibbs*, 123 S. Ct. 1972, 1982 (2003).

⁹⁷ *Craig*, 429 U.S. at 220 (Rehnquist, J., dissenting).

⁹⁸ *Id.* at 219.

⁹⁹ *Id.* at 219-21. Note Justice Rehnquist’s discussion of the evidence needed to justify legislation:

The Court’s criticism of the statistics relied on by the District Court conveys the impression that a legislature in enacting a new law is to be subjected to the judicial equivalent of a doctoral examination in statistics. Legislatures are not

It should have been easy to say that the production of “citizen-soldiers” was an “important state interest” and the “adversative training” in a single-sex environment is “substantially related” to that interest. But applying the heightened scrutiny test in the VMI case, the Court now relied on the universal concern that had only been dictum in *Craig*: do not treat an individual as a member of a group.¹⁰⁰ Over the protests of Justice Scalia, who, in dissent, pointed out that the Court had never before held “that a sex-based classification is invalid unless it relates to characteristics that hold true in every instance,”¹⁰¹ the majority held that “overbroad generalizations about the different talents, capacities, or preferences of males and females” would not suffice.¹⁰² It was true enough that few women would opt for “adversative training,” but the state could not make the necessary “exceedingly persuasive justification”¹⁰³ for a male-only school by using a generality.

held to any rules of evidence such as those which may govern courts or other administrative bodies, and are entitled to draw factual conclusions on the basis of the determination of probable cause which an arrest by a police officer normally represents. In this situation, they could reasonably infer that the incidence of drunk driving is a good deal higher than the incidence of arrest.

And while, as the Court observes, relying on a report to a Presidential Commission which it cites in a footnote, such statistics may be distorted as a result of stereotyping, the legislature is not required to prove before a court that its statistics are perfect. In any event, if stereotypes are as pervasive as the Court suggests, they may in turn influence the conduct of the men and women in question, and cause the young men to conform to the wild and reckless image which is their stereotype.

Id. at 224.

¹⁰⁰ See *supra* note 94 (providing support for this concern in *Craig*).

¹⁰¹ United States v. Virginia, 518 U.S. 515, 573-74 (Scalia, J., dissenting) (citing *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981), which upheld male-only selective-service registration even “assuming that a small number of women could be drafted for noncombat roles, [because] Congress simply did not consider it worth the added burdens of including women in draft and registration plans”).

¹⁰² *Id.* at 533.

¹⁰³ *Id.* at 531. In a concurrence, Chief Justice Rehnquist complained about the use of the phrase “exceedingly persuasive justification,” which he worried might heighten or at least “introduce[] an element of uncertainty” to the intermediate scrutiny test. *Id.* at 559 (Rehnquist, C.J., concurring). Notably, his opinion in *Hibbs* avoided this phrase. 123 S. Ct. 1972, 1976-84 (2003). Justice Scalia, in his dissenting opinion in the VMI case, observed the majority’s apparent preference for the phrase, as evinced by nine uses of it. *Virginia*, 518 U.S. at 571-73. Justice Scalia asserted that the majority has changed the formula because

[o]nly the amorphous ‘exceedingly persuasive justification’ phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI’s single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court’s reasoning, a single woman) willing and able to undertake VMI’s program.

One might speculate that the majority wielded its intermediate scrutiny test with extra vigor because it had confidence that only a laggard state would cling to same-sex education today. But in fact there was good reason to think that progress could lie in that direction. Justice Ginsburg took account of arguments by proponents of all-female schools, who “urged that diversity in educational opportunities is an altogether appropriate governmental pursuit and that single-sex schools can contribute importantly to such diversity.”¹⁰⁴ Indeed, it is the mission of some single-sex schools “to dissipate, rather than perpetuate, traditional gender classifications.”¹⁰⁵ The majority opinion struggled to preserve the ability to use sex discrimination in the vanguard, while still finding a way to force the rearguard Virginia institution to open itself to women:

“Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.¹⁰⁶

Finally, the Court resolved the case on the narrow ground that Virginia offered no all-female school comparable to the extraordinary VMI, which had developed over a long period of time into a unique institution.¹⁰⁷ Justice Ginsburg’s opinion is thus a prime example of

Id. at 573. The Chief Justice, however, was able to use the “standard elaboration of intermediate scrutiny” in *Hibbs* to arrive at the same kind of analysis, which saw a violation of the Equal Protection Clause when states make sex classifications based on stereotypes, even when the stereotype is factually supported as a generality. *Infra* text accompanying notes 338-39.

¹⁰⁴ *Virginia*, 518 U.S. at 533 n.7.

¹⁰⁵ *Id.* (quoting Brief of Amici Curiae Twenty-six Private Women’s Colleges at 5, *Virginia* (Nos. 94-1941, 94-2107)). Note that the cited brief did not support the state of Virginia; it extolled only *private* same-sex education and contended that no federal law barred sex discrimination in the admissions processes of institutions of private education. Brief of Amici Curiae Twenty-six Private Women’s Colleges at 13-20, *Virginia* (Nos. 94-1941 94-2107).

¹⁰⁶ 518 U.S. at 533-34 (citations and footnote omitted).

¹⁰⁷ *See id.* at 539-40 (concluding that “[h]owever liberally [VMI’s] plan serves the Commonwealth’s sons, it makes no provision whatever for her daughters,” thus violating equal protection). Virginia’s attempt to create a comparable women’s program, the Virginia Women’s Institute for Leadership (VWIL), fell far below the mark. *See id.* at 556 (reviewing VWIL and holding that “[the] remedy does not match the constitutional

crafting doctrine to separate the vanguard from the laggard, carefully framed to leave a basis for distinguishing newly conceived same-sex schools, especially ones designed to advance women and overcome old stereotypes.¹⁰⁸

Hinting at the role he would take in *Hibbs*, Chief Justice Rehnquist did not dissent. His concurring opinion took something of a middle position, marked by sympathy for Virginia's predicament.¹⁰⁹ The state had established VMI in 1839, long before the Fourteenth Amendment was even adopted and surely quite long before the Court began to reveal that there was any constitutional problem at all with its policy.¹¹⁰ It was not until 1982 that the Court had rejected a same-sex educational institution.¹¹¹ Thus, only at this point, according to the Chief Justice, was Virginia "on notice" of a possible constitutional violation in its VMI policy.¹¹² Only evidence after 1982 should

violation"). It was a special program designed around what the state argued were the "real" needs of women, but which the majority saw as the same old stereotypes. *See id.* at 550 (observing that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify denying opportunity to women whose talent and capacity place them outside the average description"). Moreover, the alternative program was simply worse than VMI's program according to many objective standards, such as the qualifications of the admitted students, the quality of the faculty, and the size of its library. *Id.* at 551-53.

¹⁰⁸ The proposal for a separate high school for gay students raises similar questions. *See supra* note 3 (describing mixed public reaction to the possibility of segregating gay students to protect them from homophobic attacks). It should be noted, however, that the school in question would not actively exclude students who were not gay. Needham & Perez, *supra* note 3, at A42. Since the Supreme Court has not applied heightened scrutiny to discrimination based on sexual orientation, it ought to be much easier to defend an all-gay school than an all-female school. Yet, I would speculate that a judge might very well perceive the all-gay high school as an inappropriate solution for a harassment problem and, viewing the state as a laggard, apply minimal scrutiny with enough bite to make it less likely to pass muster than an all-female school designed to advance the interests of women.

¹⁰⁹ *See Virginia*, 518 U.S. at 563 (Rehnquist, C.J., concurring) ("No legislative wand could instantly call into existence a similar institution for women; and it would be a tremendous loss to scrap VMI's history and tradition.").

¹¹⁰ *Id.* at 560-61.

¹¹¹ *Id.* at 561 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982)).

¹¹² *Id.* In determining when Section 5 power can be used to deprive states of their sovereign immunity, however, the Court has allowed Congress to rely on actions of the state as violations of constitutional rights from a period before there was Supreme Court precedent putting the state on notice that these actions in fact did violate the Constitution. *See infra* text accompanying notes 286-89 (discussing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48 (1976)). This fits the vanguard/laggard distinction in that a vanguard state anticipates the path the case law will take, while the laggard state may continue in its own ways until it is forced by the courts to change. The state that thereafter

therefore be used in determining what Virginia's real reasons were for maintaining a single-sex policy at VMI.¹¹³ In the Chief Justice's view, Virginia did not deserve to have any of its earlier justifications "held against it," regardless of how stereotypical or prejudiced they were.¹¹⁴

The Chief Justice accepted that Virginia could not instantly make a new institution equal to the century-and-a-half-old VMI, but he faulted Virginia for failing to make a "genuine effort" after 1982 to build a truly prestigious all-female institution. If Virginia had only devoted more resources and made a creditable beginning at creating this new institution, he wrote, "it might well have avoided an equal protection violation."¹¹⁵ Virginia argued that the single-sex institution was justified by the governmental interest in "diversity"¹¹⁶—offering an

flouts the Supreme Court precedent may be the worst sort of laggard, but the state that waits for a clear statement from the Court is not the vanguard.

In this light, consider the dispute that took place in the late 1980s about the scope of habeas corpus review of state court decisions. In *Butler v. McKellar*, 494 U.S. 407 (1990), the majority, in an opinion written by Chief Justice Rehnquist, foreclosed habeas relief when the state court followed all of the clear constitutional precedent. For the majority, the state court was not operating at a low enough level to deserve the intrusion of federal court review. *Id.* at 414-16. Justice Brennan, dissenting, was far more inclined to see the state court as unacceptably lagging behind on the path of constitutional law interpretation:

As every first-year law student learns, adjudication according to prevailing law means far more than obeying precedent by perfunctorily applying holdings in previous cases to virtually *identical* fact patterns. Rather, such adjudication requires a judge to evaluate both the content of previously enunciated legal rules and the breadth of their application. A judge must thereby discern whether the principles applied to specific fact patterns in prior cases fairly extend to govern *analogous* factual patterns. . . . [A]djudication according to prevailing law demands that a court exhibit "conceptual faithfulness" to the principles underlying prior precedents, not just "decisional obedience" to precise holdings based upon their unique factual patterns. The inability of lower courts to predict significant reformulations by this Court of the principles underlying prior precedents does not excuse them from the obligation to draw reasoned conclusions from principles that are well established at the time of their decisions.

Id. at 423 (Brennan, J., dissenting) (quoting *Desist v. United States*, 394 U.S. at 266 n.5 (Harlan, J., dissenting)).

¹¹³ *Virginia*, 518 U.S. at 562 (Rehnquist, C.J., concurring) ("[U]nlike the majority, I would consider only evidence that postdates our decision in *Hogan*, and would draw no negative inference from the Commonwealth's actions before that time.").

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 563.

¹¹⁶ *Id.* at 525. It is interesting to compare the Court's rejection of the "diversity" justification in the VMI case with its acceptance of "diversity" as a "compelling governmental interest" justifying disadvantaging white law school applicants based on race in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003). In the VMI case, the asserted diversity would occur in the collection of all of the state's schools through keeping one school less

alternative to coeducational institutions in the state—but the Chief Justice would only accept that justification if there were an equivalent single-sex institution for women.¹¹⁷ That is, he would have preserved some space for the state to design its own policies, but faulted Virginia for falling outside of that permissible space:

diverse (that is, there would be coeducational and a same-sex school, and schools without the adversative method and one school with it). The school doing the sex-based exclusion was internally more uniform by reason of the exclusion. In *Grutter*, the asserted diversity occurred within the school that used racial classifications in its admissions process. I would speculate that the most important distinction between the two cases is this: In *Grutter*, the majority either believed the university was experimenting in the vanguard or had enough doubt about where the vanguard was to make state autonomy preferable; by contrast, the majority felt confident that VMI was lagging. Quite interestingly, the *Grutter* majority cited Justice Kennedy's concurrence from *Lopez*, as it characterized the state—a bit warily—as a worthy experimenter:

We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. . . .

In the context of higher education, the durational requirement can be met by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity. Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop.

. . . .

We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable.

Grutter, 123 S. Ct. at 2346 (citing *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring), for the proposition that “the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear”). *Grutter* was thus implicitly invoking the *New State Ice* dissent upon which Justice Kennedy's *Lopez* opinion relies. See *supra* text accompanying notes 49-54 (describing Justice Kennedy's reliance on the *New State Ice* dissent and the principle of state experimentation to strike down the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (2000), in *Lopez*).

¹¹⁷ *Virginia*, 518 U.S. at 564 (Rehnquist, C.J., concurring). The Chief Justice also disparaged the adversative method, asserting that it did “not serve an important governmental objective” because it was not shown to be “pedagogically beneficial or . . . any more likely to produce character traits than other methodologies.” *Id.* The Chief Justice attributes the belief that the adversative method is not a good enough governmental interest to the majority opinion as well, though he gives no page citation. *Id.* It would appear, however, that the majority assumed the interest in the adversative method but rejected the state's assertion that its preservation depended on the exclusion of all women. The majority demanded that female applicants be judged as individuals rather than stereotypes and rejected the idea that all women would require “accommodations” of the sort that would mean the abandonment of the adversative system. See *supra* text accompanying notes 85-88 (detailing this section of Justice Ginsburg's majority opinion).

Had the Commonwealth provided the kind of support for the private women's schools that it provides for VMI, this may have been a very different case. For in so doing, the Commonwealth would have demonstrated that its interest in providing a single-sex education for men was to some measure matched by an interest in providing the same opportunity for women.¹¹⁸

The Chief Justice evinced more concern for autonomous state policymaking than the majority, but it was Justice Scalia alone who dissented. Like Justice Brandeis, who favored progress through democracy,¹¹⁹ Scalia fretted about judicial enthusiasm for rights—at least new rights or rights other than the First Amendment. Justice Scalia wrote: “The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly.”¹²⁰

Unlike Brandeis, Justice Scalia put tradition, not progress, at the center of his analysis. The word “tradition” (or “traditional”) appeared eighteen times in his opinion.¹²¹ He also paused to write a

¹¹⁸ *Virginia*, 518 U.S. at 564 (Rehnquist, C.J., concurring). The Chief Justice was prepared to allow the state considerable flexibility in fashioning an appropriate remedy:

An adequate remedy in my opinion might be a demonstration by Virginia that its interest in educating men in a single-sex environment is matched by its interest in educating women in a single-sex institution. To demonstrate such, the Commonwealth does not need to create two institutions with the same number of faculty Ph. D.'s, similar SAT scores, or comparable athletic fields. . . . Nor would it necessarily require that the women's institution offer the same curriculum as the men's; one could be strong in computer science, the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber.

Id. at 565 (citation omitted).

In *Hibbs*, the Chief Justice picked up Justice Ginsburg's theme of avoiding gender stereotypes, *infra* text accompanying notes 336-37, but the passage quoted above may seem to suggest gender stereotypes, as the Chief Justice referred to “computer science” and “liberal arts.” However, it is probably not an accident that he implicitly reversed the stereotype, referring to women's institutions and computer science first in the two phrases and liberal arts and men's institutions second.

¹¹⁹ See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing the ability of states in a federal system to experiment for the social and economic betterment of the nation).

¹²⁰ *Virginia*, 518 U.S. at 567 (Scalia, J., dissenting).

¹²¹ *Id.* at 566-603; see *e.g.*, *id.* at 566 (eschewing the majority's lack of respect for “the long tradition . . . of men's military colleges supported by both States and the Federal Government”). Justice Scalia outstripped this record with his dissent in *Lawrence v. Texas*, 123 S. Ct. 2472, 2488-98 (2003) (Scalia, J., dissenting), which had twenty-eight uses of the word “tradition” (or variations like “traditionally”). Even *Lawrence* is not Scalia's record. In his plurality opinion in *Burnham v. Superior Court*, 495 U.S. 604,

long footnote bemoaning the majority's minor gaffe in calling the University of Virginia "the Charlottesville campus," a failing that to Scalia revealed the majority's lack of connection to the grand historical tradition of education in Virginia, a tradition—Scalia pointed out—that goes back to Thomas Jefferson.¹²² The word "old" appears six times in Justice Scalia's dissent,¹²³ not counting two references to "Old Dominion" (mentioned once in listing the names of the many institutions of higher education run by the state that are not called the University of Virginia¹²⁴ and once as a traditional epithet for the state of Virginia).¹²⁵ At one point, writing about his style of interpreting the Constitution, Justice Scalia called the document "the Constitution of the United States—the old one."¹²⁶ He also chided the majority for relying on "various historical anecdotes designed to demonstrate that Virginia's support for VMI as currently constituted reminds the Justices of the 'bad old days.'"¹²⁷ This is a blunt way of saying the majority cannot respect a state that has not chosen to be in the vanguard. Justice Scalia's orientation toward tradition is seen most strikingly at the end of his dissenting opinion in the VMI case. He sets out in full the

607-28 (1990), Scalia uses variations of "tradition" thirty-two times to explain why personal jurisdiction based on service of process in the forum state does not violate due process. Admittedly, he did not invent the phrase "traditional notions of fair play and substantial justice," and so many of the repetitions of the word in *Burnham* were inevitable. See, e.g., *id.* at 609 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Justice Scalia's *Burnham* opinion, which was joined in full only by Chief Justice Rehnquist and Justice Kennedy, makes a wonderful contrast to Justice Brennan's opinion in the same case. Brennan's concurring opinion, which Justices Marshall, Blackmun, and O'Connor joined, did not accept "tradition" as sufficient to establish due process, despite the oft-quoted *International Shoe* phrase. *Id.* at 630 (Brennan, J., concurring). Consistent with his expansive view of jurisdiction (that is, his minimal conception of due process), Brennan found jurisdiction based on "contemporary notions of due process," *id.* at 630, which was to Scalia an improper "outright break" from the "traditional notions" that ought to govern due process analysis. *Id.* at 623. *Burnham* makes a nice example of the tradition/evolution difference in constitutional interpretation in which the evolution position is not about expanding rights, such as those in the privacy or death penalty cases, but about limiting them. For another example from the procedural realm, see *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335-37 (1979), illustrating how the Seventh Amendment right to a jury in a civil trial is under pressure from contemporary ideas about collateral estoppel.

¹²² *Virginia*, 518 U.S. at 584-85 n.4 (Scalia, J., dissenting).

¹²³ *Id.* at 566-603.

¹²⁴ *Id.* at 584-85 n.4.

¹²⁵ *Id.* at 587.

¹²⁶ *Id.* at 567.

¹²⁷ *Id.* at 586.

very old-fashioned “Code of a Gentleman,” which first-year VMI students were required to carry.¹²⁸ Here, Justice Scalia observed:

In an odd sort of way, it is precisely VMI’s attachment to such old-fashioned concepts as manly “honor” that has made it, and the system it represents, the target of those who today succeed in abolishing public single-sex education. . . . I do not know whether the men of VMI lived by this code; perhaps not. But it is powerfully impressive that a public institution of higher education still in existence sought to have them do so. I do not think any of us, women included, will be better off for its destruction.¹²⁹

Justice Scalia cautioned judges not to erect their *newly developed* beliefs into rights because the democratic “system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.”¹³⁰ Accordingly, Scalia wanted to recognize only rights that are embedded in historical tradition.¹³¹ Since “the tradition of having government-funded military schools for men is as well rooted in the traditions of this country as the tradition of sending only men into military combat,” change should come through democratic choice.¹³²

Finally, Justice Scalia poked a *New State Ice*-icle at the majority:

[I]t is one of the unhappy incidents of the federal system that a self-righteous Supreme Court, acting on its Members’ personal view of what would make a “more perfect Union,” (a criterion only slightly more restrictive than a “more perfect world”), can impose its own favored social and economic dispositions nationwide. As today’s disposition, and others this single Term, show, this places it beyond the power of a “single courageous State,” not only to introduce novel dispositions that the Court frowns upon, but to reintroduce, or indeed even adhere to, disfavored dispositions that are centuries old. The sphere of self-government reserved to the people of the Republic is progressively narrowed.¹³³

That is, while Justice Brandeis wanted to protect federalism in the hope that a vanguard state would prove to the rest of us how some

¹²⁸ *Id.* at 602-03. The Code includes instructions such as “[a] Gentleman . . . [d]oes not lose his temper; nor exhibit anger, fear, hate, embarrassment, ardor or hilarity in public . . . Does not put his manners on and off, whether in the club or in a ballroom. He treats people with courtesy, no matter what their social position may be.” *Id.*

¹²⁹ *Id.* at 601-03.

¹³⁰ *Id.* at 567.

¹³¹ *Id.* at 567-70.

¹³² *Id.* at 569.

¹³³ *Id.* at 601 (citing, in order to illustrate the willingness of the current Court to limit the power of states to employ novel or disfavored policies, *Romer v. Evans*, 517 U.S. 620 (1996); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996)).

problem might be solved, Justice Scalia embraced the laggard state—adhering to an old form, but respectable democratic self-governance nonetheless. Both Brandeis and Scalia wanted to relieve the states of the limitations of too many rights.¹³⁴ Because Justice Scalia is in the dissent as he takes this position, I will continue to use my pejorative term “laggard” for the state of Virginia, but I want to give him credit for presenting a counter-vision, which recasts the majority’s laggard state as the *traditional* state, valuable in itself.

E. *Vanguard Evidence, Laggard Evidence*

In the “laboratories of democracy” vision of federalism, the states are prized for their capacity to generate useful evidence leading to better solutions to current problems. In the next Part, which deals with Section 5 of the Fourteenth Amendment, we will see that under the doctrine that has developed since the mid-1990s, when the Court decided *City of Boerne*, the states are also viewed as a source of evidence. Now, however, the evidence will be of constitutional violations, and that evidence—while it will still be used as a basis for designing solutions to problems—will operate to empower Congress to enact statutes that restrict state actions. That is, the diverse activities of the state, under Section 5 doctrine, will be characterized as violating constitutional rights and justifying the imposition of limitations on the states’ future choices. The positive potential of the states to generate new ideas will be overshadowed by the negative potential of the states to do harm. As we shall see, Section 5 doctrine attempts to

¹³⁴ For a different view of laggard states and traditional approaches, see Justice Goldberg’s concurrence in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring):

My Brother Stewart, while characterizing the Connecticut birth control law as “an uncommonly silly law,” would nevertheless let it stand on the ground that it is not for the courts to “substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.” Elsewhere, I have stated that “[w]hile I quite agree with Mr. Justice Brandeis that . . . ‘a . . . State may . . . serve as a laboratory; and try novel social and economic experiments,’ I do not believe that this includes the power to experiment with the fundamental liberties of citizens” The vice of the dissenters’ views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

Id. at 496 (citations omitted). In *Lawrence v. Texas*, Justice Thomas, in his dissent, repeated Justice Stewart’s epithet “silly” to describe a state law banning homosexual sodomy. 123 S. Ct. 2472, 2498 (2003) (Thomas, J., dissenting). Like Stewart, he endorsed state-by-state legislative response and rejected judicial action.

answer the question: When does the need to control the laggard states outweigh the promise of benefits that might come from the vanguard states? Or perhaps it is more accurate to state that Section 5 doctrine honors the vanguard states because it views Congress as having learned from their experiments, identified a good solution, and built a statutory floor below which the laggard states may no longer fall. Under this view, the vanguard state remains free to experiment, but only by moving further in the direction that the Congress has identified as the right direction.

II. THE ROLE OF THE LAGGARD STATES IN GENERATING POWER UNDER SECTION 5 TO REPLACE STATE EXPERIMENTATION WITH A NATIONAL STANDARD

A. Introduction

Even though the Supreme Court has modestly reconfigured its commerce power doctrine in recent years,¹³⁵ that power remains tremendously expansive, permitting Congress to regulate the vast range of activities in the commercial sphere. The breadth of the commerce power had long minimized the importance of other clauses granting power to Congress. Since 1996, however, the power granted to Congress under Section 5 of the Fourteenth Amendment has gained special importance because of the Court's decision in *Seminole Tribe v. Florida*,¹³⁶ which held that Congress may not abrogate state sovereign immunity using the commerce power. *Seminole Tribe*, which overruled a tenuous decision from the late 1980s,¹³⁷ remains

¹³⁵ See *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the Commerce Clause does not support a private right of action for gender-motivated violence); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Commerce Clause does not support criminalization of gun possession in a school zone); see also Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 735 (2003) (noting that *Lopez* and *Morrison*, without more, have "few practical effects" on congressional power "except at the margin"); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 676 (1995) (noting the "minor restraint on congressional power" imposed by *Lopez*); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 661 (1996) (emphasizing the minor effect of *Lopez*); Ronald D. Rotunda, *The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1218 (2002) (noting that the Court's recent federalism cases "do not prevent the federal government from enacting any commercial regulation that would be necessary for a central government").

¹³⁶ 517 U.S. 44 (1996).

¹³⁷ *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). *Union Gas* was a particularly weak precedent because the fifth vote that produced it came from Justice White, who

controversial¹³⁸ and may perhaps be overruled one day, but for now, it has had the effect of focusing attention on Section 5 of the Fourteenth Amendment. Let us then consider the scope of Section 5 in connection with the abrogation of sovereign immunity, as it has developed in the post-Warren Era, and the extent to which the doctrine that has evolved in recent years reflects a creditable vision of federalism.

B. *Federalism and the Fourteenth Amendment in 1976: Fitzpatrick*

According to *Fitzpatrick v. Bitzer*,¹³⁹ a unanimous decision with a majority opinion written by then-Justice Rehnquist, Congress has the power under Section 5 of the Fourteenth Amendment to abrogate the states' traditional defense of sovereign immunity to lawsuits brought

concluded with exasperating coyness: "I agree with the conclusion reached by Justice Brennan in Part III of his opinion, that Congress has the authority under Article I to abrogate the Eleventh Amendment immunity of the States, although I do not agree with much of his reasoning." *Id.* at 57 (White, J., concurring in part and dissenting in part). White was the only Justice voting for this result who also adhered to the traditional interpretation of the Eleventh Amendment propounded in *Hans v. Louisiana*, 134 U.S. 1 (1890), which found that states have sovereign immunity in federal question cases. Thus, no one who believed in "the fundamental structural importance" of sovereign immunity explained why the Commerce Clause included the power to abrogate. *Union Gas*, 491 U.S. at 44. The other four Justices who approved of Commerce Clause abrogation in *Union Gas* were all strongly committed to overruling *Hans*, a development in constitutional law that would have made power to abrogate entirely unnecessary. See, e.g., *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 258-302 (1985) (Brennan, J., dissenting). With no explanation for Commerce Clause abrogation from a Justice who thought the states had any constitutional immunity from suit in cases based on federal law, *Union Gas* was highly susceptible to attack when the personnel on the Court changed. See Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 31 RUTGERS L.J. 631, 636-40 (2000) (noting that the *Union Gas* overruling "is easily attributed to personnel change on the court"). By the time *Seminole Tribe* was decided, the only Justice remaining on the Court who had joined the 1980's attacks on *Hans* was Justice Stevens. Justices Souter, Ginsburg, and Breyer all replaced *Hans* opponents, and have accepted that precedent, though they oppose *Seminole Tribe*. *Id.* at 637. Justice Thomas, who replaced *Hans* opponent Justice Marshall in 1992, would consistently vote to preserve the venerable precedent, along with the four Justices—Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Scalia—who had earlier voted with Justice White in support of *Hans*. *Id.* All four of these Justices dissented in *Union Gas*. *Id.* Justice Thomas added a fifth vote for this position, which then drew a majority in *Seminole Tribe*. *Id.*

¹³⁸ See, e.g., *Hibbs*, 123 S. Ct. 1927, 1984 (2003) (Souter, J., concurring) ("I join the Court's opinion here without conceding the dissenting positions just cited or the dissenting views expressed in [*Seminole Tribe*] . . ."); *Id.* (Stevens, J., concurring) (repeating the position that there is no constitutional state immunity and hence no problem with abrogation by statute).

¹³⁹ 427 U.S. 445 (1976).

by individuals.¹⁴⁰ As *Seminole Tribe* would later underscore, the Reconstruction Era constitutional amendments represent a very different historical understanding of the relationship between the national and the state governments from that of the original Constitution.¹⁴¹ According to *Fitzpatrick*, it is right to read these amendments as including a power to abrogate state sovereign immunity, because they are properly seen as having “fundamentally altered the balance of state and federal power,” specifically creating federal power to be exercised against the states.¹⁴² *Fitzpatrick* warrants close attention as we prepare to look at *Hibbs* because not only is it the source of the key principle that Congress can abrogate sovereign immunity using its Section 5 power, but it is also a case in which the Court accepted the use of the Section 5 power to remedy gender-based discrimination.

Fitzpatrick was decided in 1976, the same year the Court decided both *Craig v. Boren*,¹⁴³ which raised the level of scrutiny given classifications based on sex, and *National League of Cities v. Usery*,¹⁴⁴ which carved out an enclave of state immunity from commerce power legislation. *National League* was an early, post-Warren Court foray into the enforcement of federalism values, authored by then-Associate Justice Rehnquist. Thus, 1976 brought an increase of intrusion into the state sphere because the states’ sex-based classifications would need to meet a higher standard and because that standard would subject the states to suits by individuals for retrospective relief under Fourteenth Amendment statutes that express an intent to abrogate sovereign immunity;¹⁴⁵ and 1976 brought a decrease in intrusion because, under

¹⁴⁰ *Id.* at 456.

¹⁴¹ See *Seminole Tribe*, 517 U.S. at 59-61 (describing instances in which the Supreme Court had upheld congressional abrogation of state immunity).

¹⁴² *Id.* at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)). By contrast, the original Constitution was chiefly designed to enable Congress to bypass the states and act directly upon individuals.

¹⁴³ 429 U.S. 190 (1976); *supra* text accompanying notes 89-99.

¹⁴⁴ 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Another 1976 case written by then-Justice Rehnquist and also expressing federalism values was *Rizzo v. Goode*, 423 U.S. 362 (1976), which restricted federal rights claimants who sought remedies for mistreatment by the police.

¹⁴⁵ The states were already subject to suits for prospective relief under *Ex parte Young*, 209 U.S. 123 (1908), which requires naming a state official rather than the state itself as the defendant. See *Edelman v. Jordan*, 415 U.S. 651, 664-66 (1974) (distinguishing claims for retrospective relief from claims for prospective relief in *Ex Parte Young*-type suits). The states had long been subject to suits brought by the federal government, as opposed to private individuals.

National League, some essential areas of state government became unreachable by the commerce power.

What did this dichotomy say about federalism? While originalists will say that the difference in the history and the texts of the Commerce Clause and the Fourteenth Amendment explain the different treatment well enough,¹⁴⁶ I would add that the dichotomy can also be explained in normative federalism terms: The doctrine expressed a belief in the importance of individual rights, as distinguished from commercial arrangements,¹⁴⁷ and the special role of the courts in vindicating them, quite apart from whether the democratic majority is predisposed to protect them.¹⁴⁸

Fitzpatrick looked at the 1972 Amendments to Title VII of the Civil Rights Act of 1964, which expressly authorized private individual claims for damages from state government for employment discrimination based on “race, color, religion, sex, or national origin.”¹⁴⁹ Looking ahead to the line of Fourteenth Amendment power cases that would begin with *City of Boerne*¹⁵⁰ in 1997, one might wonder how the 1972 Amendments to Title VII could fit within that power. In *City of Boerne*, the Court designed a doctrinal tool to distinguish between the substantive and the truly remedial, between the redefinition of rights by statute, which the Fourteenth Amendment power will not support, and a statutory remedy for the violation of constitutional rights as defined by courts.¹⁵¹ *City of Boerne* permits a truly remedial

¹⁴⁶ *Seminole Tribe*, 517 U.S. at 66.

¹⁴⁷ *But see infra* text accompanying notes 325-50 (discussing the controversy between the majority and the dissenting Justice Kennedy in *Hibbs* over whether the FMLA is an enforcement of rights or simply an employment benefit).

¹⁴⁸ Of course, the majority would have to provide the rights claimant with a statute expressing an intent to abrogate sovereign immunity, so rights are important enough to the Court to view Congress as having a power to overcome state majoritarian preferences, but not enough to solve the problem of a rights claimant who lacks democratic support at the national level as well as the state level. See Ann Althouse, *When to Believe a Legal Fiction: Federal Interests and the Eleventh Amendment*, 40 HASTINGS L.J. 1123, 1124 (1989) (arguing that “the Court makes its difficult decisions in response to what it perceives as the federal interest at stake”).

¹⁴⁹ *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-48 (1976) (citing section 703(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (Supp. IV 1970)). It is notable that the *Fitzpatrick* opinion invariably refers to the authorization of suits *in federal court*, given the way the Rehnquist Court would later require proper abrogation (or consent) to bring federal claims in state court as well. See *Alden v. Maine*, 527 U.S. 706 (1999) (emphasizing the *substantive* and not merely jurisdictional nature of sovereign immunity). There is concurrent jurisdiction in state as well as federal courts for Title VII claims.

¹⁵⁰ 521 U.S. 507 (1997).

¹⁵¹ *Id.* at 527-29.

statute to cover a “somewhat broader swath” of state activity than is covered by Section 1 rights standing alone.¹⁵² Under the *City of Boerne* doctrine, courts must ask whether a statutory remedy has “congruence and proportionality” to violations of Section 1 rights, as those rights are defined by courts.¹⁵³ As the line of cases following *City of Boerne* showed, Congress may not act on the theory that the states *might* violate rights and that legislation should be in place to compensate victims of those possible violations, it must have evidence that the states are already presenting enough of a problem of violating rights that Congress’s statute can fairly be seen as a response to that problem.¹⁵⁴

In the mid-1970s, however, the litigants apparently had no inkling that requirements of that sort of stringency would come into play.¹⁵⁵ In *Fitzpatrick* the argument was entirely about whether Congress had the power to abrogate sovereign immunity. “There is no dispute,” the Court squirmed away in a little footnote, “that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment.”¹⁵⁶ Tantalizingly, this footnote includes a tacked-on “cf.”

¹⁵² See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000) (citing *City of Boerne* for the proposition that “Congress’ [s] power ‘to enforce’ the [Fourteenth] Amendment 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”).

¹⁵³ *City of Boerne*, 521 U.S. at 520.

¹⁵⁴ See *infra* text accompanying notes 197-266 (discussing Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999), *Morrison*, *Kimel*, and *Garrett*).

¹⁵⁵ The key case at the time about the scope of the Fourteenth Amendment power would have been *Katzenbach v. Morgan*, which upheld the Voting Rights Act of 1965, § 4(e), 42 U.S.C. § 1973b(e) (2000), under Section 5 of the Fourteenth Amendment. 384 U.S. 641, 658 (1966). *Morgan* is distinguished in the later case law. *Infra* text accompanying notes 180-86.

¹⁵⁶ *Fitzpatrick*, 427 U.S. at 453 n.9. The Court repeated the remark, with no elaboration in another footnote. See *id.* at 456 n.11 (“[R]espondent state officials do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment.”). Interestingly enough, in a concurring opinion, Justice Stevens did take on this question not raised by the parties, and opined that the plaintiffs failed to “prove[] a violation of the Fourteenth Amendment,” and even expressed doubts as to whether the 1972 Amendments were “‘needed to secure the guarantees of the Fourteenth Amendment.’” *Id.* at 458 (Stevens, J., concurring) (quoting *Katzenbach*, 384 U.S. at 651). Justice Stevens agreed with the outcome on an *Ex parte Young* ground. *Id.* at 459-60. Justice Brennan concurred in *Fitzpatrick* on the ground that no sovereign immunity survived the granting of the original powers to Congress. *Id.* at 457-58. That theory would be the basis for the assault on *Hans* in the 1980s era cases. In a similar vein, Justice Brennan also dissented in *National League*, putting forth a theory that would gain the majority in *Garcia*.

citation to *National League*, presumably meant to acknowledge that the commerce power does not fully reach the state activities and to suggest difficulties that would lie ahead—after *Garcia* overruled *National League*—with respect to abrogating sovereign immunity using the commerce power.

It is hard not to notice that the 1972 Amendments to Title VII predated *Craig*'s announcement of heightened scrutiny for sex discrimination claims.¹⁵⁷ Even assuming that we can look back on actions that were consistent with existing Supreme Court precedent and see them retrospectively as violations of the Constitution, the *Fitzpatrick* Court did not mention *any* evidence of state denial of equal protection rights attributed to sex discrimination. Justice O'Connor raised this question during the oral argument in *Hibbs* to the counsel for the state of Nevada, who pushed for strict application of the *City of Boerne* test to the FMLA:

[W]hat about the *Fitzpatrick v. Bitzer* decision, where the Court unanimously found Title VII was a valid abrogation of the Eleventh Amendment immunity, and there was no inquiry into the history of gender discrimination, it was just accepted? Do you think that that case would stand up under your analysis?¹⁵⁸

Because of *Fitzpatrick*, the Court in *Hibbs* would have a bit of a struggle to deal with gender-based discrimination and the post-*City of Boerne* Section 5 precedent.¹⁵⁹ The problem would be compounded by their later acknowledgment that “sex” had found its way into the statutory text not out of any congressional regard for real problems of sex discrimination, but, as counsel for the United States would admit in oral argument in *Hibbs*, “it was entered there as the legislative equivalent of the poison pill in order to attempt to kill Title VII, and so not

See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 858 (1976) (Brennan, J., dissenting) (arguing that there should be no limit on Congress's power under the Commerce Clause based on “state sovereignty requiring or permitting judicial enforcement”).

¹⁵⁷ See Post & Siegel, *supra* note 22, at 1951 (“It was only after Congress used its lawmaking powers to validate the [feminist] movement's understanding of equality that the Court proved willing to modify its own Section 1 doctrine to protect citizens against state action that discriminates on the basis of sex.”).

¹⁵⁸ Oral Arguments at 1, *Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972 (2003) (No. 01-1368), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/01-1368.pdf. For further discussion of this line of questioning in the oral argument, see *infra* text accompanying note 352-55.

¹⁵⁹ See *infra* text accompanying notes 267-93 (discussing how the Court dealt with the Family and Medical Leave Act).

much evidence was put into the record regarding gender discrimination.¹⁶⁰

So *Fitzpatrick* not only established that Congress could abrogate sovereign immunity using its Section 5 power; it also created a fixed point that, as we shall see, affected arguments about when Congress could use Section 5 to remedy problems of sex discrimination.

C. *The Doctrinal Shift Away From the Judicial Enforcement of Federalism in the 1980s*

In the 1980s, the Court erased the dichotomy represented by *Fitzpatrick* and *National League* when it overruled *National League* in *Garcia*.¹⁶¹ *Garcia* created the impression that Congress was the ultimate arbiter of just how much autonomy the states would be permitted.¹⁶² It seemed in the mid-1980s that the Court was ceding the enterprise of federalism enforcement to Congress, and the decision in *Union Gas*, in 1989, which authorized Congress to abrogate sovereign immunity using the commerce power, reinforced this impression. But this move toward the congressional reinforcement of federalism values should not have seemed very secure. Both *Garcia* and *Union Gas* provoked strong dissenting opinions, joined by four Justices and peppered with predictions of future overruling.¹⁶³ Moreover, throughout the 1980s, a majority resisted efforts to overrule *Hans*, the 1890 case that held that state sovereign immunity survived in the original constitutional distribution of powers. In addition, federalism values proved quite vigorous

¹⁶⁰ Oral Arguments at 45, *Hibbs* (No. 01-1368) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). The Court in *Price Waterhouse* refers to “[t]he somewhat bizarre path by which ‘sex’ came to be included as a forbidden criterion for employment—it was included in an attempt to defeat the bill.” 490 U.S. at 244 n.9 (citing CHARLES W. WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115-17 (1985)).

¹⁶¹ 469 U.S. 528 (1985); see also *supra* text accompanying notes 55-58 (discussing the *Garcia* case).

¹⁶² This “political safeguards” model of federalism was articulated most prominently in Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

¹⁶³ See *Union Gas*, 491 U.S. at 29, 44-45 (Scalia, J., dissenting) (taking the position, joined by the Chief Justice and Justices O’Connor and Kennedy, that the decision in *Union Gas* “unstable” and predicting that it—or *Hans*—would be overruled); *Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) (refusing to “spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court”); *id.* at 589 (O’Connor, J., dissenting) (sharing the “belief that this Court will in time again assume its constitutional responsibility”).

throughout the 1980s in questions of deferring to state courts in the enforcement of federal constitutional rights.¹⁶⁴

D. *The Return to the Judicial Enforcement of Federalism in the Mid-Nineties: Lopez, Seminole Tribe, and City of Boerne*

The mid-1990s brought a trio of cases that reframed the Court's federalism analysis.¹⁶⁵ Most conspicuously, in *United States v. Lopez*¹⁶⁶ in 1995, the Court roused itself from its supine deference to Congress and found the Commerce Clause inadequate to support a federal statute. *Lopez* has been the subject of much commentary¹⁶⁷ and need

¹⁶⁴ See, e.g., *Teague v. Lane*, 489 U.S. 288, 308 (1989) (shielding much state court interpretation of federal law from habeas review); *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983) (using standing and federalism-based restraint to restrict suits for injunctions based on federal rights); *Allen v. McCurry*, 449 U.S. 90, 97-98 (1980) (applying collateral estoppel to prevent civil claims for constitutional rights violations after motions to suppress evidence in criminal trials). Like the preservation of *Hans*, this countertrend in the 1980s federalism cases was produced by Justice White's voting pattern, which is best understood as an endorsement of legislative power. The trend of invigorating jurisdictional federalism doctrines began in 1971, at the dawn of the Burger Court, with *Younger*, which embraced "Our Federalism" and praised state autonomy, noting that things work best "if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). *Younger* provided that as a general rule state court criminal defendants would need to raise their federal claims in the context of the state court proceeding. *Id.* at 41. An exception was designed that would permit access to federal court upon a showing of the state court's inadequacy, a nice example of the shaping of doctrine around the problem of the laggard state weighed against the potential benefits that can be provided by the well-functioning state (in this setting, the state court). *Id.* at 45.

¹⁶⁵ This doctrinal development began with Justice Thomas's entry onto the Court in 1992, a year that produced what could be seen as the first case in the line that would reframe the Court's federalism: *New York v. United States*, 505 U.S. 144 (1992). See Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 1013-19 (1993) (commenting, inter alia, on *New York v. United States*). Justice Thomas, by replacing Justice Marshall, who was a member of the majority in *Garcia* and *Union Gas*, provided a fifth vote to the group of Justices who dissented in *Union Gas*—Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy—all of whom remain on the Court today. Chief Justice Rehnquist and Justice O'Connor were also both in dissent in *Garcia*. Along with them was Justice Powell, who later was replaced by Justice Kennedy, and Justice Burger, who was replaced by Justice Scalia. It is notable that unlike *Union Gas*, *Garcia* has not been overruled. I think that the Court has simply found better ways to enforce federalism than the approach used in *National League*. See Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 268 (2000) (expressing preference for current federalism doctrine over "tak[ing] the more drastic step of overruling *Garcia*"). The theory underlying *Garcia*, however, is clearly no longer believed by a majority of the Court.

¹⁶⁶ 514 U.S. 549 (1995).

¹⁶⁷ See generally Althouse, *supra* note 54 (discussing the *Lopez* decision); Glennon, *supra* note 52 (using *Lopez* as an example to assert that there has been a failure to see

not detain us long here, but it is worth observing that the federal statute at issue in *Lopez*, the Gun-Free School Zones Act,¹⁶⁸ imposed a uniform federal solution that displaced the states' diversity and experimentation in an area that had not escaped their attention, where they were not themselves contributing to the problem, and where there was no particular benefit to be gained through a uniform rule.¹⁶⁹ Not only was Congress not responding to a problem of laggard states, but Congress was also imposing only a traditional, harsh criminal penalty.¹⁷⁰ State and local governments, by contrast, were in the vanguard, experimenting with solutions like gun-exchange programs and parental responsibility, as Justice Kennedy's *New State Ice*-citing concurring opinion pointed out.¹⁷¹

The second of the three cases was *Seminole Tribe v. Florida*¹⁷² in 1996, which overruled *Union Gas*, making it thereafter necessary for Congress to use Section 5 of the Fourteenth Amendment in order to abrogate sovereign immunity. The following year brought the third

that federalism has a regional component); Merritt, *supra* note 135 (arguing that *Lopez* has narrow precedential value); Nagel, *supra* note 138 (expounding on federalism after *Lopez*); Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995) (commenting that *Lopez* gives little direction with regard to Congress's commerce power).

¹⁶⁸ 18 U.S.C. § 922(9)(1)(A) (2000).

¹⁶⁹ See *supra* text accompanying notes 49-53 (drawing attention to the Kennedy concurrence that relies on *New State Ice*); see also *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that the need to accommodate interstate travelers justifies imposing a uniform national rule barring race discrimination in hotels), *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that for a production control to stabilize prices it must be accomplished at the national level).

¹⁷⁰ Some might argue that gun control is the vanguard, but banning guns *in schools* is scarcely an innovation: many states did the same, unsurprisingly, as Justice Kennedy noted in his opinion in *Lopez*. See *Lopez*, 514 U.S. at 581 (1995) (Kennedy, J., concurring) (“[O]ver 40 States already have criminal laws outlawing the possession of firearms on or near school grounds.”). The focus on school zones in the federal legislation occurred because the members of Congress who generally favored gun control saw it as a way of averting opposition from gun control opponents. See J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE ROLE OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 98-99 (2004) (noting the statement of a key drafter of the bill that “[n]o Senator wanted to stand up for guns in schools”). The only “innovation” was in turning a traditional state law crime into a federal crime. The federalization of crime was unpopular with the Court because of the burden it imposed on federal courts, if nothing else. See, e.g., Lorie Hearn, *Trying Times Are Ahead: Justice O'Connor Says Federalization of Crime Could Overwhelm the Courts*, SAN DIEGO UNION-TRIBUNE, Aug. 17, 1994, at 1.

¹⁷¹ See *supra* text accompanying notes 49-53 (discussing the Kennedy concurrence).

¹⁷² 517 U.S. 44 (1996).

case, *City of Boerne*,¹⁷³ which constricted the very power that *Seminole Tribe* had just made newly important. *City of Boerne* was not itself a case about sovereign immunity. Indeed, it arose in such a distinctive context that, even though *Seminole Tribe* had so recently drawn attention to the sovereign immunity abrogation issue at stake in Fourteenth Amendment interpretation, it would take further cases to make the combined impact of *Seminole Tribe* and *City of Boerne* clear.¹⁷⁴

City of Boerne dealt with the Religious Freedom Restoration Act (RFRA),¹⁷⁵ a statute explicitly designed to overrule a Supreme Court decision. Shortly after the Court had decided that neutral, generally applicable laws that burden religion do not violate the Free Exercise Clause of the First Amendment,¹⁷⁶ Congress attempted to impose a much higher standard—requiring a compelling state interest to justify a substantial burden on a religious practice—than the Court had articulated in earlier cases.¹⁷⁷ The text of RFRA openly proclaimed Congress’s intention to “restore” the Free Exercise interpretation the Court had so recently rejected.¹⁷⁸

Justice Kennedy, writing in *City of Boerne*, began his discussion of permissible Section 5 legislation with a general quote from *Fitzpatrick*: “Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”¹⁷⁹

¹⁷³ 521 U.S. 507 (1997).

¹⁷⁴ See *infra* text accompanying notes 197-266 (discussing later cases in the *City of Boerne* line).

¹⁷⁵ Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb to 2000bb-4 (2000).

¹⁷⁶ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

¹⁷⁷ For examples of cases imposing the much higher standard, see *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963). The Court in *Smith* noted that the *Sherbert* approach to the Free Exercise Clause had been applied inconsistently over the years. 494 U.S. at 882-84.

¹⁷⁸ 42 U.S.C. § 2000bb(b)(1) (2000). The constitutional problems with RFRA were recognized early on by commentators. See Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994) (arguing that RFRA was unconstitutional on both religious freedom and federalism grounds); William Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291 (1996) (arguing that Congress lacked power under Section 5 to enact RFRA).

¹⁷⁹ *City of Boerne*, 521 U.S. at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

However, Justice Kennedy's example of judicially approved enforcement was the Voting Rights Act of 1965 (VRA).¹⁸⁰ Title VII of the Civil Rights Act of 1964—the legislation upheld in *Fitzpatrick*—was never even mentioned in *City of Boerne*.¹⁸¹ The VRA attacked racial discrimination in voting by outlawing, inter alia, literacy tests,¹⁸² even though the Court had upheld their constitutionality.¹⁸³ According to *City of Boerne*, the VRA exemplified the proper use of the enforcement power¹⁸⁴ to reach “a somewhat broader swath of conduct”¹⁸⁵ than the Section 1 right alone because of the extensive legislative record establishing that the state adopted these tests to perpetuate intentional race discrimination.¹⁸⁶ The courts had clearly outlawed race discrimination, motivating the states that wanted to practice it to end-run the system, using methods that would be difficult for courts to perceive in individual cases based on the Constitution alone. By defining the “broader swath” of conduct, outlawing the devices that evidence showed were being employed, and making it possible to control the genuinely laggard states, the VRA, as understood by the Court, exemplified the proper use of the enforcement power.

¹⁸⁰ 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (2000).

¹⁸¹ In his *Hibbs* dissent, Justice Kennedy belatedly gave Title VII the stamp of approval, calling it “a legitimate congressional response to a pattern of gender-based discrimination in employment,” but did not elaborate. *Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1994 (Kennedy, J., dissenting). He relied on the Voting Rights Act once again as the point of reference and drew attention to its particular limitations, without commenting on the lack of similar limitations in Title VII. *Id.* at 1992-94. Indeed, the FMLA appears to be a more tailored remedy for sex discrimination in the workplace than Title VII in that it focuses on the area where stereotypes are most intense—family and work. See *infra* text accompanying notes 341-43 (discussing the majority’s defense of the FMLA on this ground); see also *infra* text accompanying notes 351-52 (discussing position taken by the state at oral argument, distinguishing Title VII as regulation conduct reached by Equal Protection Clause standing alone).

¹⁸² 42 U.S.C. § 1973b(f)(2) (2000) (original version at § 4(f)(2), 42 U.S.C. § 1973b).

¹⁸³ *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45 (1959) (upholding the facial constitutionality of literacy tests as a rational means to achieve intelligent ballot use).

¹⁸⁴ *City of Boerne*, 521 U.S. at 518-19. The power in question was Section 2 of the Fifteenth Amendment, which is analogous to Section 5 of the Fourteenth Amendment.

¹⁸⁵ *Hibbs*, 123 S. Ct. at 1983 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000)).

¹⁸⁶ See *City of Boerne*, 521 U.S. at 518 (listing measures protecting voting rights that hindered states, but nevertheless were upheld in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), *Oregon v. Mitchell*, 400 U.S. 112 (1970), and *City of Rome v. United States*, 446 U.S. 156 (1980)). Justice Kennedy also cited a Prohibition-era Eighteenth Amendment case upholding a ban on medical prescriptions as exemplifying the way the enforcement power can be used. See *id.* (citing *James Everard’s Breweries v. Day*, 265 U.S. 545 (1924)).

Emphasizing the text and history of the Fourteenth Amendment, Justice Kennedy's opinion in *City of Boerne* characterized the Section 5 power as remedial and not substantive.¹⁸⁷ With a nod to the idea of deference to Congress, he announced the "congruence and proportionality" test that would prove so perplexing in later cases:

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.¹⁸⁸

City of Boerne primarily seems to express separation of powers values. The congruence and proportionality test was designed to detect enactments that are really substantive—that is, that intrude on the power of the judiciary “to say what the law is.”¹⁸⁹

But *City of Boerne* also involved federalism values¹⁹⁰ because enforcing a limit on Congress's power here preserves a space in which state and local government may experiment. The most comprehensible distinction between the VRA and RFRA is not that one is truly remedial and the other is substantive, but that one is clearly designed to identify and rein in laggard states that are conducting no legitimate policy experiment, while the other is putting restrictions on states that might very well be worthy laboratories of democracy. When it comes to state action that burdens religion, it is exquisitely difficult to tell who the laggards are and where the vanguard is. The facts of *City of Boerne* illustrate the problem: A city that sought to protect the architecture in its historic district denied the request of a church that wanted to enlarge its building.¹⁹¹ Experimenting with architectural preservation scarcely undermines our confidence in local democracy. Perhaps Congress was the real laggard here, providing “the Church with a legal weapon that no atheist or agnostic [could] obtain.”¹⁹² Holding back congressional enthusiasm for expanding the

¹⁸⁷ *Id.* at 519-29.

¹⁸⁸ *Id.* at 519-20.

¹⁸⁹ *Id.* at 536 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁹⁰ See Evan H. Caminker, “Appropriate” Means-Ends Constraints on Section 5 Powers, 53 STAN. L. REV. 1127, 1187 (2001) (noting the Court's federalism concern as an alternate justification for *City of Boerne*, but finding its defense inadequate).

¹⁹¹ See *City of Boerne*, 521 U.S. at 511-12 (describing the expansion plans of the church).

¹⁹² *Id.* at 537 (Stevens, J., dissenting) (finding a violation of the Establishment Clause).

Free Exercise right, the Court in *City of Boerne* took the moderate approach of preserving room for state and local government to experiment.

E. *Taking City of Boerne Seriously: Kimel and Garrett*

As four subsequent cases would reveal, the *City of Boerne* test was not limited to statutes like RFRA that defied Supreme Court precedent. The two post-*City of Boerne* cases that are most similar to *Hibbs* are *Kimel v. Florida Board of Regents*¹⁹³ and *Board of Trustees of the University of Alabama v. Garrett*,¹⁹⁴ and these two cases will be given the most attention here. There are, however, two other cases, *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*¹⁹⁵ and *United States v. Morrison*,¹⁹⁶ worth considering.

Florida Prepaid was the first case to show that *City of Boerne* meant something more than the simple proposition that Congress cannot replace the Court's articulation of constitutional law with its own interpretation.¹⁹⁷ Congress had attempted to allow individuals to bring suits against the states for patent infringement.¹⁹⁸ But because Congress had failed to find a pattern of constitutional violations, the Court held that the Patent Remedy Act¹⁹⁹ did not fit Section 5.²⁰⁰ Not only was there no showing of widespread patent violations, but even if the states did violate patents, they would not be violating any constitutional right found in Section 1 of the Fourteenth Amendment, unless

¹⁹³ 528 U.S. 62 (2000).

¹⁹⁴ 531 U.S. 356 (2001).

¹⁹⁵ 527 U.S. 627 (1999).

¹⁹⁶ 529 U.S. 598 (2000).

¹⁹⁷ This narrow interpretation of *City of Boerne* has been stated numerous times in dissenting opinions and articles. For commentary critical of the Court's extension of the *City of Boerne* principle beyond this narrow scope, see Caminker, *supra* note 190, at 1132; Samuel Estreicher & Margaret H. Lemos, *The Section 5 Mystique*, Morrison, and the Future of Federal Antidiscrimination Law, 2000 SUP. CT. REV. 109, 156-57; Robert C. Post & Reva B. Siegel, *supra* note 22, at 1947; Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 716 (2000). For articles generally approving of the Court's approach, see Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 469 (1999); Rotunda, *supra* note 135, at 1219.

¹⁹⁸ 527 U.S. at 630 (noting amendment to patent law expressing Congress's intent to abrogate sovereign immunity for patent infringement claims).

¹⁹⁹ 35 U.S.C. § 271(h), 296(a) (2000).

²⁰⁰ 527 U.S. at 640-41.

they also deprived the patent's owner of due process.²⁰¹ Congress's interest in providing a uniform remedy in federal court was understandable and perfectly acceptable as a commerce power (or patent power) enactment, but the states' disuniform approaches to remedying such deprivations were, according to the Court, all the process that is due a patent owner as a matter of constitutional right.²⁰²

Morrison might seem especially interesting for our purposes because it considered the scope of Section 5 as an enforcement of the right against sex discrimination, which is also the issue in *Hibbs*. Unlike *Hibbs* and all of the other cases in the *City of Boerne* line, however, *Morrison* looked at a statute that created a claim against private individuals.²⁰³ The Section 5 problem in *Morrison* was thus the lack of state action. The statutory provision at issue, part of the Violence Against Women Act of 1994 (VAWA),²⁰⁴ gave private individuals a federal right of action against other private individuals for gender-motivated violence.²⁰⁵ Congress, acting a year before the Court decided *Lopez*, in all likelihood assumed the commerce power easily authorized this provision. After the *Lopez* decision, a Section 5 argument was developed as a back-up to the commerce power argument, in spite of the well known Supreme Court precedents requiring state action for a violation of the Equal Protection Clause.²⁰⁶ The Court found it easy enough to say that to remove the state action requirement is to redefine the right, and redefining the right is clearly forbidden by *City of Boerne*.²⁰⁷

The Section 5 argument in *Morrison* did have an additional dimension. One could argue that the states were violating equal protection

²⁰¹ *Id.* at 643-44, 646-47.

²⁰² *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681-82 (1999); *see also* Althouse, *supra* note 137, at 678-79 (describing the problem identified in *Florida Prepaid*: unless the state fails to provide an adequate remedy, there is no deprivation without due process).

²⁰³ *Morrison*, 529 U.S. 598 (2000).

²⁰⁴ 42 U.S.C. § 13981 (2000).

²⁰⁵ *See* § 13981(c) ("A person . . . who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.").

²⁰⁶ *Morrison*, 529 U.S. at 621-25.

²⁰⁷ *Id.*

by failing to take gender-motivated violence seriously enough²⁰⁸ and that the private right of action was an appropriate remedy for that violation. In the majority's view, however, even if law enforcement policies and priorities could be considered a widespread pattern of equal protection violations, giving a private right of action would not be a "congruent and proportional" remedy²⁰⁹ because the remedy bypassed the supposed state offenders, doing nothing to penalize or reshape their behavior, and concentrated entirely on the private individuals, who committed wrongs, but who have not violated constitutional rights.²¹⁰ The supposed remedy in fact left the laggard state free to continue lagging, with no incentive to change its ways.²¹¹

In *Kimel*,²¹² the Court found that Section 5 would not support the Age Discrimination in Employment Act of 1967 (ADEA),²¹³ which

²⁰⁸ *Id.* at 624-25. The Court referred to the legislative history of the Civil Rights Acts of 1871:

The chief complaint is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.

Id. at 625 (citing CONG. GLOBE, 42d Cong., 1st Sess. App. 153 (1871) (statement of Rep. Garfield)).

²⁰⁹ *Id.* at 625-26.

²¹⁰ *Id.* at 621. The majority's view can be understood as holding that the state deserves control over its traditional tort law, which was not shown to be inadequate. I suspect that the Court is particularly sensitive to the federalization of torts (as well as crimes) because of the heavy burden these laws place on the federal courts. See Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, 574 ANNALS 132, 134-36 (2001) (exploring the theory that concerns about burdening the federal courts have, in part, motivated the Court's constriction of Congress's Section 5 power as well as its commerce power).

²¹¹ The proposal to create an all-gay high school in New York City, *supra* note 3, represents a similar kind of remedy in that it is an attempt to bypass the real problem rather than to cure it. The all-gay high school is presented as a solution to harassment of gay teens, but it fails to take aim at the harassment problem. By the same token, the section of VAWA stricken down in *Morrison* did not aim at the real problem of the states' purported failure to take violence against women seriously enough. Both the all-gay high school and the federal cause of action authorized under VAWA institutionalize a bypass for a problem, removing the pressure to correct it. It arguably rewards those who are causing the problem, as the harassers succeed in driving the group they disfavor out of the high school and the state avoids the costs of dealing with violence against women in their own courts.

²¹² 528 U.S. 62 (2000).

²¹³ 29 U.S.C. §§ 621-634 (2000). The Act outlaws age discrimination against people over forty in employment situations. *Id.* § 623(a)(1), § 631(a). The ADEA does permit age discrimination if it "is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." *Id.* § 623(f)(1). The ADEA did exclude state and local officials at the "policymaking level," law enforcement officers and firefighters. *Id.* §§ 623(j), 630(f)(A).

Congress had extended to the states in 1974.²¹⁴ The commerce power already supported the ADEA,²¹⁵ and it is unlikely that Congress considered or could have considered any collision with Supreme Court precedent. Sovereign immunity doctrine had not firmed up to the point where it was understood that abrogation would be necessary²¹⁶ and that it could not be accomplished simply under the commerce power.²¹⁷ Nor had the Court begun to issue opinions on the degree of scrutiny the Equal Protection Clause requires for discriminatory age restrictions.²¹⁸ In the years since 1974, the Court has repeatedly called for the lowest level of scrutiny, which leaves the states free to draw a line based on age as long as they have a “rational basis” for doing so. Quoting *Cleburne v. Cleburne Living Center*, the *Kimel* Court wrote that it cannot be said that age is “so seldom relevant to the achievement of any legitimate state interest” that age classifications must be “deemed to reflect prejudice and antipathy.”²¹⁹ Thus, a state could rely on

²¹⁴ 528 U.S. at 68. The ADEA was enforceable against the states through an amendment to the Fair Labor Standards Act (FLSA). Fair Labor Standards Amendments of 1974, § 28, 88 Stat. 74 (codified as amended at 29 U.S.C. § 630(b)(2) (2000)). The FLSA amendment redefined the term “employer” to include the states, and it was argued that the change amounted to an abrogation of sovereign immunity. *Kimel*, 528 U.S. at 68-69. Because of the need to put the various statutory provisions together, there was some disagreement on the Court about whether Congress had manifested a sufficiently *clear* intent to abrogate sovereign immunity. Ultimately, the majority concluded, however, that “Congress unequivocally expressed its intent to abrogate.” *Id.* at 78. The Court requires that Congress make its intention to abrogate sovereign immunity “unmistakably clear in the language of the statute.” *Id.* at 73 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989)).

²¹⁵ See *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (“The extension of the ADEA to cover state and local governments . . . was a valid exercise of Congress’s powers under the Commerce Clause.”).

²¹⁶ The Court’s decision in *Edelman v. Jordan*, 415 U.S. 651 (1974), announced on March 25, 1974, a few weeks before the Amendments were enacted, had established that *Ex Parte Young*, 209 U.S. 123 (1908), could not be used as a means of obtaining retrospective relief from the state. *Edelman* focused attention on the need to abrogate sovereign immunity, which led to the decision two years later in *Fitzpatrick*.

²¹⁷ See *supra* text accompanying notes 172-74, (discussing *Seminole Tribe’s* restriction on the commerce power).

²¹⁸ The *Kimel* Court cites three age discrimination cases, the oldest of which was decided in 1976, two years after the application of the ADEA to the states. *Kimel*, 528 U.S. at 83 (citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307 (1976)).

²¹⁹ *Kimel*, 528 U.S. at 83 (quoting *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)). The Court also states the rational basis test this way: “[W]e will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government’s] actions were irrational.” *Id.* at 84 (quoting *Vance*, 440 U.S. at 97). “[B]ecause an age classification is presumptively

“imperfect generalizations,” permitting it, for example, to mandate retirement of judges at a particular age rather than provide for some sort of individual assessment of fitness.²²⁰

By setting the scrutiny at the lowest level, the Court expressed its low degree of suspicion about age-based classifications. The older persons are not a “discrete and insular minority,”²²¹ and virtually everyone not already in the class hopes to enter it someday. The low level of scrutiny shows that the Court does not presume “prejudice and antipathy” from the mere use of the classification, but requires a demonstration that only “prejudice and antipathy” motivated the state to draw a particular age line.²²² Congress may reject line-drawing based on age using its commerce power—as it in fact has with the ADEA—but that its disapproval of age discrimination does not transform the practice into a constitutional rights violation. In 1974, the states engaged in plenty of age discrimination.²²³ Yet, under the Court’s interpretation of equal protection, only instances of *irrational* discrimination—discrimination based on nothing but “prejudice and antipathy”—could count toward the “widespread pattern” of rights violations.²²⁴ With that as the foundation for using Section 5, sovereign immunity abrogation failed in *Kimel*.²²⁵ The Court acknowledged

rational, the individual challenging its constitutionality bears the burden of proving that the ‘facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.’” *Id.* (quoting *Vance*, 440 U.S. at 111).

²²⁰ *See Gregory*, 501 U.S. at 473 (“The people of Missouri rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step aside at age 70.”).

²²¹ *Kimel*, 528 U.S. at 83 (citing *Mass. Bd. of Ret.*, 427 U.S. at 313-14 (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-153, n.4 (1938))).

²²² *See id.* (“Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as ‘so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.’” (quoting *Cleburne*, 473 U.S. at 440)).

²²³ *Id.* at 90.

²²⁴ *Id.*

²²⁵ *Id.* Of course, the remedy of providing a claim for all age discrimination covered by the ADEA could not be proportionate, because there were no constitutional violations to remedy. Supporters of abrogation tried to argue that the Act’s bona fide occupational qualification (BFOQ) exception was a sufficient tailoring of the act to the constitutional right. *Id.* at 86-87. But this exception still left far more in the category of proscribed behavior than just irrational discrimination. *See id.* at 87 (stating that the standard for the BFOQ exception is “one of ‘reasonable necessity,’ not ‘reasonableness’” (quoting *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419 (1985))). As the BFOQ exception had been interpreted, it was quite difficult to establish and was deliberately constrained. To qualify for the BFOQ exception, the employer must show that

that “[d]ifficult and intractable problems often require powerful remedies,”²²⁶ but demanded that the problems amount to constitutional violations before Section 5 could be used.

In dissent, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, expressed a different vision of federalism.²²⁷ Rather than preserving room for the states to engage in different practices, Justice Stevens took the position that has characterized the liberal side of the Court since *Garcia*: it is the role of Congress to decide what should be left to the states and what should be done at the federal level.²²⁸ This view of federalism has repercussions in separation of powers doctrine, since the argument that Congress sets the federalism balance can be restated as the argument that the Court is aggrandizing itself by intruding into the congressional sphere.²²⁹

Justice Stevens gave some consideration to the states’ activities in the vanguard of antidiscrimination policy—all fifty states had passed age discrimination laws²³⁰—but was not dissuaded from his broad view of congressional power. He argued that “[w]henver Congress passes a statute, it does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of the existing state norms that Congress seeks to supplement

its reliance on an age restriction is because “it is *highly impractical* . . . to insure by individual testing that its employees will have the necessary qualifications for the job.” *Id.* at 87 (quoting *Western Air Lines, Inc.*, 472 U.S. at 422-23).

²²⁶ *Id.* at 88.

²²⁷ *Id.* at 92 (Stevens, J., dissenting in part and concurring in part). This opinion concurred with the conclusion that the statute stated an unmistakably clear intent to abrogate, and thus only dissented in part. In addition, Justice Stevens restated his opposition to *Seminole Tribe*, calling it “profoundly misguided,” and announced his unwillingness “to accept [it] as controlling precedent.” *Id.* at 97-98.

²²⁸ *Id.* at 96 (“In my judgment, the question whether those enforcement proceedings should be conducted exclusively by federal agencies, or may be brought by private parties as well, is a matter of policy for Congress to decide.”).

²²⁹ *Id.* at 95 n.3 (arguing that the majority’s view aggrandizes the power of the judicial branch and is in opposition to safeguarding state sovereignty). Along with this analysis comes concern about the “enlargement of the federal bureaucracy” to provide the enforcement that is lost if individuals cannot sue. *Id.*; see also *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (questioning whether the expansion of the federal bureaucracy, which the majority’s doctrine might necessitate, would better promote state sovereignty or individual liberty). Thus, by curtailing the legislative branch of the federal government, the Court enlarges not only the judicial branch, but also, potentially, the executive branch, a consequence that this side of the Court portrayed as bad federalism.

²³⁰ *Kimel*, 528 U.S. at 94 n.2 (Stevens, J., dissenting in part and concurring in part) (noting that all fifty states have some sort of age discrimination laws but that twenty-four of them have failed to extend its protection to public employees).

or supplant.”²³¹ Justice Stevens was willing to trust Congress to pay “nuanced attention”²³² to the interests of the states, to “use its broad range of flexible legislative tools to approach the delicate issue of how to balance local and national interests in the most responsive and careful manner.”²³³ Because Congress had this ability, it was “quite evident” that it was not the Court’s role to protect state interest.²³⁴ In this view, the Court was “simply aggrandiz[ing] the power of the Judicial Branch.”²³⁵

It is easy enough to translate this separation of powers argument back into federalism-speak. Consider this statement, made in an earlier ADEA case by Chief Justice Burger:

It has been suggested that where a congressional resolution of a policy question hinges on legislative facts, the Court should defer to Congress’s judgment because Congress is in a better position than the Court to find the relevant facts. While this theory may have some importance in matters of strictly federal concern, it has no place in deciding between the legislative judgments of Congress and that of the Wyoming Legislature. Congress is simply not as well equipped as state legislators to make decisions involving purely local needs.²³⁶

How can one decide who has the better argument, Chief Justice Burger or Justice Stevens? I think the choice will necessarily reflect one’s beliefs about vanguards and laggards. If one thinks the states are likely to move in the vanguard direction or if one has doubts about where the vanguard is, and thus can value diversity, the Chief Justice’s argument will seem appealing. If, however, one has confidence that there is one congressionally identifiable, vanguard position on most issues or if one worries that the states tend to be laggards, Justice Stevens’s argument will seem convincing.

²³¹ *Id.* at 94.

²³² *Id.*

²³³ *Id.* at 94-95.

²³⁴ *Id.* at 95. Though the reasoning is in the form of institutional analysis, at this point Justice Stevens attributed the reasoning to the will of the Framers. *Id.*

²³⁵ *Id.* at 95 n.3. For further elaboration of Justice Stevens’s argument, see *supra* note 227.

²³⁶ *EEOC v. Wyoming*, 460 U.S. 226, 263 n.8 (1983) (Burger, C.J., dissenting) (citation omitted). The majority addressed only the question of whether the commerce power supported the ADEA. Because it found the commerce power adequate, despite the difficulties presented by *National League of Cities v. Usery*, 426 U.S. 833 (1976), it did not address the Section 5 issue. *Wyoming*, 460 U.S. at 243. The Chief Justice did so in his dissent. *Id.* at 260-63 (Burger, C.J., dissenting) (finding that no rights in the Constitution or the Court’s precedent supported the imposition of the ADEA on the states and that Congress lacks the power to define rights).

One year after *Kimel*, the Court issued a very similar opinion in *Board of Trustees of the University of Alabama v. Garrett*,²³⁷ this time addressing the Americans with Disabilities Act of 1990 (ADA).²³⁸ As in *Kimel*, the Court held that a statute designed to protect individuals from employment discrimination did not fit within Section 5 and consequently could not abrogate sovereign immunity.²³⁹ Also as in *Kimel*, the statute purported to enforce equal protection with respect to a classification that was subject only to minimal scrutiny,²⁴⁰ but because *Cleburne* struck down an ordinance that discriminated against the mentally disabled, there was some reason to see potential for a different result in *Garrett*.²⁴¹ The *Cleburne* Court, while purporting to apply only minimal scrutiny, rejected a law that required a permit to operate a group home for the mentally disabled.²⁴² It called the law an expression of “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding.”²⁴³ Yet *Cleburne* did not provide enough of a foundation to argue that the failure to make accommodations for the disabled violated equal protection. These omissions suggest inattention and budgetary constraint, not mere “prejudice and antipathy” toward the disabled.²⁴⁴ It was therefore not possible to produce the evidence of a widespread pattern of violations that could make the ADA look like an appropriately congruent and proportional remedy.²⁴⁵

²³⁷ 531 U.S. 356 (2001).

²³⁸ 42 U.S.C. §§ 12111–12117 (2000). The Court limited its opinion to Title I of the Act, which covered employment discrimination, though the parties had also argued over Title II of the ADA, which covers “services, programs, or activities of a public entity.” *Id.* § 12132. The Court expressly left open the question whether Section 5 supports Title II. *Garrett*, 531 U.S. at 360 n.1. Title I bars employment discrimination against the disabled and requires the employer to make “reasonable accommodations.” § 12112(b)(5)(A).

²³⁹ *See Garrett*, 531 U.S. at 364–65 (describing the Section 5 analysis).

²⁴⁰ *See id.* at 366 (citing *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), for the proposition that the mentally retarded are not a quasi-suspect class under the Equal Protection Clause and that legislation directed at the group incurs only rational basis review).

²⁴¹ *See* Seth P. Waxman, *Foreword: Does the Solicitor General Matter?*, 53 STAN. L. REV. 1115, 1123–24 (2001) (noting the contemporaneous belief that “*Garrett* offered the Court an opportunity to stop—or at least to slow—the progression of restrictive Section Five rulings” because the “precedents—particularly *Cleburne*—were noticeably better” and “[t]he legislative record of discrimination against the disabled . . . was considerably more complete than . . . the record . . . in *Kimel*”).

²⁴² *Cleburne*, 473 U.S. at 450.

²⁴³ *Id.* at 448.

²⁴⁴ *Id.* at 440.

²⁴⁵ *Garrett*, 531 U.S. at 374.

How important was it that at the time Congress passed the ADA all of the states had laws barring discrimination against the disabled?²⁴⁶ The Court drew attention to Congress's own praise for the states' work at the vanguard. It quoted one remark from the legislative history: "this is probably one of the few times where the States are so far out in front of the Federal Government, it's not funny."²⁴⁷ But when the federal law did go *further* than many of the states' laws, it was clearly not aimed at any real problem of laggard states. The point of the federal statute was to impose uniformity, looping the states into what the text of the statute itself called a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities."²⁴⁸

Congress had compiled a record supporting its conclusion that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."²⁴⁹ But there were problems with the legislative record. The discriminatory actions of private employers do not satisfy the Section 5 doctrine, and, as the Court now asserted, the actions of local government officials could not justify the remedy of abrogating sovereign immunity because sovereign immunity does not protect local government.²⁵⁰ With all discrimination by local officials and private employers excluded from consideration, only six instances of state discrimination remained,²⁵¹ and it was not clear whether any of them would amount to constitutional violations under minimal scrutiny.²⁵² The *Garrett* Court did not look closely at any of those six incidents to determine if they really were constitutional

²⁴⁶ *Id.* at 368 n.5.

²⁴⁷ *Id.* (quoting *Discrimination Against Cancer Victims and the Handicapped: Hearing on H.R. 192 Before the Subcomm. on Employment Opportunities of the House Comm. on Educ. and Labor*, 100th Cong. 5 (1987) (statement of Rep. Moakley)).

²⁴⁸ 42 U.S.C. § 12101(b)(1) (2000).

²⁴⁹ § 12101(a)(2).

²⁵⁰ *Garrett*, 531 U.S. at 369 (citing to *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890), which stated that "the Eleventh Amendment does not extend its immunity to units of local government").

²⁵¹ *See id.* (noting six incidents of discrimination against state employees including two cases of state universities refusing work to a blind person, one case of a state transportation department firing a person with epilepsy, one state university paying deaf employees less, and one state informing a job applicant that she would need to disclose a hidden disability). The Court rejected evidence from the early twentieth century of states involvement in sterilization of those perceived to have mental impairments as outdated. *Id.* at 369 n.6.

²⁵² *See id.* at 370 (questioning whether the incidents would be considered irrational under the Court's decision in *Cleburne*, which adopted a standard of minimal scrutiny).

violations, however, because even if they all were, one could still conclude, as the Court did, that there was no widespread pattern of constitutional violations capable of supporting a remedy as extensive as the ADA.²⁵³ As the Court noted, there are more than four million state employees, and given the prevalence of disabilities under the ADA's broad definition, states must have made a huge number of decisions affecting employees with disabilities over the years.²⁵⁴ In this light, as the Court concluded, the *absence* of significant discriminatory evidence should make one quite hesitant to indulge in a reflexive belief that the states act on mere "prejudice and antipathy" toward the disabled.²⁵⁵

Justice Breyer, in his dissent, called attention to many other purported incidences of state discrimination against the disabled.²⁵⁶ But to the majority this material was worthless: it was only a collection of "unexamined, anecdotal accounts of adverse, disparate treatment by state officials."²⁵⁷ There was no evidence that they were actually violations of constitutional rights,²⁵⁸ and disparate impact alone is not sufficient to establish an equal protection violation even with respect to classifications subject to the highest scrutiny.²⁵⁹ Congress had not even bothered to mention these other incidents in the ADA's findings, an omission that the majority found significant.²⁶⁰ Unlike the majority, the dissenters were willing to look at this collection of incidents, assume a widespread antipathy toward disabled workers, and "just accept" that

²⁵³ *See id.* at 370-72.

²⁵⁴ *See id.* at 370 (noting that Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities" (quoting 42 U.S.C. § 12101(a)(1))).

²⁵⁵ *See id.* ("It is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.").

²⁵⁶ *Id.* at 379 (Breyer, J., dissenting).

²⁵⁷ *Id.* at 370 (citation omitted).

²⁵⁸ *Id.* at 370-71. The Court noted that most of the accounts were submitted not to Congress but to the Task Force with the Rights and Empowerment of Americans with Disabilities and that the accounts were not adopted by Congress in its legislative findings. *Id.* at 370-71. Moreover, the Court noted that few of the items related to state employment decisions; but most were problems with public accommodations and transportation. *Id.* at 371.

²⁵⁹ *Id.* at 372-73; *see also* *Washington v. Davis*, 426 U.S. 229, 239 (1976) (holding that racially disproportionate effects without racially discriminatory purpose do not violate the Equal Protection Clause).

²⁶⁰ *Garrett*, 531 U.S. at 371 ("[H]ad Congress truly understood this information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings. There is none.").

the states had participated in it.²⁶¹ Only “prejudice and antipathy” aimed at the states—those laggards!—could support such a conclusion.²⁶²

Even if one could say that the states’ actions amounted to a widespread pattern of rights violations, the ADA imposed a remedy that, in the view of the majority, was too far out of proportion to the rights-violation problem: “[T]he accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses.”²⁶³ The majority showed interest in giving the states room to look for their own solutions to local problems where the states are not demonstrated to be laggards resisting progress.²⁶⁴ Even if we assume the states need to move in the direction of protecting the interests of the disabled—that we are sure we know which way progress lies—there is still potential for positive experimentation. Once the ADA is in place, beginning to solve the problem, it reshapes everyone’s mindset: the “indifference or insecurity” that once prevailed is replaced by a new awareness. Perhaps that is enough to set the states “on the path to a more decent, tolerant, progressive society.”²⁶⁵ Freeing the states from individual lawsuits for retrospective relief—which is all *Garrett* does, since the ADA still binds the states as a valid commerce power statute—can be seen in a positive light, at least by those not plagued with fears that the states will slip back into their laggard ways.²⁶⁶

²⁶¹ *Id.* at 371-72.

²⁶² The concurring opinion written by Justice Kennedy and joined by Justice O’Connor took the problem of antipathy toward the disabled more seriously than the main opinion: “[K]nowledge of our own human instincts teaches that persons who find it difficult to perform routine functions by reason of some mental or physical impairment might at first seem unsettling to us, unless we are guided by the better angels of our nature.” *Id.* at 375 (Kennedy, J., concurring). Justice Kennedy resisted impugning those ordinary feelings as necessarily the product of “malicious ill will.” *Id.* at 375. They may arise instead out of “indifference or insecurity.” *Id.* While not the loveliest manifestations of human character, they did not amount to constitutional violations.

²⁶³ *Id.* at 372.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 375 (Kennedy, J., concurring). Note how that statement reflects confidence about which way the vanguard goes. Justice Kennedy referred to the ADA as a “milestone” on that path of progress. *Id.*

²⁶⁶ Litigation consumes state resources and can produce defensive behavior. Saving the states from litigation frees up state money and energy to devise what may be a vanguard policy of their own. The Court called attention to the litigation burden imposed by the Act, which “makes it the employer’s duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer’s decision.” *Id.* at 372; see also Althouse, *supra* note 210, at 132 (analyzing recent federalism cases in terms of hostility to

Kimel and *Garrett* represent strict application of doctrine, but more importantly, they represent a specific vision of normative federalism. As we shall see, the majority in *Hibbs* brushes off these two precedents, purportedly because they dealt with attempts to enforce constitutional rights to be free of discrimination based on classifications subject only to rational basis review.

III. VANGUARD CONGRESS, LAGGARD STATES?—REMEDYING TRADITIONAL STEREOTYPES WITH FAMILY LEAVE

A. *The Problems Presented in Hibbs: Does Heightened Scrutiny Change Everything?*

*Hibbs*²⁶⁷ raised the question of whether Section 5 of the Fourteenth Amendment supported the Family and Medical Leave Act of 1993 (FMLA),²⁶⁸ which guarantees eligible employees, including state employees, twelve weeks of leave annually to attend to certain needs of close family members.²⁶⁹ Though the case seemed destined to follow *Kimel* and *Garrett* in the *City of Boerne* line of cases, six Justices—including Chief Justice Rehnquist, who wrote the opinion—viewed the FMLA as appropriate Section 5 legislation that enforces the constitutional

litigation); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and the Denationalization of Federal Law*, 31 RUTGERS L.J. 691, 706-18 (2000) (noting the Court's hostility to litigation as a tool of government accountability).

²⁶⁷ Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972 (2003). The case was brought by William Hibbs against his former employer, the Nevada Department of Human Resources. *Id.* at 1977. The state had in fact granted him twelve weeks leave to care for his wife, who had been injured in a car accident. *Id.* Warned that he had consumed the allotted leave and faced termination, Mr. Hibbs lost his job when he failed to return to work. *Id.* Because the sovereign immunity issue lay at the threshold of the case, none of the courts that handled the case ever reached the merits of whether the state had in fact violated the act. *Id.*

²⁶⁸ 29 U.S.C. §§ 2601–2654 (2000).

²⁶⁹ 29 U.S.C. § 2612(a)(1) (2000). The Court held that by authorizing suits for damages “against any employer (including a public agency) in any Federal or State court of competent jurisdiction,” § 2617(a)(2), and defining “public agency” to include both “the government of a State or political subdivision thereof” and “any agency of . . . a State, or a political subdivision of a State,” *id.* §§ 203(x), 2611(4)(A)(iii), Congress made the requisite “unmistakably clear statement” in the text of the FMLA of its intent to abrogate sovereign immunity. *Hibbs*, 123 S. Ct. at 1977; *see also* Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (requiring that Congress make an “unmistakably clear statement”). Thus, there was no opportunity to use statutory interpretation to avoid the constitutional question of whether the FMLA fit into Congress's Section 5 power. In *Hibbs*, the district court had held abrogation, and the Ninth Circuit, in conflict with other circuits, had disagreed, prompting the United States Supreme Court to grant certiorari. 123 S. Ct. at 1977.

right against sex discrimination. Straining to harmonize the *City of Boerne* line of cases with *Fitzpatrick* and relying heavily on the form heightened scrutiny took in the VMI case,²⁷⁰ the Court accepted the FMLA as that “somewhat broader swath of conduct” that Congress may regulate in a genuine effort to remedy violations constitutional rights.²⁷¹

The existing Section 5 doctrine should have demanded that Congress demonstrate that the requirement of substantial leave, given equally to men and women, operates as a remedy for actual, widespread violations of equal protection rights by the states. Under *Kimel* and *Garrett*, there should have been a record of equal protection violations occurring and presenting a problem to which the twelve-week leave is “congruent and proportional.” It should not have been enough, given the *City of Boerne* line of cases, that the states had failed to act affirmatively to relieve women of the burdens of family care or to provide men with incentives to take over more of the family responsibilities that have traditionally fallen on women. What the states had done with respect to general policy or individual decisions should have amounted to a widespread pattern of equal protection violations under the judicial interpretation of the Equal Protection Clause. Moreover, the twelve-week leave needed to be creditable as a way to cure these violations, not merely a kindly new benefit to ease the difficulties of balancing work and family.

Surely, women have historically taken the primary role in family care, a responsibility that has had a great effect on their working life.²⁷² Those who advocate the equal participation of women in the workplace necessarily care deeply about the special burdens and difficulties posed by family care and quite appropriately petition the democratic institutions of government for laws that seem likely to advance this cause. The FMLA is just such an enactment.²⁷³ Yet the ADEA and the ADA were similar enactments—hard-won legislation advancing the interests of older and disabled workers—which, under *Kimel* and *Garrett*, Section 5 would not support.²⁷⁴ *Hibbs* purports to distinguish those

²⁷⁰ *United States v. Virginia*, 518 U.S. 515, 532-33 (1996).

²⁷¹ *Hibbs*, 123 S. Ct. at 1979.

²⁷² *Id.* at 1978 n.2.

²⁷³ For a discussion of whether entitlement to unpaid leave necessarily advances women, see *infra* text accompanying notes 331-32.

²⁷⁴ See *supra* text accompanying notes 212-66 (discussing the Court’s findings that the ADEA and the ADA, as applied to the states, were not proper legislative enactments under Congress’s Section 5 power and thus, could not abrogate the states’ sovereign immunity).

precedent cases by relying on the heightened scrutiny applicable to sex classifications. Quoting the VMI case, the Chief Justice emphasized that “‘overbroad generalizations about the different talents, capacities, or preferences of males and females’” were no longer acceptable.²⁷⁵

The Court acknowledged that this heightened scrutiny was a relatively recent phenomenon.²⁷⁶ Until the 1970s, a narrow conception of the constitutional right preserved a wide field for state experimentation, including adherence to policies that reflected the traditional belief that women belonged in the “‘center of home and family life.’”²⁷⁷ The Chief Justice’s opinion in *Hibbs* recognized that the Court had long sanctioned these state laws,²⁷⁸ and that it was only in 1971, in *Reed v. Reed*,²⁷⁹ that it had begun to reveal to the states that sex classifications would need to meet anything more than the most deferential scrutiny; and it was not until *Craig* in 1976 that the Court announced the intermediate scrutiny test.²⁸⁰ So until the 1970s, states that took due care to align their practices with the requirements of the Constitution had reason to think they could espouse a traditional conception of sex roles—adopting policies that forthrightly treated men and women differently in accordance with the belief that women belonged in the bosom of the family.

Congress made sex discrimination in the workplace illegal in Title VII of the Civil Rights Act of 1964 and extended that bar to state employers in 1972, still four years before the Court adopted intermediate scrutiny for sex discrimination in *Craig*.²⁸¹ Thus, as the *Hibbs* majority

²⁷⁵ *Hibbs*, 123 S. Ct. at 1978 (quoting *Virginia*, 518 U.S. at 533). This distinction would not satisfy Justice Kennedy, who dissented, contending that the majority had compromised the federalism values by failing to take the *City of Boerne* doctrine seriously. *Id.* at 1987 (Kennedy, J., dissenting); see also *infra* text accompanying notes 325-60 (outlining the debate between Justice Kennedy, who considered the twelve-week leave requirement to be a benefit program, and the majority, which considered it to be a remedy for rights violations).

²⁷⁶ *Hibbs*, 123 S. Ct. at 1978.

²⁷⁷ *Id.* (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)).

²⁷⁸ *Id.*; see e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding a Michigan law restricting women from tending bar); *Muller v. Oregon*, 208 U.S. 412, 419, n.1 (1908) (approving state laws limiting the hours women could work); *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873) (upholding an Illinois statute barring women from practicing law).

²⁷⁹ 404 U.S. 71 (1971).

²⁸⁰ See *supra* text accompanying notes 89-99 (discussing *Craig* and its introduction of the intermediate scrutiny standard).

²⁸¹ See *supra* text accompanying notes 139-60 (discussing *Fitzpatrick’s* Fourteenth Amendment analysis in the context of Title VII).

recognized, Congress was the vanguard in defining the right to be free of sex discrimination in the workplace, years ahead of the Court, though the Court later defined a constitutional right to equal protection with respect to state employers that coincided with the statutory right.²⁸² The original Title VII, which reached only private employers, could tap only the commerce power, so no question would have arisen about intruding into the judicial sphere of saying what constitutional rights are.²⁸³ The 1972 amendments could have been characterized as Commerce Clause enactments as well,²⁸⁴ but given the presence of state action, the Fourteenth Amendment also became a source of legislative power.²⁸⁵ At the time these statutory amendments were passed, Congress could not have thought that it was enforcing a right the Court had defined, nor could the states have been on notice that their sex discrimination in employment practices had been laying the groundwork for congressional power to use the Fourteenth Amendment to craft a new, intrusive remedy. But, as we have seen, the Court, in 1976, in *Fitzpatrick*, “just accepted”²⁸⁶ that these amendments fit the Congress’s enforcement power as it announced the power to abrogate sovereign immunity.

Fitzpatrick seemed to exert at least as much pressure as the *City of Boerne-Garrett* cases on the *Hibbs* majority. At the time *Fitzpatrick* was decided, however, it was easy to assume without seeing any evidence that Congress passed the 1972 Amendments against a backdrop of widespread sex discrimination by state employers—albeit discrimination the states had reason to believe did not violate constitutional rights. This widespread sex discrimination was so obvious and well known that no

²⁸² *Hibbs*, 123 S. Ct. at 1978-79 (describing the history of statutes outlawing sex discrimination and judicial interpretation of the Equal Protection Clause).

²⁸³ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

²⁸⁴ Between 1976 and 1985, however, Tenth Amendment problems would have arisen under *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was overruled nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

²⁸⁵ With respect to private employers, the Court interpreted the Commerce Clause expansively. See *Katzenbach v. McClung*, 379 U.S. 294, 302 (1964) (finding that a restaurant that sold food that had traveled in interstate commerce had enough of a “substantial economic effect on interstate commerce” to support a federal ban on race discrimination). The Court’s accommodating response to Congress’s historically momentous statutes gave rise to an overconfidence that the Court would continue to view the commerce power so broadly that it would accommodate any statute Congress might have the will to enact.

²⁸⁶ See *supra* text accompanying notes 157-60 (discussing oral arguments in *Hibbs*).

one even bothered to argue otherwise in litigating *Fitzpatrick*.²⁸⁷ The *Fitzpatrick* Court paid no attention to the fact that none of its cases had ever warned the states that their long-accepted practice of sex discrimination would be seen as constitutional violations, giving Congress new power over them. Yet it was advance warning, with time allowed for experimenting with their own policies, that appealed to Chief Justice Rehnquist so much in the VMI case.²⁸⁸

Congress enacted the FMLA in 1996, thirty years after the Court had put the state “on notice” that sex classifications would need to be substantially related to important state interests and thirty-four years after Title VII specifically banned sex discrimination by the states in employment.²⁸⁹ When *Fitzpatrick* was decided in 1976, it may have made perfect sense to assume widespread sex discrimination in state employment. But after all of those years of the states coming to terms with the demands of Title VII and heightened constitutional scrutiny, one might think that it would take a serious demonstration, with probative evidence, to establish that in 1996 there was a widespread pattern of constitutional violations that warranted the remedy of guaranteed family leave. After so many years, to fail to meet the requirements of gender equality is truly to lag behind and invite a federal remedy. By the same token, however, the passage of three decades with substantial remedies already in place suggests that the requirements had been internalized—at least enough to prevent a *widespread pattern* of violations.

Chief Justice Rehnquist needed to harmonize his own opinions in *Fitzpatrick* and the VMI case with the strict requirements that had developed in the *City of Boerne* line of cases.²⁹⁰ His solution was to

²⁸⁷ *Supra* text accompanying note 158. If *Fitzpatrick* is to be taken at face value, Section 5 doctrine cannot be about whether Congress has the right attitude toward Supreme Court precedent at the time it enacts a statute. It must be acceptable for Congress to propose an expansive new interpretation of rights, as long as the courts will later agree with that interpretation.

²⁸⁸ See *supra* text accompanying notes 109-18 (analyzing the Chief Justice’s reasoning in his concurrence in *United States v. Virginia*, 518 U.S. 515, 558-66 (1996)).

²⁸⁹ See *Nev. Dep’t of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1978-79 (2003) (discussing the purpose and legislative history of the FMLA).

²⁹⁰ To that, we should add the Chief Justice’s concurring opinion in *Craig*, in which he expressed sympathy toward a state that was experimenting with a policy that did not burden the traditionally advantaged group. *Craig v. Boren*, 429 U.S. 190, 219-20 (1976) (Rehnquist, J., dissenting). In *Hibbs*, the main violation of due process he relies on is the excessive accommodation of women’s requests for leave in relation to men’s. 123 S. Ct. at 1979. See also *supra* text accompanying notes 96-99 (discussing Chief Justice Rehnquist’s varying analyses in the gender discrimination cases).

emphasize the *subtle* form that discrimination takes after it has become illegal.²⁹¹ A state that wanted to continue its practice of sex discrimination would go below board. Subtle approaches to discrimination, like the literacy tests and similar devices used to perpetuate race discrimination in voting, are hard for the courts to ferret out in individual cases alleging constitutional violations. Because of this difficulty, the less perceptible the violations are, the more room there is for Congress to act. A statute outlawing a “broader swath” of behavior is exactly appropriate in this situation. Paradoxically, the Court’s special competence in articulating the meaning of rights creates the setting for judicial incompetence if states, on hearing new pronouncements of rights, respond not with compliance but with stealth. Constitutional violations then become difficult to prove, so a prophylactic statutory remedy, penalizing more than just the constitutional violation, becomes appropriate under Section 5.

Since increasing the intrusion into state autonomy when there is *less* evidence of discrimination apparent on the surface seems to be a raw deal for the states, it is especially important for Congress to establish in the legislative record that the states have in fact opted for preserving their old ways in a cloaked fashion. It is entirely out of keeping with the vision of federalism embraced in cases from *City of Boerne* through *Garrett* to continue to “just accept” that the states are still engaging in widespread sex discrimination rather than to consider seriously whether they have actually adapted their behavior to the constitutional requirements the courts have announced and Congress has embodied in statutes like Title VII.²⁹² Even if *Hibbs* involved an area of heightened scrutiny, the Court should still have looked for a widespread pattern of constitutional rights violations commensurate with the twelve-week leave entitlement.

Heightening of scrutiny of a particular classification amounts to an expression of confidence about where the vanguard is. It tells the states which way they must go and calls a halt to experiments reaching in other directions. Why not assume that the states respond with understanding and acceptance of the supremacy of federal law? Heightening

²⁹¹ 123 S. Ct. at 1978-79. Interestingly, the Chief Justice relied on a case from 1973 to support the notion that subtle discrimination persists in 1993. *Id.* (citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973)).

²⁹² Clearly Congress amassed this sort of evidence to justify the Voting Rights Act, and there it was enforcing a constitutional right that called for the highest level of scrutiny. See *Katzenbach v. Morgan*, 384 U.S. 641, 652-53 (1966) (reviewing congressional enforcement of the Equal Protection Clause in the context of the right to vote using a rational basis test).

scrutiny does give the laggard states the news that they must disguise behavior they once openly displayed. As we have seen, the new incentive to disguise behavior justifies prophylactic federal legislation that regulates a broader field of activity in order to protect the constitutional rights that the laggard state will violate secretly. But the *City of Boerne* doctrine should remain a serious tool precisely because it should not be assumed that states are laggards who respond to new requirements by moving below board. Under *City of Boerne*, prophylactic federal legislation must be premised on evidence that there really are laggard states and that the “broader swath” needs to be cut to reach them because they have decided to proceed by stealth. Unless there is a “widespread pattern” of continuing violations of Section 1 rights, the states should be permitted the freedom to accommodate the requirements of federal law, to accept the direction in which that law has pointed them, and to produce a new set of experiments testing what good policy is.²⁹³

B. *No Worthy Experiments Here: States as Rights Violators
Generating Federal Power*

According to the *Hibbs* majority, Congress had evidence that “[s]tates continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits.”²⁹⁴ There was at least some evidence in the legislative record of leave policies that explicitly favored women, but it scarcely amounted to a demonstration of widespread constitutional violations by the states.

The key item of evidence cited in *Hibbs* was a survey of *private* employers, showing favoritism toward women in granting new parent leave, which the majority was willing to assume reflected a stereotype that states also used.²⁹⁵ Justice Kennedy, dissenting, considered this

²⁹³ There is surely some difficulty in perceiving this freedom as a positive or even workable solution given that the legislation is a valid commerce power enactment, binding the states, even though retrospective relief is not available. For a discussion of this problem, see *infra* text accompanying notes 379-81.

²⁹⁴ *Hibbs*, 123 S. Ct. at 1979.

²⁹⁵ *Id.* at 1979. (citing a 1990 Bureau of Labor Statistics (BLS) survey, S. Rep. No. 103-3, at 14-15 (1993), *reprinted in* 1993 U.S.C.C.A.N. 3, 17). This survey showed that, while maternity leave was not that prevalent (only thirty-seven percent of the surveyed employers offered it), it was twice as common as paternity leave (provided by only eighteen percent of the surveyed private employers). *Id.* The Court also perceived a widening “gender gap,” based on the previous year’s BLS survey, which showed thirty-three percent of private sector employers gave maternity leave, while only sixteen

survey to be “the only factual findings the Court cites.”²⁹⁶ Justice Kennedy objected to the majority’s inference that state practices would be similar to those of private employers²⁹⁷ because, he insisted, the states had been in the vanguard in extending leave policies.²⁹⁸ Compare the way the *Kimel* Court addressed the same matter:

[T]he United States’ argument that Congress found substantial age discrimination in the private sector . . . is beside the point. Congress made no such findings with respect to the states. Although we also have doubts whether the findings Congress did make with respect to the private sector could be extrapolated to support a finding of *unconstitutional* age discrimination in the public sector, it is sufficient for these cases to note that Congress failed to identify a widespread pattern of age discrimination by the States.²⁹⁹

The majority opinion in *Hibbs* made much of the argument that the states had relied on discretionary decision making and, in doing so, had been more generous to women than to men.³⁰⁰ The opinion referred to testimony, made during 1987 Senate Hearings on an earlier leave bill, that “the lack of uniform parental and medical leave policies in the work place has created an environment where [sex] discrimination is rampant.”³⁰¹ From the legislative history for FMLA

percent gave paternity leave. *Id.* Yet, in fact, these numbers should not give rise to a concern that the trend is toward treating men differently from women because paternity leave as a *percentage* compared to maternity leave increased (48.48% in 1989 and 48.65% in 1990) and paternity leave increased by a greater percentage from one year to the next than did maternity leave (12.5% for paternity leave and 12.1% for maternity leave).

²⁹⁶ *Id.* at 1987 (Kennedy, J., dissenting).

²⁹⁷ *Id.* at 1988. There was some testimony that state employers behaved the same way, *id.* at 1979 n.3, but it was testimony “made during the hearings on the proposed 1986 national [parenting] leave legislation, [which] preceded the [FMLA] by seven years.” *Id.* There was also testimony from the earlier consideration of the Parental and Medical Leave Act of 1986 by the Washington Council of Lawyers that “parental leave for fathers . . . is rare. Even . . . where child-care leave policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment in their requests for such leave.” *Id.* at 1979 (alteration in original). Justice Kennedy faulted this testimony because it was not part of the FMLA record, it was testimony about a bill that offered only parental leave and because, at seven years old, it lacked probative value with respect to conditions at the time of the enactment of the FMLA. *Id.* at 1988 (Kennedy, J., dissenting).

²⁹⁸ *Id.* at 1989.

²⁹⁹ *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 90 (2000); *see also Fla. Prepaid Post-secondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 640 (1999) (finding no widespread patterns of patent violations by the states).

³⁰⁰ *Hibbs*, 123 S. Ct. at 1980.

³⁰¹ *Id.* (quoting *Parental and Medical Leave Act of 1987: Hearings Before the Senate Subcomm. on Children, Family, Drugs and Alcoholism of the Comm. on Labor and Human Res.* (pt. 2),

itself, there was a report that, the majority noted, showed that Congress “was aware of the ‘serious problems with the discretionary nature of family leave,’ because when ‘the authority to grant leave and to arrange the length of that leave rests with individual supervisors,’ it leaves ‘employees open to discretionary and possibly unequal treatment.’”³⁰² In other words, the discretionary approach creates the *possibility* that discretion may be abused, which is not itself evidence of abuse, only a banal observation about the nature of any discretion. Given that the Court has made *individual treatment* the touchstone of gender equality, it seems unusually unfair to blame the states for having a policy of individual decision making! Moreover, as Justice Kennedy argued, there was no proof that the states *intentionally* favored women in their discretionary decisions.³⁰³ That the majority nevertheless accepted this evidence as sufficient betrays a loss of interest in judicial control of the definition of constitutional rights.³⁰⁴

The case law from *City of Boerne* to *Garrett* demanded evidence of violations of constitutional rights sufficient to make this new and generous employee benefit look like nothing more than a remedy for those violations. Here, the majority’s argument was to connect the disparate treatment to a belief in the traditional stereotype that women rather than men care for newborns.³⁰⁵ Obviously, to some extent, special regard for new mothers comes from a real, physical difference. The physical recovery from pregnancy and childbirth justifies some disability leave; indeed, failure to give leave for this reason

100th Cong. 173 (1987) (statement of Peggy Montes, Executive Director, Mayor’s Commission on Women’s Affairs, City of Chicago).

³⁰² *Id.* (quoting H.R. REP. NO. 103-8, pt. 2, at 10-11 (1993)). Justice Kennedy, in dissent, complained that this report relied on a study of *federal* workers. *Id.* at 1989 (Kennedy, J., dissenting). He took special exception to the assumption that the states behaved like the federal government because, he believed, the states were in the vanguard in developing family leave. *Id.* The majority rejected this point because it was not enough for the states to have developed leave, to be operating in the vanguard the states would have needed to develop leave in a way that broke down traditional sex roles. *Id.* at 1980-81; see *infra* text accompanying notes 307-11 (discussing the states’ leave practices).

³⁰³ *Id.* at 1989 (Kennedy, J., dissenting).

³⁰⁴ Whether consciously or not, the Court, in loosening its control over the definition of constitutional rights, has responded to the most persistent criticism of the *City of Boerne* line of cases; see *supra* note 197 (discussing the academic scholarship critical of the Court’s expansion of the *City of Boerne* doctrine).

³⁰⁵ *Hibbs*, 123 S. Ct. at 1979 & n.5 (noting that the “differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women’s work”).

would violate the federal Pregnancy Discrimination Act.³⁰⁶ Why then did the states' efforts at avoiding discrimination against pregnant women generate evidence of equal protection violations that could be used to impose the remedy of leave for both parents?

Prior to the enactment of the FMLA, the states had been dealing with the question of family leave on their own, reflecting local needs and preferences, perhaps channeling traditional ideas about what is "woman's work." Were these state policies flawed enough to show a widespread pattern of rights violations? Seven states had leave provisions that related only to women,³⁰⁷ but three of these concerned solely pregnancy disability leaves,³⁰⁸ where giving women a benefit denied to men cannot be considered an equal protection violation. A fourth state, Louisiana, had a statute offering women a four-month pregnancy disability leave,³⁰⁹ "which far exceeds the medically recommended pregnancy disability leave period of six weeks."³¹⁰ That left a problem with only three other states—Massachusetts, Kansas, and Tennessee—and the problem arose from giving parental leave to only women.³¹¹

The key to avoiding this constitutional violation seems to be to give exactly the right amount of pregnancy leave to women. *Hibbs* accepts the finding in the legislative history of the Pregnancy Discrimination Act "*establishing* four to eight weeks as the medical recovery period for a normal childbirth."³¹² If a state should feel inclined to be more generous to new mothers than is strictly required by the physical recovery period—as "*established*" by Congress—then it would run afoul of the Equal Protection Clause, unless it gave leave to new fathers as well. Though under the *City of Boerne* line of cases Congress is not permitted to define constitutional rights, somehow the legislative

³⁰⁶ 42 U.S.C. § 2000e(k) (2000).

³⁰⁷ *Hibbs*, 123 S. Ct. at 1980.

³⁰⁸ *Id.* at 1990 (Kennedy, J., dissenting). The majority opinion implicitly conceded this point. *Id.* at 1981 n.6.

³⁰⁹ LA. REV. STAT. ANN. § 23:1008(A)(2) (repealed 1997).

³¹⁰ *Hibbs*, 123 S. Ct. at 1981 n.6.

³¹¹ *Id.* at 1991 (Kennedy, J., dissenting). Neither men nor women received family leave, a failure that does not violate equal protection. The majority opinion implicitly backed up this assertion. *Id.* at 1981 n.6. It is not clear from the case whether the "parental leave" related primarily to new mothers in Kansas and Tennessee; however, the Massachusetts statute related to childbirth and adoption.

³¹² *Id.* at 1979 n.4 (citing H.R. REP. NO. 101-28, pt. 1, at 30 (1989) (emphasis added)).

assessment of the length of pregnancy disability drew a line that affected constitutional analysis.

The majority's assessment of the evidence hinged on the very particular problem of maternity and paternity leave. For the FMLA to square with the *City of Boerne* line of cases, however, the much more general family leave needed to be "congruent and proportional" to constitutional violations. Yet, the majority simply took the maternity/paternity leave evidence and generalized, finding a "gender stereotype: that women's family duties trump those of the workplace."³¹³ Responding to criticism from Justice Kennedy, who pressed for a serious application of the *City of Boerne* test,³¹⁴ the Court claimed to be making an easy leap: "because parenting and family leave address very similar situations in which work and family responsibilities conflict, they implicate the same stereotypes."³¹⁵

After finding a "state-sanctioned stereotype that only women are responsible for family caregiving,"³¹⁶ the majority did not require that the stereotype be inaccurate. In fact, the evidence showed that women do carry far more than half of family responsibilities.³¹⁷ A state

³¹³ *Hibbs*, 123 S. Ct. at 1979 n.5.

³¹⁴ *Id.* at 1986 (Kennedy, J., dissenting).

³¹⁵ *Id.* at 1979 n.5. In dissent, Justice Kennedy charged the majority with "set[ting] the contours of the inquiry at too high a level of abstraction." *Id.* at 1989 (Kennedy, J., dissenting). Yet it was Justice Kennedy, writing for the majority this past Term in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), who took what is perhaps the most striking step up the ladder of generality in recent memory. In *Lawrence*, he criticized the decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), for its "failure to appreciate the extent of the liberty at stake" when it spoke in terms of "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." *Lawrence*, 123 S. Ct. at 2478. Justice Kennedy insisted on a more abstract formulation of the right at stake:

To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse . . . When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Id. at 2478. In *Lawrence*, Chief Justice Rehnquist, along with Justices Scalia and Thomas, stayed at the low generality level, a choice that works to limit rights and give more of a role for states in policymaking. These Justices emphasized state legislatures as the appropriate decision makers with regard to individual liberty, which allows the community to express moral opprobrium through legislation. *Id.* at 2488 (Scalia, J., dissenting).

³¹⁶ *Hibbs*, 123 S. Ct. at 1983.

³¹⁷ *See id.* at 1983 (noting that "[t]wo-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women" (quoting H.R. REP. NO. 103-81, pt. 1, at 24 (1993))).

policy designed to relieve women of burdens *they actually carry* was now tarred as unconstitutional because presumably as in the VMI case, it follows a generality and does not treat persons as individuals.³¹⁸ It even seems to suggest that a state's failure to act affirmatively to eradicate traditional sex roles—to pursue policies that push men to take more responsibility in the home—is enough of a constitutional problem to empower Congress under Section 5! The majority conflated the stereotype about what women actually do (which was clearly true, though not necessarily in an individual case) and the stereotype about

³¹⁸ *Supra* text accompanying notes 94-103. There is a more recent case than *United States v. Virginia* that seems to permit a stereotype to affect the decision of an individual case. In *Nguyen v. INS*, 533 U.S. 53 (2001), the Court rejected a challenge to a federal statute that made it harder for the offspring of a male citizen, who was not born in the U.S., to become a U.S. citizen than the offspring of a female citizen otherwise similarly situated. Specifically, under 8 U.S.C. § 1409(a)(4) (2000), the father must take one of three formal steps to acknowledge the child's paternity before he or she reaches eighteen. The Justices divided up quite differently in *Nguyen* than in *Hibbs*. All three dissenters from *Hibbs* were in the majority in *Nguyen*, joined by two members of the *Hibbs* majority, Chief Justice Rehnquist and Justice Stevens. The four dissenters in *Nguyen* were all from the *Hibbs* majority. Interestingly enough, no one in *Hibbs*, not even Justice Kennedy, who wrote for the majority in *Nguyen*, cites *Nguyen*. The *Nguyen* Court, applying "the equal protection guarantee embedded in the Due Process Clause of the Fifth Amendment," invoked the intermediate scrutiny test and found it unnecessary to consider whether a lower level of scrutiny applies in the context of immigration and naturalization. *Nguyen*, 533 U.S. at 57. The Court identified two governmental interests assuring that there is (1) a biological relationship and (2) a "real" parent-child relationship. *Id.* at 54. As to both of these interests, the majority saw mothers and fathers as differently situated, not by mere stereotype, but because there is no anatomical assurance of the father's presence at the time of birth. *Id.* at 64. Though the interest in assuring that there is a biological relationship could have been served by a DNA test, the majority refused to read the Constitution to limit Congress to that one method of insuring biological fatherhood. *Id.* at 54. As to the second interest, the mother's necessary presence at the birth also made her inherently different from the father, who may not even know that conception took place. *Id.* The Court took special note of the large number of young military men overseas as well as the "ease of travel" and concluded that the Constitution did not "require Congress to ignore this reality." *Id.* at 54-55. What happened to the argument that this was the product of traditional stereotypes about the male and female role with respect to childrearing? In the particular case the Court considered, the father had in fact raised the child, but had failed to take the required formal step. *Id.* at 53. Why was he not allowed to show these individualized facts, much like how an individual applicant to VMI had to be allowed to show her fitness rather than to be judged by a traditional stereotype? The majority's answer was simply that the difference was physical, relating to the specific difference of pregnancy. *Id.* at 70. The Court asserted that "[n]one of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Id.* It was enough that there was sufficient fit between the statute and appropriate governmental ends, particularly where vast numbers of decisions about individuals needed to be processed. *Id.* at 70-71.

what women *should* do. Thus, a state that might have seen itself in the vanguard, by reaching out to meet the special and real needs of women, was painted as the laggard on the theory that it was reinforcing the idea that this is what women are supposed to do. The majority's word "responsible"—which can mean either taking responsibility or owing responsibility—neatly accomplished the conflation.

The Court fairly breezily observed that there are stereotypes still in force, paid little, if any, attention to whether these stereotypes were producing actual rights violations, and gave Congress free rein to impose policies aimed at eradicating stereotypes.³¹⁹ Even with the heightened scrutiny given to sex classifications, this attitude toward the evidence does not resemble the approach taken in *City of Boerne*, *Florida Prepaid*, *Kimel*, or *Garrett*.³²⁰

Compare the Court's attitude with the position taken by Justice Brandeis in his *New State Ice* dissent that the Court should hesitate to call things rights violations, leave a field of autonomy for state experimentation, and view the results of that experiment, not as evidence of rights violations, but as practical evidence about how to design policy.³²¹ Does a judge look at the states and see the vanguard experimenters searching for solutions to real-world problems who should not be hemmed in by too many rights? Or does the judge look at the states as underhanded, "subtle" discriminators, likely to do harmful things, upon whom the judges should look with skepticism and whose actions judges should interpret as justifying federal legislation to control them?³²²

³¹⁹ *Hibbs*, 123 S. Ct. at 1979-81.

³²⁰ Justice Kennedy, urging that these cases be taken seriously, wrote in his dissent that "the charge that a State has engaged in a pattern of unconstitutional discrimination against its citizens is a most serious one. It must be supported by more than conjecture." *Id.* at 1988-89 (Kennedy, J., dissenting).

³²¹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³²² The Court's treatment of affirmative action in *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), suggests that these kinds of concerns affect decision making. There, the Court deferred to the state law school even though it used racial classifications, subject to the highest level of scrutiny, in its admissions policy. Something motivated the Court to look with favor on the state in *Grutter*, to credit it as a worthy experimenter helping to search for answers to problems for which the Court hesitated to dictate a hard-line solution. *Id.* at 2347. Of course, *Grutter*, like *New State Ice*, lacked the complication of a congressional policy in conflict with the state's experiment. *But see* PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* 72-99 (1993) (detailing Justice Brandeis's opposition to large institutions, including the work of Congress); G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 276-84 (2000) (describing Justice Brandeis's "skepticism of large institutions, including the federal government"

There was no recognition in *Hibbs* that a state might, without engaging in mere sex stereotypes, genuinely think that more than eight weeks are needed to recover from pregnancy and childbirth or might, quite apart from stereotypes about who ought to take care of a baby, want to facilitate breast-feeding for a period longer than eight weeks.³²³ The Court made it impossible for the states to engage in this kind of policymaking. Far from keeping the field of experimentation uncluttered, as Justice Brandeis wanted, the Court has now accepted boxing in the state with a combination of constitutional law, which he rejected, and expansive federal statutory requirements, which he was not even contemplating.³²⁴

C. *Benefit Program or Proportionate Remedy?*

In his dissent, Justice Kennedy wrote that the twelve-week leave requirement was “not a remedy but a benefit program.”³²⁵ The majority disagreed, contending that the benefit program functioned as a remedy for the rights violations that Congress had supposedly detected. “By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not

and presuming his support for the states as laboratories entailed an openness to challenges to federal legislation).

³²³ See Liz Galst, *Babies Aren't the Only Beneficiaries of Breast-Feeding*, N.Y. TIMES, June 22, 2003, § 15, at 4 (noting the developing scientific evidence indicating that breast-feeding offers greater health benefits to children as well as to mothers). It is puzzling that there is no mention in the briefs or in the opinions of the issue of breast-feeding, which entails a real physical difference that can justify treating new mothers differently from fathers. The importance of accommodating breast-feeding women in the workplace should not make it seem invidious to support a new mother who wants to take a longer leave to procure this health benefit for herself and the infant, instead of struggling with breast-pumping or bringing the infant into the workplace. That medical research is developing in this area suggests the value of leaving room for experimentation with maternal leave policies.

³²⁴ See WHITE, *supra* note 322, at 279 (noting that Justice Brandeis's support for progressive state interpretation should not be interpreted to mean that he would support similar legislation at the national level and that in fact Brandeis “was not sympathetic toward the Roosevelt administration's experiments” and “did not believe the remedy [to economic problems] was to have the federal government emerge as a regulatory force in the nation's economy”).

³²⁵ Nev. Dep't of Human Res. v. Hibbs, 123 S. Ct. 1972, 1987 (2003) (Kennedy, J., dissenting).

evade leave obligations simply by hiring men.”³²⁶ According to the majority, this remedy is “congruent and proportional” to what *Garrett* called a “targeted violation” of constitutional law.³²⁷ In that view, the FMLA was like the Voting Rights Act; Congress had just taken on a “difficult and intractable problem.”³²⁸ Broader swath cutting was in order as the actual constitutional swath had proven too difficult for courts to locate. In this way of thinking, it was focused and sensible for Congress to respond to this entrenched prejudice against women—employers—regarding them as an “inordinate drain” on the workplace³²⁹—by creating a routine entitlement. If all workers, male and female, could, without seeking special accommodation, tap into their ample guaranteed leave, and if taking family leave came to be seen as ordinary employee behavior, women who continued to take leave would no longer be stigmatized. As the majority saw it: “FMLA attacks the formerly state-sanctioned stereotype” and, as a consequence, diminishes the incentive to avoid hiring and promoting women.³³⁰

Of course, if there is a guaranteed benefit but only women choose to take it, the ample entitlement *will* contribute to the perception of women as a drain on the workplace.³³¹ The supposed remedy for the stereotype could end up reinforcing it. But perhaps that problem falls within the realm of things Congress can do with its power: it can make wrong decisions about how a particular policy will work and expect courts to refrain from correcting such blunders. Perhaps the Court’s Section 5 idea is only to demand that Congress genuinely address a constitutional rights violation and not define a new violation. Perhaps the doctrine only asks whether Congress was really thinking in remedial terms or whether it had an ulterior rights-expanding motive. The question is whether they have properly accessed a particular

³²⁶ *Id.* at 1982; *see also id.* (“By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.”).

³²⁷ *Id.* (quoting *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001)).

³²⁸ *Id.* (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000)).

³²⁹ *Id.*

³³⁰ *Id.* at 1982-83.

³³¹ *See* 139 CONG. REC. S985 (1993) (statement of Sen. Kassenbaum) (“[M]andatory leave will have a negative impact on [employment] opportunities for women. . . . Employers . . . will seek to hire workers with lower benefit costs, increasing the pressure to discriminate against women.”).

power source, not whether they have wisely chosen what to do with it. Being wrong about whether a remedy will work, one might say, is different from lacking a remedial attitude at the time one makes the mistake.³³²

The statute permits the states to give additional leave,³³³ which gives the states some autonomy, provided they continue the push in what is now the officially designated vanguard direction. Justice Kennedy drew attention to the fact that Congress did not bother to express a requirement that any additional leave be given on a gender-neutral basis.³³⁴ The majority did not think much of this criticism because other laws in force at the time of the FMLA's enactment—the Equal Protection Clause itself as well as Title VII—already required nondiscrimination.³³⁵ This response, however, was unfair to Justice Kennedy. His point was that the failure to state the nondiscrimination principle displayed Congress's lack of interest in the stereotype-eradicating program that was supposed to be central to its purpose. In Justice Kennedy's view, if Congress had the proper remedial attitude, it would not have made a reference to the state's power to give greater benefits without stating the antidiscrimination principle, even though such a statement would only repeat requirements already imposed by the Equal Protection Clause and Title VII.

The option of offering no leave at all has of course been rejected: the twelve-week entitlement has become the floor. But in thinking about what remedy was genuinely *proportionate* to the violations of constitutional law actually presented in the record, one ought to wonder why the correct answer was not a simple ban on sex discrimination in the event that the state chose to provide a leave benefit beyond the basic pregnancy disability leave. That solution would have targeted the problem that turned up when Louisiana gave too much post-childbirth leave and when Massachusetts, Kansas, and Tennessee offered parental leave only to women. Why was it acceptable to force all fifty states to give twelve weeks of leave to remedy such flaws? The

³³² This way of looking at the problem clearly forefronts separation of powers and minimizes the importance of federalism in the analysis of Section 5 cases. See *supra* text accompanying notes 189-92 (discussing the role of separation of powers and federalism in *City of Boerne*).

³³³ See 29 U.S.C. § 2651(b) (2000) ("Nothing in this Act or any amendment made by this Act shall be construed to supersede any provision of any State or local law that provides greater family or medical leave rights than the rights established under this Act.").

³³⁴ *Hibbs*, 123 S. Ct. at 1992 (Kennedy, J., dissenting).

³³⁵ *Id.* at 1984 n.12.

majority contended that allowing a state to offer no leave at all would be a *disproportionate* remedy for the violations found.³³⁶ The Chief Justice wrote: “Where ‘two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women,’ and state practices continue to reinforce the stereotype of women as caregivers, such a policy would exclude far more women than men from the workplace.”³³⁷

So, according to the evidence, the stereotype is not an incorrect generalization: a fair-minded person talking about what women generally do would say they take more family time. This truth, and not mere prejudice, would continue to stoke the belief that women need to take a lot of family time away from work. The remedy was thus justified by the Court as a way to change the reality of women’s responsibilities.

How can that be considered a way to eliminate the states’ constitutional violations? One needs to say that it is a constitutional violation to judge an individual based on a sex stereotype and that changing the reality will make it less likely that the individual will be judged this way. The remedy attacks the stereotype itself by trying to make it less true (as a generality) rather than attacking the practice of judging individuals by general characteristics believed to be true of the group, which seems to be the relevant constitutional violation.³³⁸ The hope seems to be that the leave entitlement will change the reality, that men and women will come to share family care responsibilities, and that at some point in the future, women will not be stigmatized as a drain on the workplace. By then, even though the state might still judge individual women by reference to the group stereotype, the old stereotype will have been expunged. It might not work, as discussed above,³³⁹ and it is quite a strained argument. It is much easier to see the FMLA as a simple entitlement program. Clearly, the Court felt motivated to approve the FMLA under Section 5, and this is the theory it produced to portray the leave as a true remedy for a rights

³³⁶ *Id.*

³³⁷ *Id.* at 1983 (quoting H.R. REP. NO. 103-8, pt. 1, at 24 (1993); S. REP. NO. 103-3, at 7 (1993)).

³³⁸ See *supra* text accompanying notes 100-20 (discussing sex classification claims as attacking unfounded stereotypes).

³³⁹ See *supra* text accompanying notes 331-32 (noting the potential ineffectiveness of a leave remedy in the event that it is used most often by women).

violation understood in terms of failing to treat female employees as individuals.³⁴⁰

The majority's strongest argument distinguishing *Hibbs* from *City of Boerne*, *Kimel*, and *Garrett* was that the statutes involved in those cases were extraordinarily broad, covering every activity the state might engage in as an employer.³⁴¹ By contrast, as the Court put it, "FMLA is narrowly targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship."³⁴² Thus, even though the twelve-week requirement is extravagant, at least it sticks to the problem of balancing work and family, which really does powerfully affect the advancement of women in the workplace. This argument is unlikely to satisfy anyone who takes the *City of Boerne* line of cases seriously, for it largely underscores a political goal—the progress of the interest group that procured the legislation, which was at stake in *Kimel* and *Garrett* as well.³⁴³ But it does show that the remedy chosen has some focus and limitation, which was missing in those earlier statutes.

The *Hibbs* majority also credited Congress for including other limitations. Only unpaid leave is required.³⁴⁴ Leave is only available to employees who have been on the job for at least one year and who have worked at least 1250 hours in the previous year, and it is not available to certain high-level employees.³⁴⁵ Moreover, advance notice

³⁴⁰ Upholding the FMLA after the *Kimel* and *Garrett* cases is likely to stir suspicion that the Court is deciding cases based on political preference. For pre-*Hibbs* expressions of such suspicion, see Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" but Missing the Beat: Does the New Federalism Really Matter?*, 32 IND. L. REV. 11, 12 (1998); Michael Wells, *Naked Politics, Federal Courts Law, and the Canon of Acceptable Arguments*, 47 EMORY L.J. 89, 121-23 (1998).

³⁴¹ *Hibbs*, 123 S. Ct. at 1983.

³⁴² *Id.*

³⁴³ One could make a similar argument about eradicating stereotypes with respect to age and disabilities. Even if only rational basis scrutiny applies, the *Hibbs* attitude toward the "congruence and proportionality" test might support the attenuated causal chain between forcing the inclusion of the aged and disabled persons in the workplace and eradicating irrational fears about them.

³⁴⁴ 29 U.S.C. § 2612(c)(1) (2000). One might think that the unpaid nature of the leave makes it *disproportionate*, since women may have a greater capacity to take advantage of unpaid leave. If men are unwilling to use unpaid leave, the remedy will not work as described to eradicate the stereotype. Though mandatory leave may still be considered a nice benefit, if this occurs it should be criticized on the ground that it makes the stereotype stronger. As discussed above, it may not matter under the *City of Boerne* doctrine whether the remedy is effective, but only whether the legislature acted with a duly remedial attitude.

³⁴⁵ *Id.* §§ 2611(2)(A), (B)(i).

is required for foreseeable leaves,³⁴⁶ and certification of medical conditions may be required.³⁴⁷ One limitation that the Court thought demonstrated special attention to the needs of the states was the exclusion of elected officials, their staffs, and appointed policymakers.³⁴⁸ Attention to the financial needs of the employer is shown by the limited damages: employees may recover only their actual monetary loss, and back-pay amounts are limited by the two-year statute of limitations.³⁴⁹ The Court likened these limitations to the geographic limitation and the sunset aspects of the Voting Rights Act.³⁵⁰ Are they really the same sort of limitations? The VRA limitations were designed to target the laggard states, while leaving the unoffending states unburdened, but the FMLA's limitations are a more generic sort of moderation.

The state's brief in *Hibbs* had faulted the FMLA for lacking a termination provision like the VRA remedies: "The absence of a sunset provision leads to the absurd result that States, like Nevada, that provide FMLA-type family-care leave as a matter of state law are treated as if they purposefully engage in a pattern of unconstitutional conduct or irrationally deny leave."³⁵¹ But if this were the case, how could Title

³⁴⁶ *Id.* § 2612(e).

³⁴⁷ *Id.* § 2613.

³⁴⁸ *See Nev. Dep't of Human Res. v. Hibbs*, 123 S. Ct. 1972, 1983-84 (2003) (applying 29 U.S.C. §§ 203(e)(2)(C); 2611(2)(B)(i), (3) (2000)).

³⁴⁹ 29 U.S.C. §§ 2617(a)(1)(A)(i)-(iii); 2617(c)(1), (2). The Court noted that the attention to the employer's finances attends to sovereign immunity concerns. *See Hibbs*, 123 S. Ct. at 1984 n.12 (noting that Congress chose a "middle ground," attending to the interests of both families and employers). Justice Kennedy's dissenting opinion highlights this value. *See id.* at 1986 (Kennedy, J., dissenting) (emphasizing that the Section 5 question arises in "the context of the Eleventh Amendment, which protects a State's fiscal integrity from federal intrusion by vesting the States with immunity from private actions for damages pursuant to federal laws"). Justice Kennedy's opinion for the majority in *Alden v. Maine* spelled out this concern about the "financial integrity of the states" in greater detail. 527 U.S. 706, 750 (1999). Justice Kennedy found normative value in sovereign immunity because it permitted the state to structure its own finances to balance the many demands on its treasury. *Id.* at 749-52. He saw individual lawsuits against the states as impinging on the "State's most fundamental political processes, [striking] at the heart of the political accountability so essential to our liberty and republican form of government." *Id.* at 751. He characterized private lawsuits, even private lawsuits in state courts, as a way in which the federal government compels the states and displaces democratic state government. *Id.* at 751-52.

³⁵⁰ 42 U.S.C. §§ 1973(b)(a)(8), (b)(b) (2000).

³⁵¹ Brief for the Petitioner at 37, *Hibbs*, 123 S. Ct. 1972 (2003) (No. 01-1368); *see NEV. REV. STAT.* § 284.360(5) (Michie 2003) (permitting up to twelve weeks of family leave).

VII continue to apply indefinitely? The question arose at the oral argument:

[I]f the discrimination doesn't exist anymore in the State, even if it did at one time, then the provision would have to sunset, and as far as Title VII is concerned, many States, the vast majority of States have their own Title VII laws, so at this point in time I guess, under your reasoning, *Fitzpatrick* and *Bitzer* would have to go.³⁵²

In reply, the State's counsel attempted to argue that no time limit would be needed because Title VII "closely hewed" to the Section 1 rights the Court has defined.³⁵³ The suggestion was that the *Kimel-Garrett* requirements do not apply when Congress is only proscribing the activities that Section 1 already proscribes.³⁵⁴ When Congress cuts that broader swath, however, regulating additional behavior with prophylactic legislation, the state argued that the requirements need to be temporary.³⁵⁵ There would need to be a way for the states, like the southern states that went below-board with their race discrimination in voting, to regain their autonomy in areas that are not governed by constitutional rights. This argument pulled no weight in the *Hibbs* written opinion. In the Court's view, it would seem, there is nothing special about the time limitation in the Voting Rights Act, and the power to reach the "broader swath of conduct," once the states have generated the evidence of constitutional rights violations, can continue in perpetuity.³⁵⁶

Justice Scalia, in his dissent, argued for a geographic type of limitation, like that found in the Voting Rights Act, which Congress crafted to cover only the states shown to have a history of intentional race discrimination.³⁵⁷ Even if the statute could be upheld on its face

³⁵² Oral Argument Transcript at 11, *Hibbs*, 123 S. Ct. 1972 (2003) (No. 01-1368), available at http://www.supremecourtus.gov/oral_arguments/argument_transcript/01-1368.pdf.

³⁵³ *Id.*

³⁵⁴ *Id.* at 10-11.

³⁵⁵ *Id.*

³⁵⁶ *Hibbs*, 123 S. Ct. at 1983 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82 (2000)).

³⁵⁷ *Id.* at 1985 (Scalia, J., dissenting). Justice Scalia credited Congress with an awareness—perhaps only an intuition—of this limitation, which he calls "self-evident." *Id.* The fact that Congress narrowly framed one statute, however, does not establish that it knew that the Constitution required that limitation. Other motivations for limited remedies do exist, most obviously the self-interested desire of legislators to keep their own states free of the burdens of the new law. Surely, even if Congress did believe this sort of tailoring was a constitutional requirement, the Court would not rely solely on congressional interpretation. Indeed, the whole point of this Section 5

as a “congruent and proportional” remedy—and he did not think that it could—Justice Scalia would have required a litigant to demonstrate that each particular state had a record of constitutional violations before Section 5 could abrogate that state’s sovereign immunity.³⁵⁸ No matter how vast the record of violations by the states as a group, as long as no record exists with respect to a particular state, it could assert the defense of sovereign immunity and resist claims for retrospective relief.³⁵⁹ In Justice Scalia’s view, the states did not deserve to be lumped together, vanguards with laggards. They are not “some sort of collective entity which is guilty or innocent as a body.”³⁶⁰

C. *Sorting Out the Vanguards and Laggards*

How did ideas about vanguard states affect the Court’s decision? Justice Kennedy characterized the states as the vanguard: Congress had used state leave policies as a model in devising the federal approach, some states had leave policies even broader than the FMLA,³⁶¹ and the evolution of leave policy at the state level had “picked up tremendous momentum in the States.”³⁶² But the majority saw things much differently: States that offered leave only to women could not be seen as working at the vanguard of fighting discriminatory stereotypes, even if some of these states, which offered only pregnancy disability leave, could be excused from a charge of violating the constitution.³⁶³ Other states were just failing to provide generous leave

doctrine seems to be to hoard the Constitution-interpreting function in the judicial branch.

³⁵⁸ *Id.* at 1985 (Scalia, J., dissenting). Justice Scalia wrote about a state’s immunity as he would write about an individual’s rights: the violations by other states may justify abrogation of their sovereign immunity, but any given state deserves to be judged on its own merits, free from guilt by association. *Id.* Justice Scalia also equated sovereign immunity with individual rights in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 681-82 (1999). In *College Savings Bank*, he wrote that deeming a state’s entry into a regulated business as constructive consent to suit is analogous to deeming entry into the business of securities transactions as a constructive waiver of the right to a jury trial. *Id.* at 682.

³⁵⁹ *Hibbs*, 123 S. Ct. at 1985 (Scalia, J., dissenting).

³⁶⁰ *Id.*

³⁶¹ *Id.* at 1989 (Kennedy, J., dissenting).

³⁶² *Id.* at 1989.

³⁶³ *Id.* at 1979-81. Seven states offered leave only to women, and four of these offered only maternity leave. *Id.* at 1990. One of these states, Louisiana, committed the offense of offering too much maternity leave (i.e., leave in excess of the six weeks experts attributed to real physical disability). *Id.* at 1980 n.6. This fact is offered, apparently, not as any evidence of constitutional violation, but merely as evidence that the states were not in the vanguard of the family leave movement.

entitlements.³⁶⁴ The majority also saw it as a problem that many states did not create specific entitlements but relied on “voluntary or discretionary leave programs” that would “do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate.”³⁶⁵ That is, these states were not in the vanguard with respect to using leave entitlements *as a tool to wipe out stereotypes*. Discretionary leaves might just as well reinforce stereotypes if women are ones who are granted leaves. The majority thus concluded that “[a]gainst the above backdrop of limited state leave policies, no matter how generous [Nevada’s] own may have been, Congress was justified in enacting the FMLA as remedial legislation.”³⁶⁶ While Justice Kennedy was willing to trust the states to solve problems of gender discrimination autonomously within the plans they set up,³⁶⁷ the majority saw the downside of state autonomy and thought federal legislation was warranted to bring all the states up to a uniform floor.³⁶⁸

The majority feared that without legislation correcting a tendency to give special regard to new mothers traditional sex roles would be reinforced and that this seeming benefit for women would actually harm them as they sought equal regard in the workplace.³⁶⁹ This is an interesting hypothesis that draws attention to a possible social problem, but it is scarcely a widespread pattern of constitutional rights violations.³⁷⁰ The majority was willing to allow general anxieties about laggard states to work a transfer of power to Congress quite distinct from the way it had handled *Kimel* and *Garrett*. The dissenting Justices, pushing for taking these precedents seriously, thought the role of autonomous states was worth preserving.³⁷¹ The Justices, it would seem, split over the perception of the states as vanguard or laggard.

The Justices also differed in their degree of confidence about *where* the right answers lay. If one is confidently committed to strictly equivalent treatment of men and women, one feels motivated to see Congress as having the power to impose a uniform floor: perception of federal legislation as a “floor” occurs only in the mind of a person

³⁶⁴ See *id.* at 1980-81 (noting that “twelve states provided their employees no family leave, beyond an initial childbirth or adoption, to care for a seriously ill child or family member”).

³⁶⁵ *Id.* at 1981.

³⁶⁶ *Id.* (citation omitted).

³⁶⁷ *Id.* at 1990 (Kennedy, J., dissenting).

³⁶⁸ *Id.* at 1982-83.

³⁶⁹ *Id.* at 1982.

³⁷⁰ *Id.*

³⁷¹ *Id.* at 1991.

who knows which way is up. Yet many reasonable persons have questioned pure equality as the best way to remedy sex discrimination.³⁷² For those with doubts like this, leaving the states alone to experiment with various policies will be seen in a much more positive light. They might, like Justice Brandeis, view their overconfident colleagues as “erect[ing their] prejudices into legal principles.”³⁷³ Those “overconfident colleagues” in turn are seeing the states as infusing their policies with prejudices of their own—specifically, traditional stereotypes of the sexes. Perhaps it would be better for the sake of federalism to free the states to design their own benefit programs, with the constitutional kinks worked out in individual lawsuits relying on Title VII. In *Hibbs* itself, Nevada had its own plan, which was displaced by the FMLA disrespecting what Justice Kennedy called the “States’ autonomous power to design their own social benefits regime.”³⁷⁴ Autonomy can be valued as capable of producing some good, not just in giving Congress some ideas in the preuniformity period, but continually—or at least until a pattern of below-board rights violations emerges to justify a statute regulating a broader swath of behavior.

Of course, as long as Congress could still enact the law under the commerce power, this autonomy picture seems a bit incoherent. The states are still required to give twelve weeks of leave, so they in fact cannot go off and design their own policies. Pulling the Fourteenth Amendment foundation out from under the FMLA only means that

³⁷² See, e.g., Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 884 (1997) (surveying forms of feminism other than the Supreme Court’s equality theory and recommending the exploration of “more complex, contingent accounts of gender discrimination”); Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1, 2 (1985) (challenging the Supreme Court’s “assimilationist model of equality”). Of course, *Grutter v. Bollinger* showed the majority of the Court in a state of doubt about whether pure equality is the best way to think about race discrimination. The only justice who embraced pure equality in both *Hibbs* and *Grutter* was Chief Justice Rehnquist. No Justice *objected* to the pure equality approach in both cases. Every other Justice leaned once toward the strong equality position and once toward the weak one. One might speculate that a tendency to defer to Congress motivated members of the *Grutter* majority to exaggerate the constitutional violations that supposedly underlay the FMLA in *Hibbs*. One could also explain the switch on the part of the *Grutter* dissenters on the ground that race discrimination is given a higher degree of scrutiny than sex discrimination or on the ground that *Hibbs* involved a complete failure to satisfy the *City of Boerne* doctrine. But I think the most sensible explanation for the shifting positions is the differing assessments about which policies were enlightened and which were backward, and whether such assessments were reliable.

³⁷³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see also *supra* text accompanying notes 25-30 (discussing Justice Brandeis’s views on federalism).

³⁷⁴ *Hibbs*, 123 S. Ct. at 1992 (Kennedy, J., dissenting).

states cannot be subjected to suits by individuals for retrospective relief if they violate the law. What kind of space for experimentation is that?³⁷⁵

To embrace the doctrinal structure Justice Kennedy presents, one would need to find the following set of beliefs appealing: autonomous program designing is a good thing, but the states will not be permitted to engage in it; nevertheless, if they fail to follow the federal rules as required, they at least deserve a break in the accumulated-liability department. One could attempt to justify this version on the doctrine in normative terms on the ground that it spares the state that misjudges or fails to anticipate how a court will apply the law. This solicitude for the state is appealing if we think the state may be conducting a worthy experiment. By creating an environment in which the prospect of accumulated liability does not loom ahead, Justice Kennedy's version of the sovereign immunity doctrine would free some states to follow policies that are in fact legal.³⁷⁶ In the *Hibbs* case, for example, the state of Nevada was not flouting federal law. Mr. Hibbs was given leave to tend to his wife's health problems. He was fired only after he had used up all of the required leave, according to the state. Sovereign immunity offers states the power to end a lawsuit quickly without regard to the substantive merits, and, as was true in

³⁷⁵ The limited effect appropriately leads many commentators to question the Court's choice to express federalism values through sovereign immunity. See, e.g., Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 493-94 (2002) ("Sovereign immunity does not restrict the regulatory power of Congress, it seldom bars suits for injunctions to force compliance with federal law, and it does not protect local governments at all. Why, then, has the Court made sovereign immunity a centerpiece of its drive to revive constitutional federalism?"); Pamela S. Karlan, *The Irony of Immunity: The Eleventh Amendment, Irreparable Injury, and Section 1983*, 53 STAN. L. REV. 1311, 1330 (2001) (noting the "growing tension between the commitment to state sovereignty that underlies the immunity decisions and the long-standing doctrines of *Ex parte Young* and § 1983, which have consistently worked to circumvent the formal constraints of the Eleventh Amendment"); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1052 (2000) (finding sovereign immunity doctrine "ineffectual and counterproductive"); Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 1999 S. CT. REV. 1, 1 (criticizing the Court's excessive reliance on "the arcane doctrine of state sovereign immunity"); Charles Fried, *Supreme Court Folly*, N.Y. TIMES, July 6, 1999, at A17 (criticizing the Court's over-reliance on sovereign immunity). Cf. Robert F. Nagel, *Real Revolution*, 13 GA. ST. U. L. REV. 985, 1003-04 (1997) (noting that antifederalist scholars' objectives are "modest and equivocal").

³⁷⁶ For example, single-sex schools. See *supra* text accompanying notes 104-08 (discussing the effort made by the majority in the VMI case to preserve room for positive experiments with single-sex education).

Hibbs, the state may deserve to win on the merits as well.³⁷⁷ Yet if a case is decided on the sovereign immunity defense, we are deprived of the ability to learn through the lawsuit whether or not the state was flouting the federal law that it was obligated to follow.

CONCLUSION

This Article has examined the way ideas about laggard states and vanguard states have affected the Court's federalism doctrine in recent years, in particular, the scope of Congress's power under Section 5 of the Fourteenth Amendment. Many of us who think about federalism worry about laggard states—the literacy-test-wielding rearguard springs all too easily to mind, blotting out thoughts of more positive experiments. For the “laggard sensitive,” expansive constitutional rights will seem to be important tools, not obstacles to progress like the substantive due process rights that troubled Justice Brandeis in *New State Ice*. Strong congressional power to control the laggard states will also seem quite appealing, and *Hibbs* will be seen as a welcome break from the rigors of *Kimel* and *Garrett*. Some of us who think about federalism, however, genuinely share Justice Brandeis's optimism about states as laboratories of democracy. This cast of mind is skeptical about over-expanding rights and favors a role for the courts in holding off the political excesses of Congress³⁷⁸ in order to preserve a place for state experimentation.

Quite aside from this optimism or pessimism about the role the states can play, many of us, at least much of the time, will feel quite

³⁷⁷ Surely, one must wonder whether this watered-down federalism is worth the confusion and unclarity it creates. The tendency toward moderation is apparent and is understandable, but it may be worse than either the extreme of undertaking a genuinely vigorous enforcement of federalism or the extreme of leaving federalism enforcement to Congress, as the *Seminole Tribe* dissenters advocated. For a look at what genuinely vigorous enforcement of federalism would be like, one could patch together a number of Justice Thomas's dissenting and concurring opinions. See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U. S. 564, 609 (1997) (Thomas, J., dissenting); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring). For a pre-*Lopez* meditation on the subject, see Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207 (1994). An interesting recent effort exploring a somewhat vigorous enforcement of federalism is Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75 (2001). The approach they explore can only be called somewhat vigorous, because it includes overruling *Seminole Tribe*.

³⁷⁸ See Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1200 (2001) (expressing the concern that “special-interest politics, not factfinding in the public interest, dominate[s] congressional decisionmaking”).

dubious about whether any position on a given policy matter deserves to be called vanguard or laggard. Even if one believes there really are vanguard and laggard policies, it may not matter unless one also believes that someone—the states, the courts, or Congress—is going to do a better job than someone else classifying the various policies.³⁷⁹ Yet, if one thinks there is a vanguard direction and that it is good to take it, but also thinks that no one in power will reliably find it, one ought to want decisions to be made at the lowest level—without “risk to the rest of the country,”³⁸⁰ as Justice Brandeis put it. In this view, the uniform federal statute becomes worrisome and edges the decision maker toward imposing restraints on congressional power. If one believes there are vanguard states and laggard states, the key question becomes whether to trust Congress to choose the vanguard policy and impose it on the entire country—to take the risk Justice Brandeis wanted to avoid. If one thinks the states through experimentation are most likely to find the vanguard, or that at least one brave state may find the vanguard, there remains a question whether Congress ought to have an eventual role in choosing which policies to transform into uniform rules.³⁸¹

The current Supreme Court falls into three groups when it comes to these matters. The first group, consisting of Justices Stevens, Souter, Ginsburg, and Breyer, is committed to the idea of judicial identification of rights, taking certain favored matters out of legislative hands, and then allowing what remains to be governed by federal law to the extent Congress sees fit. This is the political model of federalism that has long been endorsed by the liberal side of the Court.³⁸² What

³⁷⁹ See generally NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994) (discussing comparative institutional analysis).

³⁸⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³⁸¹ Cf. Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271 (1990) (noting the relative ease of “obtain[ing] passage of one federal statute” compared with “passage of fifty state statutes”).

³⁸² This position is also endorsed by many commentators. See, e.g., JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 192-93* (1980) (advocating reliance on political branches to protect federalism values); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 293 (2000) (finding the political safeguards model of federalism still valid); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (proposing “political safeguards” model).

background beliefs about vanguard states and laggard states influence a decision maker to adopt this attitude? There is in fact a wide range of beliefs that can give rise to and reinforce this approach to the federalism problem, including the following: fear of the laggard state, doubt about the existence of vanguard states, belief in the ability of Congress to mediate between the two types of states, belief that it is good to have a uniform law imposing the best policy (perhaps the policy Congress will learn is best from observing the vanguard states), belief that uniformity is generally good, belief that Congress will be in the best position to determine when uniformity is good, or simple skepticism about what is good and whether there are any vanguards and laggards at all.³⁸³

The second group consists of Justices Scalia and Thomas, who take very nearly the opposite position. They generally favor narrow construction of constitutional rights and robust enforcement of federalism doctrine, to hold off Congress and preserve room for state and local governments to go about setting their own policies.³⁸⁴ These Justices are far more willing than other members of the Court to approve of free and decentralized local democracy. In particular, they are much less affected by perceptions that the states are in the vanguard or lagging behind on what other Justices may visualize as a road of progress. The traditional state, in their view, deserves its autonomy as much as the innovator that Justice Brandeis's "laboratories of democracy" model idealized.

³⁸³ This last idea, simple skepticism, can very well lead to extreme deference to Congress. If one sees only various political actors fighting to have their way, it might make sense for the Court to let the strongest legislature—Congress—prevail. This was the form that judicial restraint took for Justice Oliver Wendell Holmes, Jr., who viewed legislation as nothing but a process of "shift[ing] disagreeable burdens from the shoulders of the stronger to those of the weaker." Oliver Wendell Holmes, *Ideals and Doubts*, 10 ILL. L. REV. 1, 2 (1915), reprinted in 3 THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES 442, 443 (Sheldon M. Novick ed., 1995), reprinted in ALBERT W. ALSCHULER, LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 58 (2000). In Professor Alschuler's words, "[a]lthough Holmes viewed the legislature as an unprincipled battlefield, he believed that judges should not deprive the victors of their spoils." ALSCHULER, *supra*, at 58.

³⁸⁴ For a scholarly discussion rejecting the political safeguards model of federalism, see Baker & Young, *supra* note 377. See also Marci A. Hamilton, *Why Federalism Must Be Enforced: A Response to Professor Kramer*, 46 VILL. L. REV. 1069 (2001) (arguing that the safeguards theory is based on false historical and empirical assumptions); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001) (arguing against political safeguards theory on textual, originalist, and structural grounds).

The third group is the powerful, yet beleaguered,³⁸⁵ center: Chief Justice Rehnquist and Justices O'Connor and Kennedy. They determine outcomes as they decide which of the other of the two groups to join on any particular occasion. This group has some concern about overstating the scope of constitutional rights and some interest in restraining Congress to preserve autonomy for state and local governments. They are sensitive to the context of particular cases and consequently, more susceptible to the influence of ideas about the positive and negative contributions of the states and Congress.³⁸⁶ While thoughts about where the vanguard is and who the laggards are can influence choices, these thoughts can and should cause dissonance for judges, who must worry about intruding on the choices of democratic institutions, even as they feel they are doing what is necessary to facilitate the functioning of democracy. The middle is a precarious position to attempt to occupy. It yields complicated doctrine and a wavering line of cases that make easy targets for the Court's critics³⁸⁷ and undermine confidence in the Court as a principled instrument of the rule of law.

While I see these problems with the middle position, I must confess to finding moderation attractive enough to keep me from preferring either of the other two positions. All three positions have strengths and weaknesses, and all three strike me as worthy attempts

³⁸⁵ See, e.g., Banks, *supra* note 22, at 470 ("Understanding the limits of Congress's Section 5 power is notoriously difficult because the doctrinal position a Justice stakes out is fact-sensitive and always affected by a variety of legal and political factors."); Fallon, *supra* note 375, at 492 ("[I]f the Rehnquist Court's federalism revival has not rendered federal courts law dramatically less coherent, neither has it arrested the slide into Byzantine complexity."); Karlan, *supra* note 375, at 1330 (noting that "[e]xplicit right-remedy gaps seldom produce particularly stable doctrine" and seeing potential for the Court in the future to deal with "the paradox its sovereign immunity decisions have spawned" by limiting prospective as well as retrospective relief); Daniel J. Meltzer, *Overcoming Immunity: The Case of Federal Regulation of Intellectual Property*, 53 STAN. L. REV. 1331, 1391 (2001) (expressing doubt that "the present doctrinal pattern creates a stable resting place"). But see Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477, 497-500 (2001) (finding stability in the Court's recent federalism precedents, despite their narrow majorities because they arose in a "social and political context" favoring decentralization).

³⁸⁶ For a helpful analysis comparing this style of decision making to the more rule-based approach, see Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 122-23 (1992). Also helpful is Justice Scalia's incisive defense of rule-based decision making over the case-by-case, multi-factored approach. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

³⁸⁷ See Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859, 912-15 (2000) (critiquing the Court's sovereign immunity jurisprudence); Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113 (2001) (arguing that the state sovereign immunity doctrine embodied in *Alden v. Maine* is based on faulty premises).

to solve the difficult federalism problem. I am inclined to think that the Stevens-Souter-Breyer-Ginsburg position is likely to prevail in the long run because it provides a clear and stable resolution. The Scalia-Thomas position is also attractively clear and stable, but it is unlikely to prevail: the center's cold feet seem to be a permanent affliction. *Hibbs* showed two members of the center group, the Chief Justice and Justice O'Connor, to be unable to follow through on the doctrine the center had carved out in *City of Boerne*, *Florida Prepaid*, *Morrison*, *Kimel*, and *Garrett*. Justice Kennedy was left with the task of defending the center position alone, cheered perhaps by the company of Justices Scalia and Thomas, whose commitment to vigorous federalism enforcement has spared them many struggles. I would like to be able to say that I find the middle position the best, but the difficulty the Court has had in defining it and making it comprehensible and convincing to fair-minded readers makes it quite hard to support. If the federalism-enforcing project is to succeed, the Court must move beyond bewildering complexities and articulate a coherent, normative vision.³⁸⁸ In this light, the extensive reliance on the arcana of sovereign immunity doctrine has been uninspiring.

My chief purpose in writing this Article has been to try to understand the process of reaching decisions about federalism and to shed some light on the various positions. One can never know exactly what goes into another person's opinions; it is not even easy to detect the true cause of one's own opinions, so looking behind what judges choose to reveal in their writings is a tenuous endeavor. Yet I would maintain that it is an even more tenuous endeavor to attempt to understand, or to influence, the Court's federalism jurisprudence without thinking about such things.

³⁸⁸ As Professors Post and Siegel have written, "[a]lthough the Court may claim authority to speak for the Constitution, that authority does not exist merely by decree. It must be earned by articulating a vision of the Constitution that the nation is prepared to accept." Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 43 (2003). For a criticism of the Court for "fail[ing] to articulate an overarching vision" of federalism and an argument recommending more attention to the "vertical competition between the states and the federal government for the people's 'affection,'" see Todd E. Pettys, *Competing for the People's Affection: Federalism's Forgotten Marketplace*, 56 VAND. L. REV. 329, 330, 332 (2003).