STATE EMPLOYEES'ACCESS TO FEDERAL COURT UNDER FEDERAL ANTI-DISCRIMINATION LAWS

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Article 1, Section 8 of the Constitution of the United States, after listing the specific powers of the Congress, provides that Congress has the power "(To) make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The Tenth Amendment to the Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This sharing of sovereign powers between the federal and state governments is the basis of the concept known as federalism. The broad language of the Constitution has led to much debate over the exact boundaries between the powers of the respective sovereignties, the location of which has been left largely up to judiciary. For most of the last century the courts have permitted the regulatory authority of the federal government to be expanded over many areas of the economic environment of the United States. However, during the 1990s and continuing into the 21st Century, the Supreme Court, under the leadership of Chief Justice Rehnquist, handed down several decisions that curtailed the regulatory powers of the federal government and strengthened states' rights. This trend has been felt in the area of employment law and resulted in making the federal courts less accessible to employees of a state in seeking redress under the federal anti-discrimination laws. Three cases in particular involved the federal anti-discrimination laws.

The first of these three cases decided by the Court was *Kimel v. Florida Board of Regents.*[1] In this case the Court dealt with the issue of whether, in the Age Discrimination in Employment Act (ADEA),[2] Congress had expressed its clear intent to abrogate the states' 11th Amendment immunity and, if so, whether the ADEA is a proper exercise of authority granted to Congress by §5 of the Fourteenth Amendment.

The ADEA makes it unlawful for an employer to discriminate against a person forty years of age or older when making job related decisions regarding an employee or applicant.[3] The Act specifically permits decisions based upon any factor other than age[4] and provides for a bona fide occupational qualification.[5] The ADEA permits any person aggrieved by an employer in violation of the Act to bring a civil action in a federal or state court for relief.[6] The Act incorporates enforcement provisions contained in §16(b) of the Fair Labor Standards Act of 1938.[7] The Act defines the term "employer" to include the government of a state or its political subdivisions.[8]

Roderick MacPherson and Marvin Narz, ages 57 and 58 at the time, filed suit in the United States District Court for the Northern District of Alabama claiming that their employer, the University of Montevallo, an instrumentality of the State of Alabama, had discriminated against them on the basis of their age and had retaliated against them for filing charges with the Equal Employment Opportunity Commission (EEOC). Both parties were associate professors in the College of Business and claimed that the College had employed an evaluation system that had a disparate impact on older faculty members. They asked for declaratory and injunctive relief, back pay, and promotions to full professor. The university claimed the suit was barred by the 11th Amendment and asked the court to dismiss the suit. The District Court granted the motion to dismiss holding that the ADEA did not abrogate the States' 11th Amendment immunity

In a second case, J. Daniel Kimel, Jr. and a group of current and former faculty and librarians at Florida State University, all over the age of 40, filed suit in the United States District Court for the Northern District of Florida. The complaint was subsequently amended to include current and former faculty and librarians at Florida International University. This suit alleged that the Florida Board of Regents had refused to allocate money to provide previously agreed upon market adjustment to the salaries of eligible employees at the two universities and this refusal had a disparate impact upon older employees in violation of the ADEA. The plaintiffs sought back-pay, liquidated damages, and permanent salary adjustments. The Board of Regents filed a motion to dismiss claiming 11th Amendment immunity. The district Court denied the motion holding that Congress had expressed its intent to abrogate the States' 11th Amendment immunity and that the ADEA was a proper exercise of Congress' authority under §5 of the Fourteenth Amendment.

In a third case, Wellington Dickson, an employee of the Florida Department of Corrections, filed a suit in the United States District Court for the Northern District of Florida, claiming that the state had failed to promote him because of his age and because he had filed grievances regarding age discrimination. Dickson requested injunctive relief, back-pay and both compensatory and punitive damages. The Florida Department of Corrections filed a motion to dismiss claiming that the suit was barred by the 11th Amendment. The Court, in denying the motion, held that that Congress had clearly expressed its intent to abrogate the States' 11th Amendment immunity and that the ADEA was a proper exercise of Congress' authority under §5 of the Fourteenth Amendment.

Appeals were taken in each case and the U.S. Court of Appeals for the 11th Circuit consolidated the appeals and held that the ADEA did not abrogate the States' 11th Amendment immunity. Prior to this decision most Courts of Appeals had held that the ADEA did validly abrogate the states' immunity.[9] Only the Eighth Circuit had ruled the abrogation to be invalid.[10] The U.S. Supreme Court granted certiorari to resolve the conflict.

The issue of whether the 11th Amendment immunizes a state from being sued in a federal court by one of its own citizens has long been the subject of dispute, as the dissent by Justice Stevens in *Kimel* expresses. However, in a number of close decisions the Supreme Court has held that it does.

The 11th Amendment reads as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.

The suits in *Kimel* were brought by citizens against their own states, not by citizens of another state or a foreign state. The question then arises; does the 11th Amendment have application in such a situation? The Court, citing a line of precedent, [11] noted, "the court has long 'understood the 11th Amendment to stand not so much for what it says, but for the presupposition…which it confirms.'[12]… [A]ccordingly, for over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against non-consenting states."[13] In addressing

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[1] 528 U.S. 62 (2000).
[2] 81 Stat. §602.
[3] 29 U.S.C. §623(a)(1).
[4] 29 U.S.C. §623(f)(3).
[5] 29 U.S.C. §623(f)(1).
[6] 29 U.S.C. §626(c)(1).
[7] 29 U.S.C. §216(b).
[8] 29 U.S.C. §630(b).

[9] *See* Cooper v. New York State Office of Mental Health, 162 F. 3rd 70 (CA2, 1998), Scott v. University of Miss., 148 F. 3rd 493 (CA5 1998), Coger v. Board of Regents of the State of Tenn., 154 F. 3rd 296, Goshtasby v. Board of Trustees of the University of Ill., 141 F. 3rd 76l (CA7 1998), Keeton v. University of Nev. System, 150 F.3rd 1055 (CA9 1998) and Migneault v. Peck, 158 F.3rd 1131 (CA 10 1998).
[10] *See* Humenansky v. Regents of University of Minn., 152 F. 3rd 822 (CA8 1998).
[11] *See* Hans v. Louisiana, 134 U.S. 1 (1890), Blatchford v. Native Village of Noatak, 501 U.S. 44 (1991), Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), and College Savings Bank v. Florida Prepaid Post-Secondary Ed. Expense Bd., 527 U.S. 666 (1999).
[12] *Id.* Quoting *Blatchford*.
[13] 528 U.S. 62, 72.

the concept of sovereign immunity, the Court in *Alden v. Maine*[14] observed that "although the sovereign immunity of the states derives at least in part from the common-law tradition, the structure of history of the constitution make clear that the immunity exists today by constitutional design."

Kimel and others argued that Congress had the power under §5 of the Fourteenth Amendment to abrogate the states' immunity from suit in federal court and that was the intent of Congress in enacting the ADEA. The Court agreed that Congress does have that power under some circumstances. In order to determine if the circumstances were appropriate for Congress to validly exercise that power, the Court indicated that it would apply a "simple but stringent test: 'Congress may abrogate the states' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'"[15] The court then held that Congress had met this test in the enactment of the ADEA.

However, this does not dispose of the issue. There is one more matter to consider. Is the ADEA an appropriate exercise of Congress' power under the 14th Amendment? The relevant parts of that amendment read as follows:

> Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> ……
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> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

In *City of Boerne v. Flores*[16] the Court held that for the exercise of Congress' power under §5 to be valid "there must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[17] In making its determination in *Kimel* as to whether the "congruence and proportionality" standard was met, the Court focused its attention on two aspects of the case. Did the ADEA prohibit conduct that was likely to be held unconstitutional and had Congress assembled sufficient data to indicate that there was a pattern of age discrimination by the states?

Regarding the question of whether the ADEA prohibited conduct that was likely to be considered unconstitutional the Court noted that it had previously considered claims of unconstitutional age discrimination under the Equal Protection Clause and in each instance held that the age classifications at issue did not violate the Equal Protection Clause.[18] Because, according to the Court, age is not a suspect classification under the Equal Protection Clause, states may discriminate on that basis as long as the discrimination is rationally related to a legitimate state interest. The Court concluded that because almost any discrimination based upon age can be justified as long as it is not irrational, there is very little likelihood that any such discrimination would be found to be unconstitutional.

As to the second question of whether age discrimination against state employees was a significant problem, the Court observed that the legislative record regarding the ADEA did not identify any pattern of age discrimination by the states that made remedial legislation necessary. The Court stated, "A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age….Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under §5 of the Fourteenth Amendment. The ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid."[19]

In an effort to give some comfort to the plaintiffs, the Court did point out that state employees who were victims of age discrimination were not totally without remedy. After all, they still could seek redress in state courts because almost every State had enacted statutes that protect state employees from age discrimination. History seems to teach us, however, that such statutes have not produced the level of protection from job bias as have the federal statutes.

The second of the three cases dealing with state employees' access to federal courts was *University of Alabama v. Garrett.*[20] In this case the Court was faced with the same issues it faced in *Kimel* except it was dealing with the Americans with Disabilities Act (ADA),[21] not the ADEA. The Court, citing *Kimel*, stated that Congress may abrogate the states' 11th Amendment immunity if the statute in question contains an unequivocal expression of intent to do so and as long as it acts according to a valid grant of constitutional authority. Furthermore, it observed that only the second of these two requirements was in dispute in this case.

The ADA makes it unlawful for an employer, when making job related decisions regarding an employee or applicant, to discriminate against a qualified person with a disability when that person, with or without a reasonable accommodation, can perform the essential functions of the job held or being sought. The ADA, like the ADEA, includes states and their subdivisions in the definition of "employer."

This case involved two employees of the State of Alabama, one a nurse employed by the University of Alabama at Birmingham, and the other an employee of the State's department of youth services. Both parties filed suits in the United States District Court for the Northern District of Alabama seeking monetary damages from the state alleging violations of Title I of the ADA, which prohibits employment discrimination on the basis of disability. In a single opinion disposing of both cases, the District Court granted summary judgment to the State. The basis of the judgment was that in enacting the ADA, Congress had exceeded its authority in abrogating the states' immunity from such suits. The cases were consolidated on appeal to the United States Court of Appeals for the 11th Circuit, which reversed the decision of the lower court. The United States Supreme Court granted certiorari and held that the suits were barred under the 11th Amendment because Congress had exceeded its power under §5 of the Fourteenth Amendment in abrogating the states' immunity from suit in federal court.

Using language similar to that found in *Kimel* and citing the same precedents, the Court held that the 11th Amendment applies to suits initiated by a citizen against its own non-consenting state.[22] The Court recognized that Congress does have the power under §5 of the 14th Amendment to abrogate the immunity of a state if it expresses its intent in unequivocal language in the statute and if the statute is an appropriate §5 vehicle for the exercise of that power. The Court indicated that only the second of these principles was at issue in this case.

The Court stated that Congress does have the power under §5 of the Fourteenth Amendment to enforce the substantive guarantees found in §1 of that Amendment by the enactment of "appropriate legislation." It also indicated that it was the Court's responsibility, not Congress' to define the substance of constitutional guarantees. "Accordingly, §5 legislation reaching beyond

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[14] 527 U.S. 706 (1999).
[15] Dellmuth v Muth, 491 U.S. 223, 228 (1989) (quoting Atascadero State Hospital v. Scanlon, 491 U.S. 234, 242 (1985)).
[16] 521 U.S. 507 (1997).
[17] *Id*. at 520.
[18] *See* Gregory v. Ashcroft, 501 U.S. 452 (1991), Vance v. Bradley, 440 U.S. 93 (1979), and Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).
[19] 528 U.S. 62, 91 (2000).
[20] 531 U.S. 356 (2001).
[21] 104 Stat. §330.
[22] The Court cited as precedent Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000), College Savings Bank v. Florida Prepaid Post secondary Ed. Expense Bd., 527 U.S. 666 (1999), Seminole Tribe of Florida v. Florida, 517 U.S.44 (1999), and Hans v. Louisiana, 134 U.S. 44 (1890).

the scope of §1's actual guarantees must exhibit 'congruence and proportionality' between the injury to be prevented or remedied and the means adopted to that end."[23] Determination of the issue of congruence and proportionality apparently is a two-step process.

The first step is to determine if the statute (in this case the ADA) prohibits conduct that is likely to be held unconstitutional. The answer to this question seems to turn on whether the class of individuals to be protected is a suspect class for 14th Amendment purposes. The Court in *Cleburne v. Cleburne Living Center, Inc.*[24] apparently held that persons with disabilities were not members of a suspect class. In *Cleburne* the Court held that mental retardation did not qualify as a suspect or quasi-suspect class and that, therefore, the validity of any legislation regarding those afflicted with mental retardation would be determined by using the minimum "rational basis" test. This classification was then apparently extended to other types of disabilities covered by the ADA. Accordingly, any state action discriminating against the disabled would be legitimate as long as it was not irrational. In the Court's words, "[S]uch a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[25] The Court continued, "Thus, the result of *Cleburne* is that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. They could quite hard-headedly—and perhaps hard-heartedly—hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause."[26] Consequently, it is unlikely that any conduct prohibited by the ADA would be found to be an unconstitutional violation of the Equal Protection Clause.

The Court then turned its attention to step two of the congruence and proportionality test. Did Congress identify a history and pattern of unconstitutional employment discrimination by the states against the disabled? The Court opined that the legislative record of ADA reveals that Congress did not identify a pattern of irrational state discrimination against persons with disabilities. In a strongly worded dissent, Justice Breyer disagreed with the majority on the lack of evidence showing patterns of discrimination by the states. According to Justice Breyer, Congress had documented much evidence of society-wide discrimination against persons with disabilities including evidence of such behavior on the part of state officials. In effect, he accused the majority of ignoring the facts and placing an unnecessary burden of Congress' fact finding procedures.

Nevertheless, the majority of the Court held that the ADA failed to pass muster regarding the congruence and proportionality test and that, therefore, the ADA did not constitute a valid abrogation of the states' immunity proscribed by the 11th Amendment.

The final case in this trilogy is *Nevada Department of Human Resources v. Hibbs.*[27] The statute involved in this case is the Family and Medical Leave Act of 1993 (FMLA).[28] The FMLA gives eligible employees the right to take up to 12 weeks of unpaid leave per year for any of a number of statutory reasons, including the onset of a serious health condition in the employee's spouse, child, or parent.[29] The Act also gives an aggrieved employee the right to bring suit in federal or state court against the employer (including a state or its political subdivisions) for equitable relief and monetary damages when this right is denied or interfered with.

In April and May of 1997, Hibbs, an employee of the Welfare Division of the Nevada Department of Human Resources, requested leave under the FMLA to care for his wife who had been injured in an automobile accident and undergone neck surgery. His employer granted the request for the full 12 weeks of FMLA leave and authorized Hibbs to use the leave intermittently as needed between May and December of 1997. Hibbs used the leave until August 5, 1997, after which he did not return to work. In October, his employer informed Hibbs that he had exhausted his FMLA leave, that he would receive no further leave, and instructed him to return to work by November 12, 1997. Hibbs failed to do so and was terminated. He then filed suit against the Department of Human Resources and two of its officers in the United States District Court for the District of Nevada seeking equitable relief and damages. The District Court granted summary judgment to the defendants on the grounds that the suit was barred by the 11th Amendment. The United States Court of Appeals for the Ninth Circuit reversed. The U.S. Supreme Court granted certiorari to resolve a split among the Courts of Appeals on the question of whether an individual may sue a State for money damages in federal court for violation of the FMLA. The Supreme Court held that Congress had validly abrogated the states' immunity and affirmed the decision of the Ninth Circuit.

In its opinion the Court restated its position that the Constitution does not provide for federal jurisdiction over suits against non-consenting states but that Congress may abrogate that immunity if it makes its intention unequivocally clear in the language of the statute and acts pursuant to a legitimate exercise of it power under §5 of the 14th Amendment. It then held that Congress had clearly expressed its intention to abrogate the states' immunity in its enactment of the FMLA and the case turned on the validity of Congress' action measured by §5 of the 14th Amendment. According to the Court, in enacting the FMLA, Congress relied upon two powers vested in it by the Constitution; its power over commerce expressed in Article 1, §8 and its power under §5 of the 14th Amendment. Citing *Seminole Tribe of Florida v. Florida*,[30] the Court held that Congress may not abrogate the states' immunity under the commerce clause. It may, however, do so under §5 of the 14th Amendment because "the Eleventh Amendment, and the principle of sovereignty which it embodies, are necessarily limited by the enforcement provisions of §5 of the Fourteenth Amendment."[31]

Citing *Boerne* the Court noted that in order for legislation to be valid under §5 it must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[32] Making this determination is a two-step process. First, does the statute in question prohibit conduct likely to be unconstitutional under the Equal Protection Clause of the 14th Amendment and, secondly, has Congress identified a history and pattern of discrimination by the states?

In *Kimel* and *Garrett* the Court had dealt with discrimination based upon age and disability respectively. Neither case involved parties who were members of a suspect or quasi-suspect class for equal protection purposes. Hence, the Court evaluated the validity of the state action using the rational basis test. Under this test the state action is considered to be legitimate as long as it is rationally connected to a permissible or legitimate state objective. In the opinion of the Court it is quite unlikely that a violation of either the ADEA or the ADA would be considered unconstitutional under the equal protection clause. This conclusion led to the decision that Congress' abrogation of states' immunity was an improper exercise of its powers granted by §5 of the 14th Amendment.

In *Hibbs* the Court was dealing with the FMLA, a statute that "aims to protect the right to be free from gender-based discrimination in the workplace."[33] Gender based classifications, according to the Court, are classifications involving a quasi-suspect class. Therefore, the evaluation of any classification based upon gender is subject to heightened scrutiny.[34] This means that the state action will be considered valid only if it is substantially related to an important governmental interest. Thus it is much more likely that discrimination based upon gender will not pass equal protection muster. This obviously is a major difference between *Hibbs* and the cases of *Kimel* and *Garrett.* The Court stated:

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[23] 531 U.S. 356, 365 (2001).
[24] 473 U.S. 432 (1985).
[25] 531 U.S. 356, 367 (2001) quoting Heller v. Doe, 509 U.S. 312, 320 (1993) (citing Nordlinger v. Hahn, 505 U.S. 1 (1992) and New Orleans v. Dukes, 427 U.S. 297, 303 (1976).
[26] *Id*. at 367-368.
[27] 538 U.S.721 (2003).
[28] 107 Stat. 9, 29 USCS §2601 et seq.
[29] 29 U.S.C. §2612(a)(1)(C).
[30] 517 U.S. 44.
[31] 538 U.S.721, 727 (2003).
[32] *Id*. at 728.
[33] *Id*. at 728.
[34] *See* Craig v. Boren, 429 U.S. 190 (1976).

> We reached the opposite conclusion in *Garrett* and *Kimel*. In those cases, the §5 legislation under review responded to a purported tendency of state officials to make age or disability based distinctions. Under our equal protection case law, discrimination on the basis of such characteristics is not judged under a heightened review standard, and passes muster if there is a rational basis for doing so at a class-based level, even if it is probably not true that those reasons are valid in a majority of cases…. Thus, in order to impugn the constitutionality of state discrimination against the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a widespread pattern of irrational reliance of such criteria. We found no such showing with respect to the ADEA and Title I of the Americans with Disabilities Act of 1990…. Here however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test – it must serve important governmental objectives and be substantially related to the achievement of those objectives, it was easier for Congress to show a pattern of state constitutional violations.[35]

As to the second prong of the proportionality and rationality test, the Court cited a long history of gender-based discrimination by the states. The Court pointed out that, in its own opinions through the years, it had recognized that throughout the history of this nation states had enacted many laws limiting women's employment opportunities and that Congress had responded to this history of discrimination by the enactment of Title VII of the Civil Rights Act of 1964.[36] Yet, despite this statute states continued to rely upon gender stereotypes in the administration of leave benefits. Consequently, policies regarding leave for family reasons typically made distinctions between male employees and female employees. These distinctions were based upon stereotypical assumptions regarding the gender responsibility for family duties. Substantial evidence of such widespread practices was included in the legislative record before Congress and it was this type of practice that the FMLA sought to eliminate. As the Court noted, "…stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread."[37] It was this type of discriminatory treatment that the FMLA sought to eliminate. Said the Court, "(I)n sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic §5 legislation."[38]

In conclusion, the Court stated, "(F)or these reasons, we conclude that §2612(a)(1)(C) is congruent and proportional to its remedial object and can be understood as responsive to, or designed to prevent unconstitutional behavior."[39] Thus the Court validated the abrogation of states' immunity by the family leave provisions of the FMLA.

It must be pointed out that the FMLA provides for four categories of leave, three of which relate to care of family members and one relates to the individual employee.[40] The first relates to the birth and care for a child,[41] the second relates to the adoption or foster care of a child,[42] the third relates to care of a spouse, child, or parent with a serious health condition,[43] and the fourth relates to an individual employee who cannot perform his job duties because of a serious health problem.[44] In *Hibbs* the Court was faced only with the third of these categories. The application of the decision to the first two categories seems probable in that they too deal with leave to provide care for a family member and the same stereotypical assumptions regarding family care duties would seem to apply. However, the United States Court of Appeals for the Tenth Circuit has held that the decision in *Hibbs* does not pertain to the fourth category, relating to the self care of an individual employee who cannot perform his job duty because of a serious health problem.[45] The Tenth Circuit's decision noted that the decision in *Hibbs* rested on a legislative history dealing with gender discrimination whereas the self-care provision does not implicate gender discrimination. Whether this decision will be followed by other circuits or by the Supreme Court is purely conjectural at this time, but the decision does have a ring of legitimacy.

Kimel, *Garrett*, and *Hibbs* deal with the ADEA, ADA, and FMLA respectively. One has to wonder, then, what about the flagship of all the anti-discrimination laws, Title VII of the Civil Rights Act of 1964 prohibiting employment discrimination on the basis of race, color, religion, sex, and national origin? The Supreme Court apparently answered this question in 1976 in the case of *Fitzpatrick v. Bitzer.*[46] In *Fitzpatrick* the Court held that the provisions of Title VII that give aggrieved employees the right to sue for redress in federal courts was a legitimate exercise of Congressional power under §5 of the 14th Amendment thereby abrogating the states' immunity in regard to these cases. Thus it appears that state employees still have substantial access to the federal courts to redress rights promulgated by the various federal anti-discrimination statutes except in cases involving the ADEA, ADA, and non-family leave provisions of the FMLA.

The decisions in *Kimel, Garrett, and Hibbs* raise some interesting questions regarding the Court's position regarding federalism. First, do *Kimel and Garrett* signal a trend toward limiting the exercise of Congress' 14th Amendment power?. Secondly, does *Hibbs* indicate that the Court is still inclined to limit States' rights in favor of the exercise of federal power? Perhaps the decision in the case of *Tennessee v. Lane*[47] provides some guidance. *Lane* dealt with Title II of the ADA[48], which provides, "No qualified person with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity."[49] In this case two paraplegics, one a defendant and one a court reporter, were unable to gain access to a second floor courtroom because the building did not have an elevator. The Court, unlike in *Garrett,* found that there was pervasive unequal treatment of persons with disabilities in terms of their access to public facilities, specifically courtrooms, and that this infringed upon their fundamental right of access to the courts. Consequently, any state action is going to be analyzed under the heightened scrutiny test. Furthermore, the Court was convinced that there was ample historical evidence of unconstitutional treatment of the disabled by state agencies with respect to this particular type of public service. Consequently, the Court found that Title II of the ADA was appropriate prophylactic legislation and did indeed legitimately abrogate states' immunity.

Lane may be a harbinger of things to come and may indicate that the Court has gone as far in protecting states' rights as it is willing to go at this time. One can only ponder the future direction the Court may take, particularly at this time in history when substantial changes in the makeup of the Court are looming on the horizon.

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[35] 538 U.S. 721, 735-736 (2003) (internal quotes and citations omitted).
[36] 78 Stat 255, 29 U.S.C. 2000(e) et seq.
[37] 538 U.S. 721,730.
[38] *Id*. at 735.
[39] *Id*. at 740.
[40] *See* 29 U.S.C. §2612(a)(1).
[41] *See* 29 U.S.C. §2612(a)(1)(A).
[42] *See* 29 U.S.C. §2612(a)(1)(B).
[43] *See* 29 U.S.C. §2612(a)(1)(C).
[44] *See* 29 U.S.C. §2612(a)(1)(D).
[45] Brockman v. Wyoming Department of Family Services, 342 F.3rd 1159 (10th Cir. 2003).
[46] 427 U.S. 445 (1976).
[47] 541 U.S.509 (2004).
[48] 104 Stat 337, 42 U.S.C. 12131 et seq.
[49] 42 U.S.C. § 12132.