State Sovereign Immunity versus Individual Rights under Federal Employment Laws

by

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Using a broad reading of the 10th and 11th Amendments, the U.S. Supreme Court has shielded State governments from federal statutory remedies for employment discrimination – unless either (a) the State consents to the suit or (b) fundamental rights are coupled with a historical pattern of discrimination by States. Where fundamental rights are involved – such as due process access to the courts – those rights prevail over the sovereign immunity defense.[1] In the employment sector, however, discrimination based on age,[2] disability[3] or overtime pay[4] is judged by a "*rational basis test*" and does not rise to the level of a fundamental right. Gender-based discrimination is viewed with greater scrutiny, and federal laws (such as the Family Medical Leave Act) do apply to the States, especially since a majority of the Justices believe that there was a historical pattern of gender-based discrimination in State family medical leave policies.[5] In reaching these conclusions during the past ten years, most U.S. Supreme Court decisions have expanded the scope of the 11th Amendment to provide a sovereign immunity shield that prevents State employees from using most federal discrimination laws to seek damages against the State. Simultaneously, the Supreme Court has narrowed Congressional authority under the Interstate Commerce Clause and used the sliding scale to evaluate when 14th Amendment rights justify abrogation of State sovereign immunity under New Federalism.

Historical and Constitutional Foundations For and Against State Sovereign Immunity

State sovereign immunity is based on (a) natural law or common law principles, (b) views of selected "Founding Fathers" and (c) a broad reading of the 10th and 11th Amendments of the U.S. Constitution. The 10th Amendment to the U.S. 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.**

The Founders were far from being of one mind on the issue of State sovereign immunity. James Wilson, who was a delegate to the Constitutional Convention and later a justice on the Supreme Court, thought that the "government of each state ought to be subordinate to the government of the United States."[6] Echoing this sentiment, Edmund Randolph (U.S. Attorney General and plaintiff's counsel in the *Chisholm* case (*discussed below*)), avowed that the language in Article III permitting suit in federal court "where a state shall be a party" trumped any natural law assumptions concerning sovereign immunity. Even Alexander Hamilton's advocacy for State sovereign immunity was aimed primarily at diversity cases involving State law claims (such as contract disputes), not at federal questions.[7] In his 1999 dissent in the *Alden* case, Justice Souter viewed sovereign immunity as "an obsolete royal prerogative inapplicable to a republic," which was available to the English crown – but not to the colonies – and which the 10th Amendment did not adopt as a constitutional doctrine.[8] Instead, the right of the people to have remedies against wrong-doing is more fundamental. Justice Brennan's 1976 concurring opinion in *Fitzpatrick* espoused the belief that the States surrendered sovereign immunity "in the plan of the Convention" that formed the Union, at least insofar as the States granted Congress specifically enumerated powers."[9]

In a number of areas, the powers of State governments are expressly prohibited or limited by U.S. Constitutional provisions. With regard to individual rights, States cannot pass or enforce laws or otherwise deny citizens of "life, liberty or property without due process of law"[10] or "equal protection of the laws"[11] or "privileges and immunities."[12] These 14th Amendment clauses have also been interpreted to extend other Bill of Rights guarantees (protecting against federal Congressional encroachment of individual's rights) by prohibiting the States from infringing upon many of those individual rights as well. "Full faith and credit" is to be given to records and judicial proceedings of other States.[13] Voting rights are protected.[14] Racial discrimination is banned.[15] Arbitrary criminal penalties are prohibited by the ex post facto law and bills of attainder clauses (with the latter prohibiting State legislatures from passing laws that impose criminal judgments without judicial proceedings). State statutes that impair "obligation of contracts" are also outlawed.[16] In addition, a number of other powers (such as treaty making) are denied the States because they are reserved to the federal government.[17] Central to the discussion of this paper, Article I of the U.S. Constitution vests Congress with the authority to "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."[18]

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In a number of areas, the powers of State governments are expressly prohibited or limited by U.S. Constitutional provisions. With regard to individual rights, States cannot pass or enforce laws or otherwise deny citizens of "life, liberty or property without due process of law"[28] or "equal protection of the laws"[29] or "privileges and immunities."[30] These 14th Amendment clauses have also been interpreted to extend other Bill of Rights guarantees (protecting against federal Congressional encroachment of individual's rights) by prohibiting the States from infringing upon many of those individual rights as well. "Full faith and credit" is to be given to records and judicial proceedings of other States.[31] Voting rights are protected.[32] Racial discrimination is banned.[33] Arbitrary criminal penalties are prohibited by the ex post facto law and bills of attainder clauses (with the latter prohibiting State legislatures from passing laws that impose criminal judgments without judicial proceedings). State statutes that impair "obligation of contracts" are also outlawed.[34] In addition, a number of other powers (such as treaty making) are denied the States because they are reserved to the federal government.[35] Central to the discussion of this paper, Article I of the U.S. Constitution vests Congress with the authority to "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes."[36]

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In contrast, other "Founding Fathers" and five of current nine U.S. Supreme Court Justices emphasize that State governments retain substantial power (despite the aforementioned restrictions). In THE FEDERALIST PAPERS NO. 39, James Madison (future U.S. President) said of the U.S. Constitution that it "leaves to the several States a residuary and inviolable sovereignty over all other objects." The majority of U.S. Supreme Court Justices concluded in 1999 that the "Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States,"[37] although Article I of the Constitution does not expressly make that distinction. Considering "immunity from private suits as central to sovereign dignity," Justice Kennedy concluded in the 1999 employment case of *Alden et al. v. Maine* that "neither the Supremacy Clause nor the enumerated powers of Congress confer authority to abrogate the States' immunity from suit in federal court."[38] Citing deep English roots, he found that "States' immunity from suit is a fundamental aspect of sovereignty which States enjoyed before the ratification of the Constitution, and which they retain today."[39]

11th Amendment Controversy

At the heart of such a conclusion is a very expansive reading of the 11th Amendment, adopted in response to the case of *Chisholm Ex'r v. Georgia*. An assumpsit action was brought by the executor of a South Carolina decedent's estate against the State of Georgia in federal court to compel payment on Georgia Revolutionary War bonds. In siding with Chisholm, Justice Blair concluded that "a State, by adopting the Constitution, has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty."[40] The decision against the State of Georgia prompted the Georgia House of Representatives to pass a bill making it a felony (punishable by death) to attempt to enforce the U.S. Supreme Court's *Chisholm* decision.[41] Since the U.S. Constitution provides that no State shall pass a law impairing the obligation of contracts,[42] such a bill should be unconstitutional. Nevertheless, Congress quickly reacted to concerns of debt-laden States by proposing the 11th Amendment in 1793, which was adopted by a sufficient number of States by 1798.

The 11th Amendment to the U.S. Constitution limits the authority of federal courts to hear certain cases in which a State is a defendant, proving that:.

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

Ironically, this Amendment removed from the jurisdiction of federal courts the very type of conflict most suitable for resolution by federal courts in an era when "instate bias" was of considerable concern. Although it does not expressly guarantee States sovereign immunity, few doubted that to be its purpose – *at least as to matters directly listed in the Amendment.*

The Scope of Sovereign Immunity versus In-State Citizen Suits against States

After the passage of the 11th Amendment, should a citizen be able to *sue his or her own State* in federal or State court to compel the State's compliance with federal law? Justice Souter (in his recent dissents) believes that one of the main objectives of the Constitutional Convention was to find a better way to bind the States to federal law. The language of the 11th Amendment expressly bars citizens of other States and foreign citizens from commencing suits against a State, but it does not expressly ban a suit by an in-state citizen against his or her own State.

Strict construction of the 11th Amendment has been supplanted by historical assumptions that assume the States retained immunity from all citizen suits (brought without the State's consent) because such sovereign immunity predated the U.S. Constitution. In an 1890 decision denying an in-state citizen an order compelling the State of Louisiana to honor a bond coupon interest payment, the U.S. Supreme Court postured, "Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own state in federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indigently repelled?"[43] Since many State courts lacked jurisdiction to hear nonconsensual individual suits against the State government,[44] the Court reasoned in *Hans v. Louisiana* that the federal courts surely lacked the power as well (especially since federal jurisdiction was premised on concurrent jurisdiction). Ignoring the judicial maxim of *expressio unius est exclusio alterius*, the Court simply assumed that the 11th Amendment did not need to include that "obvious" limitation on in-state citizens' claims against the State. Recent "New Federalism" cases expanding the scope of the 11th Amendment have relied on the *Hans* case to preclude in-state citizens from suing their own State to enforce federal laws.[45]

Limits to Sovereign Immunity

Despite the current Supreme Court's expanded view of the sovereign immunity defense, the doctrine may *not* insulate States from suits in the following categories. State sovereign immunity may NOT apply where:

1. State voluntarily waives sovereign immunity[46] by statute or

State consents to removal of the case to federal court[47] or
State consents to a suit or fails to plead sovereign immunity as a defense[48] or

2. **"Abrogation Doctrine" (especially important to interpreting the application of federal employment laws to the States) applies to**
   - **A. 14th Amendment due process[49] or equal protection principles[50] or**
   - **B. Interstate Commerce Clause[51] (extension recently limited) or**
3. **U.S. Supreme Court is reviewing the case under its Constitutional appellate jurisdiction[52] or**
4. **Federal government initiates the suit[53] or**
5. **Another State government initiates the suit[54] or**
6. **Some subdivisions of the State, such as cities and counties,[55] are sued or**
7. **State officials are sued in their personal capacity or under 1983 actions,[56] but "official immunity doctrine" or the "public duty doctrine" may provide qualified immunity.[57]**

Waiving Sovereign Immunity

Most States have voluntarily limited the scope of sovereign immunity through State statutes or State judicial rulings which permit tort suits against the State for injuries that occur on State property or which are caused by State employees in their official capacity. Awards in such suits are typically capped to limit the dollar recovery per person and per incident,[58] with the States abrogating their sovereign immunity shield only up to that monetary cap. In addition, most States have enacted civil rights legislation that allows State citizens to sue the State as well as private employers under State law in certain circumstances. An alternative approach, therefore, would be to allow States to be sued for violating federal employment laws and civil rights – with the lawsuit tried in State court – and subject to that State's monetary cap on damages. However, this approach has not been adopted by the courts when assessing the viability of employment claims against the States.

The U.S. Supreme Court and State supreme courts have recognized that a State can waive sovereign immunity or can consent to be a party in a suit. As is the case with in personam jurisdiction, sovereign immunity is designed to protect the defendant, who can waive its objection to jurisdiction, so a case can be heard in a court with subject matter jurisdiction. A State voluntarily waives the sovereign immunity defense by requesting that the case be removed to federal court. In *Lapides v. Board of Regents*, the State sought such removal of the college professor's claims under the Georgia Torts Claims Act and 42 U.S.C. § 1983. In a rare unanimous decision, the Supreme Court held in 2002 that the State voluntarily invoked federal jurisdiction as a defendant on State tort claims.[59] Applying *Lapides* to an ADA case in which the State removed the case to federal court,[60] the 10th Circuit concluded that the State also waived its sovereign immunity.[61] Most States have also enacted statutes (or have had State judicial decisions) that diluted sovereign immunity or set forth exceptions to it.

Abrogation Doctrine

The court-created "Abrogation Doctrine" permits Congress to regulate the States, but only if pursuant to a valid grant of Constitutional authority. The Supreme Court has created a two-prong test. For a federal law to abrogate State sovereign immunity, Congress must (1) "unequivocally express . . . its intent to abrogate the immunity," and (2) act "pursuant to a valid exercise of power."[62] Historical authority of Congress to legislate has been grounded primarily in the 14th Amendment's Equal Protection Clause or Due Process Clause or the Commerce Clause. In addition, there "must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[63] This Abrogation Doctrine was analyzed in most of the employment discrimination cases discussed below.

Commerce Clause and Regulation of Business Practices & Employment Rights

The Commerce Clause serves as a primary vehicle for regulating business activities. Article I, § 8, cl. 3 of the U.S. Constitution expressly delegates to Congress the authority "*to regulate commerce with foreign nations, and among the several States and with the Indian tribes*." Some authors have viewed this Commerce Clause as "second in importance to no other provision in the Constitution." James Monroe (a member of Congress under the Articles of Confederation and future U.S. President) believed national regulation was "necessary to preserve the Union; without it, it will infallibly crumble to pieces."[64]

Since the U.S. Supreme Court had upheld the constitutionality of the National Labor Relations Act (NLRA) in 1937,[65] federal legislation imposing regulations on private businesses has generally been upheld (as not being an impermissible encroachment on State power). In 1941 the Supreme Court used the Commerce Clause to justify the minimum wage and maximum hour requirements of the Fair Labor Standards Act (FLSA) and to prohibit shipment in interstate commerce of lumber created in violation of its requirements.[66] Citing the grandparent of all commerce

cases (*Gibbons v. Ogdon* (1924)), this *Darby* decision recognized that the "power of Congress over interstate commerce 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.'"[67] When the "necessary and proper" clause of Art. I, § 8, cl. 18 of the Constitution is appendaged to the Commerce Clause, it facilitates Congressional laws that "affect" interstate commerce. "The power of Congress over intrastate commerce . . . extends to those activities which so affect interstate commerce . . . as to make regulation of them appropriate means to attainment of a legitimate end."[68]

After FDR's New Deal legislation finally survived Supreme Court scrutiny, an expansive reading of the Commerce Clause validated federal legislation ranging from civil rights to environmental laws to employment practices. Justice Brennan, in his concurring opinion in *Fitzpatrick*, viewed Congressional authority to enact Title VII of the Civil Rights Act to be strongly rooted in the enumerated powers of both the Commerce Clause and section 5 of the 14th Amendment.[69]

Although the NLRA contained language initially exempting States and their subdivisions, no such exemption was contained in the FLSA. By 1985, the Supreme Court recognized Congressional authority to apply minimum wage and overtime provisions of the FLSA to local government transportation employees in *Garcia v. San Antonio Metropolitan Transit Authority*, abandoning confused attempts to distinguish "governmental" versus "proprietary functions" of State or local governments.[70] Justice Blackmun, writing for the majority, concluded that

> **we perceive nothing in the overtime and minimum-wage requirements of FLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision. SAMTA faces nothing more than the same . . . obligations that hundreds of thousands of other employers, public as well as private, have to meet.[71]**

The report of President Reagan's Domestic Policy Council – Working Group on Federalism predicted that after *Garcia* "in effect the federal judiciary would no longer entertain federalism challenges to congressional exercise of the commerce power."[72] Justice Souter's dissent in *United States v. Morrison*[73] advances this sentiment one step further when he advocates treating Commerce Clause questions as non justiciable political questions.

<u>New Federalism</u>

How that perception of the Commerce Clause has changed in the past decade since the elevation of the 11th Amendment and the ubiquitousness of 5-4 decisions fostering "New Federalism"! Chief Justice Rehnquist – a long-time advocate of a restricted federal government – laid the foundation for "New Federalism" in *United States v. Lopez.* Therein, Rehniquist declared in 1995 that the subject matter of a federal statute must have "substantial effect" on interstate commerce – citing James Madison for the principle that "powers delegated . . . to federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[74] The assault on the Commerce Clause did not begin in the employment sector, but would soon encompass that realm as well.

The 55-year expansion of the plenary nature of the Commerce Clause was halted with the *Lopez, Morrison, SWANCC* and *Seminole* decisions. Deferring to State police powers, the Court found the federal Gun-Free School Zones Act of 1990 to be unconstitutional in *Lopez*, as having an insufficient nexus to interstate commerce.[75] With similar reasoning in *Morrison* in 2000, the Supreme Court struck down portions of the Violence Against Women Act,[76] concluding that sexual assaults are "not commercial" in nature and rejecting the "argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[77] Where the regulated activity does not either cross a state line or affect a channel of interstate activity, it must have a "commercial character" or involve an "economic endeavor" to be viable for regulation under the Commerce Clause.[78]

In interpreting Clean Water Act (CWA) regulations, the majority of U.S. Supreme Court justices In *SWANCC* refused to give deference to the Corp of Engineers' Migratory Bird Rule. The Court emphasized the "primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources" and that permitting "federal jurisdiction over ponds and mudflats falling within the 'Migratory Bird Rule' would result in significant impingement of the States' traditional and primary power over land and water use."[79] In refusing to grant deference to the administrative agency, the majority of the Court avoided ruling directly on "significant constitutional and federalism questions" concerning whether Congress had sufficient authority under the Commerce Clause to more broadly define "navigable waters."[80] Instead, the Court limited the scope of the CWA to require a significant nexus between wetlands and traditional "navigable waters" and refused to extend jurisdiction to isolated wetlands and nonnavigable, intrastate waters. In so ruling, the majority ignored clear Congressional intent that the CWA receive the "broadest interpretation" to foster environmental protection, as well as the long-standing recognition that regulation of natural resources (water, birds) fall within the scope of the Commerce Clause. Justice Holmes recognized 85 years ago "that the protection of migratory birds is a textbook example of a national problem . . . [that] can be protected only by national action" because of their transitory nature, a point reemphasized in Steven's dissent in 2000.[81]

The 1996 *Seminole Tribe* case involved an attempt by the tribe to compel the State of Florida to negotiate gaming rights in good faith under the federal Indian Gaming Regulatory Act, passed by Congress under express Constitutional authority to regulate Indian Commerce.[82] The Supreme Court declared that "even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[83] Ironically, Indian Tribes are more than "private parties," having their own sovereign characteristics under the U.S. Constitution. The federal government itself and States (as sovereigns) have generally been allowed to bring suits against States even where individuals have been barred from bringing private claims or qui tam actions.[84] Furthermore, the Tribe was not seeking monetary damages against the State, but merely equitable enforcement of the duty to negotiate a compact in good faith. This case was an even more deleterious limitation of both the Commerce Clause and sovereign rights of Indian tribes than the monetary damages bans in the employment sector.

Concluding that its interpretation of the 11th Amendment trumped both the Indian Commerce Clause and Interstate Commerce Clause, the 5-4 majority in *Seminole Tribe overruled* the 1989 *Pennsylvania v. Union Gas Co.*[85] CERCLA environmental decision. The *Union Gas Co*. case had viewed Congressional power of the Interstate Commerce Clause as plenary, as part of the original constitutional understanding – an understanding which could not be changed without express reference in subsequent amendments. *Union Gas Co.'s* plurality decision had also considered the Commerce Clause power to be "incomplete without the authority to render the States liable for damages."[86] In overruling that case, the *Seminole Tribe* case paved the way for other cases that would take a similarly restrictive view of the scope of Congressional authority under the Commerce Clause when applied to the employment sector.

<u>FLSA</u>

The U.S. Supreme Court upheld both the constitutionality of the Fair Labor Standards Act (FLSA) (as applied to private sector businesses) in *Darby* in 1941 and the authority of Congress to apply FLSA minimum wage and maximum hour requirements to local governments in the 1985 *Garcia* case (*as discussed above*). Using broad sweeping language, the majority considered as constitutional the application of fair employment requirements to both private and State employers and did not consider such application to be "destructive of state sovereignty or violative of any constitutional provision."[87]

When the Fair Labor Standards Act (FLSA) came under review by the Rehniquist-Scalia Court in 1999, however, the Court played the State sovereign immunity trump card and concluded that State employed probation officers could not sue their own State for overtime pay under FLSA in *Alden et al. v. Maine.*[88] Without directly overruling *Garcia*, the *Alden* decision gutted the effect of *Garcia* or at least limited its effect to local government workers. Although the Court indicated that States are still bound by the federal laws, the 5-4 majority of the Supreme Court concluded that "powers delegated to Congress under Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts."[89]

Justice Kennedy (writing for the majority in *Alden*) was also inclined to bend the literal text of the 11th Amendment to fit the round peg in the square hole if necessary, as he tried to square the concept of sovereign immunity with common law, historical understandings, and Constitutional federalism. This 1999 case prompted a well-reasoned dissent by Justice Souter, clarifying historical obfuscations and denouncing the majority's interpretation of both amendments and sovereign immunity principles. The dissenting judges believed that Maine should be subject to the national objective of the FLSA because federal legislation enacted through the Commerce Clause and pursuant to the Supremacy Clause is binding on the States, as previously decided in *Garcia*. Consistent with this view, sovereign immunity should not be used as a concept to protect a lesser sovereign from enforcing the laws of a greater (national) sovereign pursuant to valid Constitutional authority.

***Alden* can be distinguished from other key predecessor cases. In *U.S. v. Darby,* the federal government was the plaintiff seeking enforcement of FLSA in federal court (against a private sector business), while Alden was a private citizen seeking monetary damages against the State in State court. Even in the 1890 *Hans* case, an in-state citizen was not allowed to use federal court to seek a State-based remedy, while Alden was precluded from enforcing federal law rights against the State government in State courts. Because the *Alden* case was initiated in State court, the 10th Amendment, coupled with Founding Father Madison's views, were seen as the primary Constitutional foundation for State sovereign immunity.**

A federal government-initiated suit against a State is still viewed as permissible (as an exception to sovereign immunity), while private damage claims against a State are rarely permitted under New Federalism. In a case decided before *Garcia*, the U.S. Supreme Court denied overtime FLSA compensation claims to Missouri Department of Public Health State workers in 1973 based on the 11th Amendment,[90] indicating that these employees were limited to restitution secured for them by the federal Secretary of Labor. This is especially true in light of the Supreme Court's reluctance to allow qui tam claims on behalf of the federal government against the States.[91] Such rulings

leave most State employees no effective remedy unless State employment laws afford them protection or unless a State expressly waives sovereign immunity.[92]

ADEA

The federal Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful for an employer of 20 or more employees "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age," if that individual is over 40.[93] ADEA references FLSA, through which aggrieved employees are afforded legal and equitable relief. Statutory requirements of ADEA were expressly applied to subdivisions and agencies of State governments as employers in 1974 amendments to FLSA, and Congress expressly permitted employees to file civil actions in State or federal court. As it had done a year earlier with the FLSA, a bare majority of the Supreme Court used New Federalism to bar in-state employees' suits based on federal employment laws. While the earlier FLSA case was filed in State Court, the consolidated ADEA *Kimel* cases originated in federal District Court. In *Kimel v. Florida Board of Regents*, a Department of Corrections employee, as well as faculty members and librarians of State universities in Florida and Alabama, were all denied the opportunity to exercise their rights against age discrimination under ADEA.[94]

The Court used its two-prong Abrogation Doctrine for determining whether ADEA abrogates States' 11th Amendment sovereign immunity. A plurality of the Court in *Kimel* concluded first that Congress clearly intended to apply the age discrimination law to the States. However, a different plurality held that the second prong was not satisfied because protection against age discrimination did not rise to the level of a fundamental right under the 14th Amendment, so ADEA was not a valid exercise of 14th Amendment Congressional authority to abrogate State sovereign immunity principles. The right of one to be free of discrimination on the basis of "age" was afforded only "*rational basis*" protection under the Court's interpretation of the Equal Protection Clause[95] and, thus, States were permitted to discriminate on the basis of age if doing so is "rationally related to a legitimate State interest."[96] This 2000 decision concluded that Congress inappropriately elevated age to "heightened scrutiny" protection. Unlike race and gender (which are afforded the higher protection), O'Connor declared that "[o]ld age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it . . . [so] age is not a suspect classification under the Equal Protection Clause."[97]

Furthermore, ADEA exceeded the Court's doctrine of *"congruence and proportionality"* of remedies. Despite substantial evidence of private sector discrimination and many references in the Congressional Record to discrimination by State governments, the Court found no widespread pattern of discrimination by the States, so monetary damages were not appropriate.[98]

An expanded interpretation of the penumbras of the 11th Amendment was again used as the basis for the decision, even though in-state (rather than out-of-state) citizens were bringing the suit against a State entity. To address this concern, Justice O'Conner echoed Chief Justice Rehnquist's *Seminole Tribe* opinion by noting that the Court "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms."[99] She further concluded that although ADEA was a valid exercise of Congressional power to regulate commerce, "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[100]

Justice Stevens spoke for the dissenting judges who believed that Congress has the power to regulate public as well as private sectors of the workplace and that "[n]either the Eleventh Amendment nor the doctrine of sovereign immunity places any limit on that power."[101] A plurality of the Court concluded, however, that States were protected from ADEA damage suits by in-state employees, thus leaving State employees to seek remedies only if State discrimination statutes permit damages. Under State laws the protection may not be as broad as under ADEA; Missouri, for example, generally extends age protection to age 70,[102] while the federal ADEA law abolished that age cap in 1987 for most professions. Despite the prohibition against ADEA claims against the State, claims against local government employers have been permitted.[103]

ADA Cases

ADA Title I deals with employment, while Title II requires access to public facilities. Under the statutory language of the Americans with Disabilities Act, private employers (and States) are prohibited from

> **discriminating against a qualified individual with a disability because of that disability . . .**
> **in regard to . . . terms, conditions, and privileges of employment [and are required] to**
> **make reasonable accommodations.[104]**

The Supreme Court recently upheld the application of Title II of the Americans with Disabilities Act to the States under the 14th Amendment's Due Process Clause. The 14th Amendment provides, in part, in 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.**

A county courthouse lacked an elevator, making the upstairs courtroom inaccessible to a wheelchair-bound defendant who refused to be carried up the stairs. Recognizing that access to the judicial services was a "fundamental right" guaranteed by due process, the Court concluded in *Tennessee v. Lane et al.* that the 14th Amendment's due process requirements prevail over State sovereign immunity.[105] In *Lane*, monetary damages were not at issue and access to judicial services was viewed as a proportionally appropriate accommodation under the Court's "*congruent and proportionality test.*"[106]

In 2001, however, the Supreme Court struck down State employees' pursuit of monetary damages for ADA discrimination under Title I in *Board of Trustees of the University of Alabama et al. v. Garrett et al*., refusing to use the 14th Amendment's equal protection guarantees to abrogate State sovereign immunity.[107] A nurse and a security officer sued the State of Alabama when the State employer forced a reassignment of the nurse after she returned from breast cancer disability leave and disallowed the latter's request for a reassignment based on his asthma disability. Congressional intent to apply Title I of ADA to the States as employers was clear (satisfying prong one of the Court's Abrogation Doctrine). Nevertheless, the Court found that Congress had exceeded its 14th Amendment authority to enforce the Equal Protection Clause to abrogate States' 11th Amendment sovereign immunity, thereby failing prong two of the Court's Abrogation Doctrine.[108] In so ruling, the Court found no legislatively documented record of a pattern of unconstitutional State-based discrimination against disabled employees and rejected the extensive list of examples submitted to the Congressionally-created Task Force on Rights and Empowerment of Americans with Disabilities, attached in Justice Breyer's dissent.[109] Instead, the majority concluded that ADA monetary remedies failed the "*congruent and proportionality test*"; consequently, States retained 11th Amendment immunity.

State discrimination against disabilities only has to satisfy the "*rational basis test,*" as the Court had previously ruled with mental retardation.[110] As long as there is a rational basis for "disparity of treatment and some legitimate government purpose" (such as saving the State money), a constitutional violation does not occur.[111] Some justices maintain that only purposeful and intentional discrimination violates the Equal Protection Clause.[112]

Dissenting judges criticize the "*rational basis test*" as "a paradigm of judicial restraint" applicable to lower courts that should not be applied to Congress - a constitutionally separate branch of government. Such application improperly positions the Court as a "superlegislature to judge the wisdom or desirability of legislative policy determinations."[113] Nevertheless, because of such rulings, States (as employers) are not subject to ADA damage suits (unless the State consents to the suit by seeking removal of the case to federal court).[114] However, the Court continues to recognize that the 11th Amendment does not protect local governments, which are still subject to private ADA claims.[115]

Even in claims against private employers, the Supreme Court has significantly curtailed the ability of individuals to qualify for protection under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12111 et seq. First, the definition of a "qualified disability" has been substantially limited by the Court's decision to examine potential disabilities in their "corrected state" instead of examining the severity of the disability before a remedial fix or accommodation has been applied. Second, a "broad range of jobs," not merely a single job, must be significantly restricted by a disability before the Court will find a "substantial limitation" on the major life activity of working.[116] Third, and even more remarkable, a disability with a substantial impact on work skills alone may not be sufficient for ADA standing, without also showing that performance of "activities central to daily life" have been significantly impaired.[117]

<u>Gender Discrimination – FMLA and Title VII</u>

Laws aimed at remedying gender-based discrimination have fared better under Supreme Court scrutiny because race and gender have traditionally been judged under a "*heightened scrutiny*" standard, rather than the "*rational basis test.*" A gender-based classification must "'serve important governmental objectives' and 'the discriminatory means employed [must be] substantially related to the achievement of those objectives . . . [and not based on] overly broad generalizations.'"[118] Because of the application of "heightened scrutiny" to gender-based actions, it is easier to establish unconstitutional discrimination and easier to satisfy the Court's judicially-created 14th Amendment Abrogation Doctrine and "*congruent and proportionality tests.*"

The Family and Medical Leave Act (FMLA) allows up to 12 weeks of unpaid medical leave per year for most workers employed for at least a year by a business with 50 or more employees within a 75-mile radius. The leave can be taken to deal with serious health conditions of the employee, spouse, children or parents, as well as in conjunction with the birth or adoption of a child.[119]

In *Nevada Dept. of Human Resources et al. v. Hibbs*, the Supreme Court (in a plurality opinion) upheld a public employee's right to sue his State for violation of FMLA.[120] The federal statute authorizes public employees to

seek damages against State governments, their agencies, and their political subdivisions for violations of FMLA.[121] The intent of Congress to apply FMLA to the States was clear.

Under its Abrogation Doctrine, the Court then turned its attention to the second prong to assess whether FMLA was an appropriate exercise of Congress' 14th Amendment section 5 power. Ironically, the Court offered little direct evidence of Nevada-specific present discrimination, a pivotal point of Justice Scalia's dissent.[122] The majority instead found a history of gender-based discrimination in family medical leave policies by the States (collectively), an assumption that dissenting Justice Kennedy did not find supported by the Congressional Record.[123] Historical stereotypes viewed only women as responsible for family caregiving and did not require or allow men to assume domestic responsibilities, thereby discriminating against males as caretakers. Discrimination against females was even more prevalent. Forty to a hundred years ago, State laws were replete with provisions prohibiting women from practicing certain professions (such as law) and restricting job benefits, based in part on the traditional belief that women should remain in "the center of home and family life."[124] Even though State laws have changed in recent times and no longer facially discriminate based on gender, they continue to be applied in a discriminatory manner. The Court upheld the "prophylactic legislation" to remedy the historical pattern of discrimination by making leave policies available for both men and women, so the employers cannot hire men simply to avoid leave requests. FMLA remedies, including damages, were upheld as "congruent and proportional" to the targeted violation of the 14th Amendment's Equal Protection Clause by States.[125]

A female former State employee's constructive discharge claim against the Pennsylvania state police was upheld as a viable theory under Title VII of the federal Civil Rights Act of 1964 – subject to the defense that she unreasonably failed to avail herself of the internal procedures for reporting sexual harassment. Sovereign immunity issues were not discussed in this 2004 Supreme Court decision,[126] despite the propensity to raise the issue in most claims against States during the past ten years.

In 1976, claims by Connecticut male employees against their State employer under Title VII of the Civil Rights Act of 1964 were permitted in *Fitzpatrick v. Bitzer*.[127] At issue was the State retirement plan. The 1972 Amendments to the Civil Rights Act allowed monetary damage awards (in addition to injunctive relief and attorneys' fees) against a State government for employment discrimination. In 1976, the Court was more inclined to recognize that "Congress has the power to authorize federal courts to enter such an award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment."[128] Congressional legislation was not tortured through the Abrogation Doctrine. The enactment of Title VII was also seen a valid exercise of Congressional authority under the Commerce Clause in Justice Brennan's concurring opinion.[129] Justice Rehnquist, writing for the Court, held that the State

> **cannot disregard the limitations which the Federal Constitution has applied to her power . . . and the Eleventh Amendment, and principle of sovereign immunity which it embodies, . . . are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority.[130]**

Rehnquist then accepted the more "plenary" view of legislative authority, a position he no longer endorses. As the author of the *Hibbs* majority opinion, Rehnquist cited his earlier *Fitzpatrick* opinion as supporting authority. However, the prevailing majority view today makes it much less likely that federal laws authorizing damages against the States will be upheld under the judicially-created Abrogation Doctrine.

<u>Critique</u>:

Throughout our Constitutional history, courts have struggled with achieving the intended (and appropriate) balance of power between the federal government and the States.[131] New Federalism revives the importance of the State sovereign immunity principle and the inherent conflict between the roles of legislative and judicial branches of government. Also at bay, however, is the protection of individual rights from encroachment by either federal or State governments. Trying to reconcile these competing interests is problematic at best.

The Constitution is a compact in which the States yielded some of their sovereignty "in order to form a more perfect union" and to protect individual rights. The core motivation for that compact was the Commerce Clause. Article I, § 8, cl. 3 of the U.S. Constitution expressly delegated to Congress the authority "to regulate commerce with foreign nations, and among the several States and with the Indian tribes,"[132] without any provision distinguishing private versus State-sponsored commercial activity and without any exemption for State sovereign immunity. Justice Souter recognized in his *Alden* dissent that "the law is settled that federal legislation enacted under the Commerce Clause may bind the States without having to satisfy a test of undue incursion into state sovereignty."[133] Notwithstanding recent U.S. Supreme Court decisions, nothing in the Commerce Clause itself limits its application to the States, and nothing in the express language of the 10th or the 11th Amendment suggests that either of these Amendments should prevail over the Commerce Clause.[134]

In drafting the 11th Amendment, Congress chose not to expand the exception to federal jurisdiction beyond situations hypothesized by the *Chisholm* case. A "plain meaning" interpretation of the 11th Amendment reveals that the "original intent" (of the Founders) was to prevent the federal courts from hearing claims against State governments only if those claims were brought by foreigners or citizens of some other State. The judicial maxim of *expressio unius est exclusio alterius* supports this conclusion. Direct language of the 11th Amendment does not prohibit an in-state citizen from suing his or her own State for monetary damages in State or federal court. Even out-of-state citizens should be able to sue a State – but only in State court. Furthermore, to hold that the States must comply with federal laws designed to protect individual rights, but to deny citizens standing to enforce those rights unfairly subjects those citizens to the compunction of the States. An occasional suit by the federal government for injunctive relief is little consolation to individuals injured by noncompliance.

The strained construction of the 11th Amendment relegates individual rights to secondary status – contrary to (a) Locke's principles to which most Founders adhered, (b) the intent of the Bill of Rights to limit federal government infringement on individual rights, (c) the 14th Amendment through which individual rights were to prevail over State sovereign immunity, and (d) the Supremacy Clause. As Justice Stevens stated in his *Kimel* dissent, "There is not a word in the text of the Constitution supporting the Court's conclusion that the judge-made doctrine of sovereign immunity limits Congress' power to authorize private parties, as well as federal agencies, to enforce federal law against the States."[135] The Supremacy Clause further compels States to enforce federal law in State court and does not authorize the States to violate federal laws that were validly made through the Commerce Clause authority.

The 11th Amendment was a narrowly drafted restriction on federal court jurisdiction. Arguably, the Supreme Court's majority misstates the issue when it asks whether Congress can validly abrogate State sovereign immunity through the Commerce Clause. The 11th Amendment is a <u>limitation on federal judicial authority</u>, <u>not a limitation on federal legislative authority</u>. Where the Constitution grants authority to Congress (as it does with the Interstate Commerce Clause) that authority should not be undermined by strained judicial interpretation. Even though the 11th Amendment limits the "judicial power of the United States" (rather than just the federal original jurisdiction of lower courts), the Supreme Court simply assumes that the 11th Amendment does not limit its own federal appellate review,[136] while viewing the 11th Amendment as limiting the rights of in-state citizens by indirect implication.

While most justices today concede that there are limits to the breadth of the Commerce Clause, there is stark disagreement on where to draw the line and who draws the line. It involves not only a difference in perception of federalism Balance of Power between the States and federal government, but also a Separation of Powers conflict between the legislative and judicial branches of government. In the 1941 decision of *United States v. Darby,* the Court cautioned that the "judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged power."[137] Nor should the court sit as a "superlegislature" to second-guess the wisdom legislative policy decisions,[138] a view now espoused today by dissenting judges such as Breyer and Souter. Justice Black's concurring opinion in *Heart of Atlanta Motel v. United States,* however, acknowledged in 1964 that while Congress has the right to set policy, the determination of "whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question."[139] New Federalism expands that interpretation and operates as a limitation on Congressional authority as much as it serves as a protection of States rights.[140]

<u>Conclusion</u>

To strictly construe Congressional authority under the Interstate Commerce Clause and 14th Amendment, while broadly construing the 10th and 11th Amendment's scope of protection of States against lawsuits, leads to jurisprudential inconsistencies and results-oriented decision-making. Recent Supreme Court decisions have gone far beyond the strict constructionist's view that the federal government lacks powers not enumerated in the Constitution. The Court now restricts powers granted to Congress in the Constitution, ranging from regulation of intellectual property rights[141] to interstate commerce. In elevating the 11th Amendment to a broad State sovereign immunity shield, the Supreme Court (in 5-4 decisions) has barred in-state employees from suing their own State for damages in State and federal court under the federal Fair Labor Standards Act,[142] the Age Discrimination in Employment Act (ADEA),[143] and the Americans with Disabilities Act (ADA). Although the 14th Amendment was passed to guarantee that States honor citizens' rights of due process and equal protection, recent judicial activism by the majority of the Supreme Court has significantly limited such rights by expanding State sovereign immunity to deny State employees the right to institute damage suits for violation of federal employment laws.

Footnotes

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[1] ***State of Tenn. v. Lane et al.*, 541 U.S. 509, 124 S.Ct. 1978 (2004).**

[2] ***Kimel et al. v. Fla. Bd. of Regents et al.*, 528 U.S. 62 (2000).**

[3] ***Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).**
[4] ***Alden et al. v. Me.*, 527 U.S. 706 (1999).**
[5] ***Nev. Dept. of Human Resources et al. v. Hibbs et al.*, 538 U.S. 721 (2003).**
[6] ***Id.* at 776; *see also Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 56 (1996).**
[7] ***See* Justice Souter's dissent in *Alden et al.*, 527 U.S. at 764-768, 775, which also distinguishes common law and natural law versions of sovereign immunity.**
[8] ***Alden et al.*, 527 U.S. at 764.**
[9] ***Fitzpatrick et al. v. Bitzer et al.*, 427 U.S. 445, 457 (1976).**
[10] **States shall not make or enforce laws that "deprive any person of life, liberty or property, without due process of law" under U.S. CONST. amend. XIV, § 1.**
[11] **States shall not make or enforce laws that "deny to any person within its jurisdiction the equal protection of the laws" under U.S. CONST. amend. XIV, § 1.**
[12] **States shall not deny or make laws that deny or abridge "Citizens of each State . . . Privileges and Immunities of Citizens in the several States under U.S. CONST. art. IV, § 2, cl. 1, reinforced by U.S. CONST. amend. XIV, § 1.**
[13] **States shall not deny "Full Faith and Credit . . . in each State to the public Acts, Records, and judicial Proceedings of every other State . . ." U.S. CONST. art. IV, § 1, cl. 1.**
[14] **States shall not deny or abridge the "right of citizens of the United States to vote . . . on account of sex" under U.S. CONST. amend. XIX; States shall not deny or abridge the "right of citizens of the United States, who are eighteen years of age or older, to vote . . . on account of age" under U.S. CONST. amend. XXVI, § 1; and States shall not deny or abridge the "right of citizens of the United States to vote in any . . . election for President or Vice-President, for electors . . . or for Senator or Representative in Congress . . .by reason of failure to pay any poll tax or other tax." U.S. CONST. amend. XXIV, § 1.**
[15] **States shall not deny or abridge the "right of citizens of the United States to vote . . . on account of race, color, or previous condition of servitude" under U.S. CONST. amend. XV.**
[16] **U.S. CONST. art. I, § 10, cl. 1.**
[17] **Under U.S. CONST. art. I, § 10, cl. 1 State shall not "enter into any Treaties, . . . grant Letters of Marques and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass Bills of Attainder, ex post facto Law or law impairing the Obligation of Contracts, or grant any Title of Nobility." Without consent of Congress, States shall not "lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for the executing its inspection Laws; and the net Produce of . . . shall be for the Use of the Treasury of the United States . . .; lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay" under U.S. CONST. art. I, § 10, cl. 2 and 3.**
[18] **U.S. CONST. art. I, § 8, cl. 3.**
[19] ***State of Tenn. v. Lane et al.*, 541 U.S. 509, 124 S.Ct. 1978 (2004).**
[20] ***Kimel et al. v. Fla. Bd. of Regents et al.*, 528 U.S. 62 (2000).**
[21] ***Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).**
[22] ***Alden et al. v. Me.*, 527 U.S. 706 (1999).**
[23] ***Nev. Dept. of Human Resources et al. v. Hibbs et al.*, 538 U.S. 721 (2003).**
[24] ***Id.* at 776; *see also Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 56 (1996).**
[25] ***See* Justice Souter's dissent in *Alden et al.*, 527 U.S. at 764-768, 775, which also distinguishes common law and natural law versions of sovereign immunity.**
[26] ***Alden et al.*, 527 U.S. at 764.**
[27] ***Fitzpatrick et al. v. Bitzer et al.*, 427 U.S. 445, 457 (1976).**
[28] **States shall not make or enforce laws that "deprive any person of life, liberty or property, without due process of law" under U.S. CONST. amend. XIV, § 1.**
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[33] States shall not deny or abridge the "right of citizens of the United States to vote . . . on account of race, color, or previous condition of servitude" under U.S. CONST. amend. XV.

[34] U.S. CONST. art. I, § 10, cl. 1.

[35] Under U.S. CONST. art. I, § 10, cl. 1 State shall not "enter into any Treaties, . . . grant Letters of Marques and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass Bills of Attainder, ex post facto Law or law impairing the Obligation of Contracts, or grant any Title of Nobility." Without consent of Congress, States shall not "lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for the executing its inspection Laws; and the net Produce of . . . shall be for the Use of the Treasury of the United States . . .; lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay" under U.S. CONST. art. I, § 10, cl. 2 and 3.

[36] U.S. CONST. art. I, § 8, cl. 3.

[37] *Alden et al.*, 527 U.S. at 714.

[38] *Id*. at 733.

[39] *Id*. at 713.

[40] *Chisholm Ex'r v. Ga.*, 2 U.S. 419, 452 (1793).

[41] *Alden et al.*, 527 U.S. at 721 and discussed in John Alan Doran and Christopher Michael Mason, *Disproportionate Incongruity: State Sovereign Immunity and the Future of the Federal Employment Discrimination Law*, 2003 MICH. ST. DCL. L REV. 1 (2003).

[42] U.S. CONST. art. I, § 10.

[43] *Hans v. La*., 134 U.S. 1, 15 (1890).

[44] Connecticut and Rhode Island initially adopted their previous charters, which did not include sovereign immunity, thus allowing the State to be sued in its own courts, contrary to the majority's claim that sovereign immunity was universal among the States. See Souter's dissent in *Alden et al.*, 527 U.S. at 769.

[45] *Alden et al.*, 527 U.S. 706 and *Kimel, et al*., 528 U.S. 62.

[46] *Alden et al.*, 527 U.S. at 755.

[47] *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 251 F.3d 1372 (11th Cir. 2001), *rev'd* 535 U.S. 613 (2002).

[48] *Greene County v. State*, 926 S.W.2d 701, 704 (Mo. App. S.D. 1996).

[49] *Lane et al.*, 541 U.S. at 533-634.

[50] *Kimel et al.*, 528 U.S. at 81, wherein the Supreme Court recognizes Congressional authority to "enforce" the 14th Amendment's equal protection clause, but not the authority to "determine what constitutes a violation."

[51] *Fitzpatrick et al.*, 427 U.S. at 445.

[52] *McKesson Corp. v. Div. Alcoholic Beverages and Tobacco*, 449 U.S. 18, 26-31 (1990).

[53] *Alden et al*., 527 U.S. at 755.

[54] *Id*. at 755; *Principality of Monaco v. Miss*., 292 U.S. 313, 328-29 (1934).

[55] *Lincoln Cty. v. Lunig*, 133 U.S. 529, 530 (1890).

[56] For discussion of suits that can be brought against state officials, *see* Ronald D. Rotunda, *Garrett Disability Policy and Federalism: A Symposium on Board of Trustees of the University of Alabama v. Garrett: The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1185 (2002), noting that a "state official's actions are 'state action' for purposes of the Fourteenth Amendment, but she is not 'the state' for purposes of the Eleventh Amendment." While State government agencies are protected by sovereign immunity, local government and boards are not protected. *See, Mt. Healthy City Sch. Bd. v. Doyle*, 429 U.S. 274, 280-81 (1977) and *Idaho v. Coeur'd Alene Tribe of Idaho*, 521 U.S. 261, 267 (1997*), but see Kimel et al.*, 528 U.S. at 73.

[57] Even though State sovereign immunity shield may not extend to municipalities or State officials, limited immunity may exist for governmental functions under the "official immunity doctrine" or "public duty doctrine." Some States use the "official immunity doctrine" to shield employees from personal tort liability, especially for discretionary duties within their scope of authority. *See Bachmann v. Welby*, 860 S.W. 2d 31, 34 (Mo. App. E.D. 1993). The doctrine also applies to duties owed to the general public. *See Beaver v. Gosney*, 825 S.W.2d 870, 874 (Mo. App. W.D. 1992).

[58] *See* § 537.600, RSMo 2002 for the Missouri exclusions from sovereign immunity and § 537.610, RSMo 2002 for the liability caps; see also discussion in James Burt, *The Tortured Trail of Sovereign Immunity in Missouri*, 54 J. MO. BAR 189 (July-August 1998).

[59] *Lapides*, 535 U.S at 613.

[60] For discussion of the scope of waiver of sovereign immunity rights in removal cases, see Eric Porterfield, *Eleventh Amendment Immunity After Lapides v. Board of Regents of the University System of Georgia: Keeping States Out of Federal Court*, 55 BAYLOR L. REV. 1243 (2003).

[61] *Estes v. Wyo. Dept. of Transportation*, 302 F.3d 1200 (10th Cir. 2002).

[62] *Seminole Tribe of Fla.*, 517 U.S. at 56.

[63] *City of Boerne v. Flores*, 521 U.S. 507, 519, 532 (1997).

[64] **THOMAS JAMES NORTON, THE CONSTITUTION OF THE UNITED STATES ITS SOURCES AND ITS APPLICATION 50-51 (Committee for Constitutional Government 1971).**

[65] ***NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937).**

[66] ***United States v. Darby,* 312 U.S. 100 (1941).**

[67] ***Id*. at 114, *citing Gibbons v. Ogdon*, 9 Wheaton 1 (1824).**

[68] ***Id.* at 118.**

[69] ***Fitzpatrick et al.*, 437 U.S. at 457.**

[70] ***Garcia v. San Antonia Metro. Transit Auth.*, 469 U.S. 528, 533 (1985).**

[71] ***Id*. at 555.**

[72] **U.S. CONST. art. I, § 8 cl. 3: Congress shall have the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."**

[73] **529 U.S. 598, 625, 648-49 (2000).**

[74] ***United States v. Lopez*, 514 U.S. 549, 552 (1995).**

[75] ***Lopez*, 514 U.S. 549.**

[76] **42 U.S.C. § 13981.**

[77] ***United States v. Morrison*, 529 U.S. 598, 613 (2000).**

[78] ***Morrison*, 529 U.S. at 611, 617-18.**

[79] ***Solid Waste Agency of Northern Cook County (SWANCC) v. U. S. Army Corps of Engineers, et al*., 531 U.S. 159, 174 (2000).**

[80] ***Id*. at 162 and 174.**

[81] ***Id*. at 195-196, citing *Missouri v. Holland*, 252 U.S. 416, 435 (1920).**

[82] **U.S. CONST. art. I, § 8 cl. 3.**

[83] ***Seminole Tribe*, 517 U.S. at 73.**

[84] **Even when the Supreme Court has declined the opportunity to premise its ruling on 11th Amendment grounds, it is narrowly interpreting the word "person" and looked for specific statutory language to show that Congress intended legislation to apply to States as actors. *See Vermont Agency of Natural Resources v. United States, ex rel., Jonathan Stevens*, 529 U.S. 765 (2000), denying the relator the right to bring a qui tam suit in federal court on behalf of the United State against a State.**

[85] **491 U.S. 1(1989).**

[86] ***Id.* at 18, 19.**

[87] ***Garcia*, 469 U.S. at 533.**

[88] ***Alden et al.*, 527 U.S. at 712.**

[89] ***Id*. at 755-757; *in accord, see Employees of Dept. of Public Health and Welfare of Mo. v. Dept. of Public Health and Welfare of Mo*., 411 U.S. 279, 283 (1973).**

[90] ***Employees of the Dept. of Public Health and Welfare of Missouri, et al. v. Dept. of Public Health and Welfare of Missouri et al.*, 411 U.S. 279 (1973).**

[91] ***See Stevens*, 529 U.S. 765.**

[92] **A case permitting a FELA claim against a State-owned railroad was distinguished by concluding that the State had waived sovereign immunity by entering the market after Congress passed FELA with language that clearly subjected all who operated railroads to suits by injured workers. *See Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197 (1991). The concept of "constructive waiver" of sovereign immunity is suspect, however, since *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. et al.*, 527 U.S. 666 (1999), another 11th Amendment case that refuses to use the 14th Amendment to abrogate sovereign immunity to facilitate a patent infringement claim against a State agency.**

[93] **29 U.S.C. § 623(a).**

[94] **29 U.S.C. § 621 et seq.**

[95] **The "strict scrutiny" versus "lower scrutiny" distinction has been used in nonemployment cases as well. While the U.S. Supreme Court upheld the application of the federal Voting Rights Act to compel States to abolish language literacy tests for voting (as discriminatory on the basis of race and ethnicity) in *Katenbach v Morgan*, 384 U.S. 641 (1966), the Supreme Court struck down amendments to that law which would have compelled States to lower the voting age to 18 (prior to the adoption of the 26th Amendment) in *Oregon v. Mitchell*, 400 U.S. 112 (1970).**

[96] **For example, the "*rational basis test*" has been used to uphold Missouri's requirement that judges retire at age 70 based on the generalization that old age affects ability to perform. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Court also concludes that an employer's burden of legitimizing a BFOQ defense is higher than the burden on a State to establish a "rational basis" for age-based classifications, *Kimel et al.*, 528 U.S. at 86-87.**

[97] ***Kimel et al.*, 528 U.S. at 83.**

[98] *Id*. at 89-90. This "*congruence and proportionality test*" has been applied to deny remedies against States under a wide range of laws from the Patent and Plant Variety Protection Remedy Clarification Act and the Religious Freedom Restoration Act.

[99] *Id*. at 72-73.

[100] *Id*. at 78.

[101] *Id*. at 93, 97.

[102] *See* § 213.010(1), RSMo 2004.

[103] *See Smith, et al. v. City of Jackson*, 125 S. Ct. 1536 (2005), in which local police officers over 40 brought an ADEA claim against the City based on differences in salary increases. Without addressing sovereign immunity issues, the U.S. Supreme Court concluded that ADEA authorizes recovery on a disparate-impact theory, subject to "reasonable factors other than age discrimination" defenses. Thus, an age discrimination claim against the local government employer was allowed to proceed in federal court, but was deemed to lack a factual basis for a disparate impact claim.

[104] 41 U.S.C. §§ 12111(2), 12112(a) and (b).

[105] *Lane et al.*, 541 U.S. 509.

[106] Relocating judicial services was mentioned as an alternative to costly remodeling of older facilities in *Lane et al.*, 541 U.S. at 533.

[107] *Garrett*, 531 U.S. 356.

[108] *Id*., 531 U.S. 356.

[109] *Id*. at 389-424.

[110] *Cleburne v. Cleburne Living Center, Inc*., 473 U.S. 432 (1985).

[111] *Garrett et al.*, 531 U.S. at 367.

[112] *Id*., *see* Kennedy's concurring opinion at 375 (2001).

[113] *Id*., see Breyer's dissent at 384.

[114] *Estes v. Wyo. Dept. of Transportation*, 302 F.3d 1200 (10th Cir. 2002), relying on *Lapides*, 523 U.S. 613.

[115] *Garrett et al.*, 531 U.S. at 369.

[116] See *Murphy v. UPS*, 527 U.S. 516 (1999) and *Sutton et al. v. United Air Lines, Inc.*, 521 U.S. 471 (1999).

[117] *Toyota Motor Mgf. v. Williams*, 534 U.S. 184 (2002).

[118] *Hibbs et al.*, 538 U.S. at 728 (2003).

[119] See 29 U.S.C. § 2606, et seq., especially 29 U.S.C. § 2612 (a)(1)(C).

[120] Justice Stevens, concurring in the judgment opinion, again asserts that the 11th Amendment is no barrier to a citizen suing his own State. *Hibbs et al.*, 538 U.S. at 741.

[121] See 29 U.S.C. § 2617 (a)(2).

[122] As Justice Scalia notes in his dissent in *Hibbs et al*., 538 U.S. at 741-742, there is little record of Nevada having a history of such discrimination, since its State allowed Hibbs 12 weeks' leave to care for his wife. Scalia maintains that FMLA should not be broadly applied to all States, but that a State-by-State determination of discrimination is required.

[123] *Id*. at 750; Justice Kennedy's dissent further notes that 30 States had adopted family-care laws before FMLA was enacted and the content of these "entitlement programs" (as Kennedy views them) is more properly left to the States to determine.

[124] *Id*. at 729.

[125] *Id*. at 735; the majority views FMLA as remedial rather than a substantive entitlement program.

[126] *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004).

[127] *Fitzpatrick et al.*, 427 U.S. 445.

[128] *Id*. at 447.

[129] *Id*., *see* Justice Brennan's concurring opinion in *Fitzpatrick et al.*, 427 U.S. at 457.

[130] *Id*. at 454-457.

[131] *See* Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 635 (1933) and Todd Tatelman, Comment, *Nevada Department of Human Resources v. Hibbs: The Eleventh Amendment in a States' Rights Era: Sword or Shield?*, 52 CATHOLIC UNIV. L. REV. 683 (2003).

[132] U.S. CONST. art. I, § 8 cl. 3.

[133] *Alden et al.*, 527 U.S. at 806.

[134] While the definition of "commerce" could be revisited, to do so would ignore decades of precedent broadly defining commerce in conjunction with the "necessary and proper clause" to include anything that "affects" commerce.

[135] *Kimel et al.*, 528 U.S. at 96.

[136] See *Alden et al.*, 527 U.S. at 755, where the majority concludes that "Sovereign immunity . . . does not bar all judicial review of state compliance with the Constitution and valid federal law."

One could argue, however, that if the 11th Amendment could trump other provisions of the Constitution (by implication) and preclude lower federal courts from hearing damage claims against the States that were brought by her own citizens, the 11th Amendment just as logically could trump the U.S. Supreme Court's implied power of judicial review, since the 11th Amendment limits the "Judicial Power of the U.S.," not just the jurisdiction of lower federal courts.

The Supreme Court has been unwilling to limit its own implied power of judicial review, however, since it first declared an act of Congress unconstitutional in *Marbury v. Madison et al.*, 1 Cranch 137 (1803). In *Marbury et al.*, the Supreme Court struck down a minor portion of the Judiciary Act of 1787 -- which granted the Supreme Court authority to hear original writs of mandamus -- on the premise that the law unconstitutionally expanded the Supreme Court's original jurisdiction. However, the Court's exercise of judicial review over acts of Congress was itself an expansion of authority beyond that expressly delineated in Article III of the U.S. Constitution.

More recently the U.S. Supreme Court extended its authority to review decisions of the "sovereign State" of Florida (interpreting its own State law) in the *Bush* v. *Gore* cases, although, the federal question arguably was not yet ripe at the time the U.S. Supreme Court agreed to hear the case. *See Bush et al. v. Gore et al.*, 531 U.S. 98 (2000), finding a violation of the Equal Protection Clause in the election counting process and *Bush v. Palm Beach County Canvassing Bd. et al*, 531 U.S. 70 (2000), vacating the Florida Supreme Court's judgment that had allowed the counting of ballots.

[137] ***Darby*, 312 U.S. at 115.**

[138] ***Board of Trustees of the University of Alabama, et al. v. Garrett*, 531 U.S. 356, 384 (2001).**

[139] **379 U.S. 241, 273 (1964) (Justice Black concurring).**

[140] **For an article supporting New Federalism and its limits on Congressional authority, see Ronald D. Rotunda, *Garrett Disability Policy and Federalism: A Symposium on Board of Trustees of the University of Alabama v. Garrett: The Eleventh Amendment, Garrett, and Protection for Civil Rights*, 53 ALA. L. REV. 1183, 1185 (2002).**

[141] ***See Fla. Prepaid Postsecondary Educ. Bd. v. College Savings Bank*, 527 U.S. 627 (1999). Congress has the authority to regulate scientific and artistic inventions (through patents and copyrights) under U.S. CONST. art. I, § 8, cl. 8. Although such authority is clearly delegated to the federal government (and States were not granted any specific exemption), the Supreme Court concluded that States cannot be sued for violation of patents.**

[142] ***Alden et al.*, 527 U.S. 706.**

[143] ***Kimel et al.*, 528 U.S. 62.**