SUPREME COURT OF THE UNITED STATES

No. 01–1368

NEVADA DEPARTMENT OF HUMAN RESOURCES, ET AL., PETITIONERS *v.* WILLIAM HIBBS ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 27, 2003]

JUSTICE KENNEDY, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Family and Medical Leave Act of 1993 makes explicit the congressional intent to invoke §5 of the Fourteenth Amendment to abrogate state sovereign immunity and allow suits for money damages in federal courts. *Ante*, at 2–4, and n. 1. The specific question is whether Congress may impose on the States this entitlement program of its own design, with mandated minimums for leave time, and then enforce it by permitting private suits for money damages against the States. This in turn must be answered by asking whether subjecting States and their treasuries to monetary liability at the insistence of private litigants is a congruent and proportional response to a demonstrated pattern of unconstitutional conduct by the States. See *ante*, at 5; *Board of Trustees of Univ. of Ala.* v. *Garrett,* 531 U. S. 356, 365 (2001); *City of Boerne* v. *Flores*, 521 U. S. 507, 520 (1997). If we apply the teaching of these and related cases, the family leave provision of the Act, 29 U. S. C. §2612(a)(1)(C), in my respectful view, is invalid to the extent it allows for private suits against the unconsenting States.

Congress does not have authority to define the substantive content of the Equal Protection Clause; it may only shape the remedies warranted by the violations of that

guarantee. *City of Boerne, supra,* at 519–520. This requirement has special force in the context of the Eleventh Amendment, which protects a State's fiscal integrity from federal intrusion by vesting the States with immunity from private actions for damages pursuant to federal laws. The Commerce Clause likely would permit the National Government to enact an entitlement program such as this one; but when Congress couples the entitlement with the authorization to sue the States for monetary damages, it blurs the line of accountability the State has to its own citizens. These basic concerns underlie cases such as *Garrett* and *Kimel* v. *Florida Bd. of Regents,* 528 U. S. 62 (2000), and should counsel far more caution than the Court shows in holding §2612(a)(1)(C) is somehow a congruent and proportional remedy to an identified pattern of discrimination.

The Court is unable to show that States have engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits. The inability to adduce evidence of alleged discrimination, coupled with the inescapable fact that the federal scheme is not a remedy but a benefit program, demonstrate the lack of the requisite link between any problem Congress has identified and the program it mandated.

In examining whether Congress was addressing a demonstrated "pattern of unconstitutional employment discrimination by the States," the Court gives superficial treatment to the requirement that we "identify with some precision the scope of the constitutional right at issue." *Garrett*, 531 U. S., at 365, 368. The Court suggests the issue is "the right to be free from gender-based discrimination in the workplace," *ante*, at 5, and then it embarks on a survey of our precedents speaking to "[t]he history of the many state laws limiting women's employment opportunities," *ante*, at 6. All would agree that women historically have been subjected to conditions in which their employ-

ment opportunities are more limited than those available to men. As the Court acknowledges, however, Congress responded to this problem by abrogating States' sovereign immunity in Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e–2(a). *Ante*, at 6; see also *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976). The provision now before us, 29 U. S. C. §2612(a)(1)(C), has a different aim than Title VII. It seeks to ensure that eligible employees, irrespective of gender, can take a minimum amount of leave time to care for an ill relative.

The relevant question, as the Court seems to acknowledge, is whether, notwithstanding the passage of Title VII and similar state legislation, the States continued to engage in widespread discrimination on the basis of gender in the provision of family leave benefits. *Ante*, at 7. If such a pattern were shown, the Eleventh Amendment would not bar Congress from devising a congruent and proportional remedy. The evidence to substantiate this charge must be far more specific, however, than a simple recitation of a general history of employment discrimination against women. When the federal statute seeks to abrogate state sovereign immunity, the Court should be more careful to insist on adherence to the analytic requirements set forth in its own precedents. Persisting overall effects of gender-based discrimination at the workplace must not be ignored; but simply noting the problem is not a substitute for evidence which identifies some real discrimination the family leave rules are designed to prevent.

Respondents fail to make the requisite showing. The Act's findings of purpose are devoid of any discussion of the relevant evidence. See *Lizzi* v. *Alexander*, 255 F. 3d 128, 135 (CA4 2001) ("In making [its] finding of purpose, Congress did not identify, as it is required to do, any pattern of gender discrimination by the states with respect to the granting of employment leave for the purpose of

providing family or medical care"); see also *Chittister* v. *Department of Community and Econ. Dev.*, 226 F. 3d 223, 228–229 (CA3 2000) ("Notably absent is any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause").

As the Court seems to recognize, the evidence considered by Congress concerned discriminatory practices of the private sector, not those of state employers. *Ante*, at 7–8, n. 3. The statistical information compiled by the Bureau of Labor Statistics (BLS), which are the only factual findings the Court cites, surveyed only private employers. *Ante*, at 7. While the evidence of discrimination by private entities may be relevant, it does not, by itself, justify the abrogation of States' sovereign immunity. *Garrett*, *supra*, at 368 ("Congress' §5 authority is appropriately exercised only in response to state transgressions").

The Court seeks to connect the evidence of private discrimination to an alleged pattern of unconstitutional behavior by States through inferences drawn from two sources. The first is testimony by Meryl Frank, Director of the Infant Care Leave Project, Yale Bush Center in Child Development and Social Policy, who surveyed both private and public employers in all 50 States and found little variation between the leave policies in the two sectors. *Ante*, at 7–8, n. 3 (citing The Parental and Medical Leave Act of 1986: Joint Hearing before the Subcommittee on Labor-Management Relations and the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 2d Sess., 33 (1986) (hereinafter Joint Hearing)). The second is a view expressed by the Washington Council of Lawyers that even "'[w]here childcare leave policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment in their requests for such leave.'" *Ante*, at 8 (quoting

Joint Hearing 147) (emphasis added by the Court).

Both statements were made during the hearings on the proposed 1986 national leave legislation, and so preceded the Act by seven years. The 1986 bill, which was not enacted, differed in an important respect from the legislation Congress eventually passed. That proposal sought to provide parenting leave, not leave to care for another ill family member. Compare H. R. 4300, 99th Cong., 2d Sess., §§102(3), 103(a) (1986), with 29 U. S. C. §2612(a)(1)(C). See also L. Gladstone, Congressional Research Service Issue Brief, Family and Medical Leave Legislation, pp. 4–5, 10 (Oct. 26, 1995); Tr. of Oral Arg. 43 (statement of counsel for the United States that "the first time that the family leave was introduced and the first time the section (5) authority was invoked was in H. R. 925," which was proposed in 1987). The testimony on which the Court relies concerned the discrimination with respect to the parenting leave. See Joint Hearing 31 (statement of Meryl Frank) (the Yale Bush study "evaluate[d] the impact of the changing composition of the workplace on families with infants"); *id.,* at 147 (statement of the Washington Council of Lawyers) ("[F]or the first time, *childcare* responsibilities of *both* natural and adoptive mothers *and* fathers will be legislatively protected"). Even if this isolated testimony could support an inference that private sector's gender-based discrimination in the provision of parenting leave was parallel to the behavior by state actors in 1986, the evidence would not be probative of the States' conduct some seven years later with respect to a statutory provision conferring a different benefit. The Court of Appeals admitted as much: "We recognize that a weakness in this evidence as applied to Hibbs' case is that the BLS and Yale Bush Center studies deal only with parental leave, not with leave to care for a sick family member. They thus do not document a widespread pattern of precisely the kind of discrimination that

§2612(a)(1)(C) is intended to prevent." 273 F. 3d 844, 859 (CA9 2001).

The Court's reliance on evidence suggesting States provided men and women with the parenting leave of different length, *ante*, at 8, and n. 5, suffers from the same flaw. This evidence concerns the Act's grant of parenting leave, §§2612(a)(1)(A),(B), and is too attenuated to justify the family leave provision. The Court of Appeals' conclusion to the contrary was based on an assertion that "if states discriminate along gender lines regarding the one kind of leave, then they are likely to do so regarding the other." 273 F. 3d, at 859. The charge that a State has engaged in a pattern of unconstitutional discrimination against its citizens is a most serious one. It must be supported by more than conjecture.

The Court maintains the evidence pertaining to the parenting leave is relevant because both parenting and family leave provisions respond to "the same gender stereotype: that women's family duties trump those of the workplace." *Ante*, at 9, n. 5. This sets the contours of the inquiry at too high a level of abstraction. The question is not whether the family leave provision is a congruent and proportional response to general gender-based stereotypes in employment which "ha[ve] historically produced discrimination in the hiring and promotion of women," *ibid.*; the question is whether it is a proper remedy to an alleged pattern of unconstitutional discrimination by States in the grant of family leave. The evidence of gender-based stereotypes is too remote to support the required showing.

The Court next argues that "even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways." *Ante*, at 9. This charge is based on an allegation that many States did not guarantee the right to family leave by statute, instead leaving the decision up to individual employers, who could subject employees to "'discretionary and possibly unequal treat-

ment.'" *Ibid.* (quoting H. R. Rep. No. 103–8, pt. 2, pp. 10–11 (1993)). The study from which the Court derives this conclusion examined "the parental leave policies of Federal executive branch agencies," *id.*, at 10, not those of the States. The study explicitly stated that its conclusions concerned federal employees: "'[I]n the absence of a national minimum standard for granting leave for parental purposes, the authority to grant leave and to arrange the length of that leave rests with individual supervisors, leaving Federal employees open to discretionary and possibly unequal treatment.'" *Id.*, at 10–11. A history of discrimination on the part of the Federal Government may, in some situations, support an inference of similar conduct by the States, but the Court does not explain why the inference is justified here.

Even if there were evidence that individual state employers, in the absence of clear statutory guidelines, discriminated in the administration of leave benefits, this circumstance alone would not support a finding of a state-sponsored pattern of discrimination. The evidence could perhaps support the charge of disparate impact, but not a charge that States have engaged in a pattern of intentional discrimination prohibited by the Fourteenth Amendment. *Garrett*, 531 U. S., at 372–373 (citing *Washington* v. *Davis*, 426 U. S. 229, 239 (1976)).

The federal-state equivalence upon which the Court places such emphasis is a deficient rationale at an even more fundamental level, however; for the States appear to have been ahead of Congress in providing gender-neutral family leave benefits. Thirty States, the District of Columbia, and Puerto Rico had adopted some form of family-care leave in the years preceding the Act's adoption. The Reports in both Houses of Congress noted this fact. H. R. Rep. 103–8, at 32–33; S. Rep. No. 103–3, pp. 20–21 (1993); see also Brief for State of Alabama et al. as *Amici Curiae* 18–22. Congressional hearings noted that the provision of

family leave was "an issue which has picked up tremendous momentum in the States, with some 21 of them having some form of family or medical leave on the books." The Family and Medical Leave Act of 1991: Hearing on H. R. 2 before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 102d Cong., p. 4 (1991) (statement of Congresswoman Marge Roukema). Congress relied on the experience of the States in designing the national leave policy to be cost-effective and gender-neutral. S. Rep. 103–3, at 12–14; Parental and Medical Leave Act of 1987: Hearings on S. 249 before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 100th Cong., 1st Sess., pt. 2, pp. 194–195, 533–534 (1987). Congress also acknowledged that many States had implemented leave policies more generous than those envisioned by the Act. H. R. Rep. No. 103–8, pt. 1, p. 50 (1993); S. Rep. 103–3, at 38. At the very least, the history of the Act suggests States were in the process of solving any existing gender-based discrimination in the provision of family leave.

The Court acknowledges that States have adopted family leave programs prior to federal intervention, but argues these policies suffered from serious imperfections. *Ante*, at 10. Even if correct, this observation proves, at most, that programs more generous and more effective than those operated by the States were feasible. That the States did not devise the optimal programs is not, however, evidence that the States were perpetuating unconstitutional discrimination. Given that the States assumed a pioneering role in the creation of family leave schemes, it is not surprising these early efforts may have been imperfect. This is altogether different, however, from purposeful discrimination.

The Court's lengthy discussion of the allegedly deficient state policies falls short of meeting this standard. A great

majority of these programs exhibit no constitutional defect and, in fact, are authorized by this Court's precedent. The Court points out that seven States adopted leave provisions applicable only to women. *Ibid.* Yet it must acknowledge that three of these schemes concerned solely pregnancy disability leave. *Ante*, at 10, n. 6 (citing 3 Colo. Code Regs. §708–1, Rule 80.8 (2002); Iowa Code Ann. §216.6(2) (West 2000); N. H. Rev. Stat. Ann. §354–A:7(VI)(b) (Michie Supp. 2000)). Our cases make clear that a State does not violate the Equal Protection Clause by granting pregnancy disability leave to women without providing for a grant of parenting leave to men. *Geduldig* v. *Aiello*, 417 U. S. 484, 496–497, n. 20 (1974); see also Tr. of Oral Arg. 49 (counsel for the United States conceding that *Geduldig* would permit this practice). The Court treats the pregnancy disability scheme of the fourth State, Louisiana, as a disguised gender-discriminatory provision of parenting leave because the scheme would permit leave in excess of the period Congress believed to be medically necessary for pregnancy disability. *Ante*, at 10, n. 6. The Louisiana statute, however, granted leave only for "that period during which the female employee is disabled on account of pregnancy, childbirth, or related medical conditions." La. Rev. Stat. Ann. §23:1008(A)(2)(b) (West Supp. 1993) (repealed 1997). Properly administered, the scheme, despite its generous maximum, would not transform into a discriminatory "4-month maternity leave for female employees only." *Ante*, at 10, n. 6.

The Court next observes that 12 States "provided their employees no family leave, beyond an initial childbirth or adoption." *Ante*, at 10. Four of these States are those which, as discussed above, offered pregnancy disability leave only. See *ante*, at 11, n. 7 (citing 3 Colo. Code Regs. §708–1, Rule 80.8 (2002); Iowa Code Ann. §216.6(2) (West 2000); La. Rev. Stat. Ann. §23:1008(A)(2) (West Supp. 1993) (repealed 1997); N. H. Rev. Stat. Ann. §354–

A:7(VI)(b) (Michie Supp. 2000)). Of the remaining eight States, five offered parenting leave to both men and women on an equal basis; a practice which no one contends suffers from a constitutional infirmity. See *ante*, at 11, n. 7 (citing Del. Code Ann., Tit. 29, §5116 (1997); Ky. Rev. Stat. Ann. §337.015 (Michie 2001); Mo. Rev. Stat. §105.271 (2000); N. Y. Lab. Law §201–c (McKinney 2002); U. S. Dept. of Labor, Women's Bureau, State Maternity/Family Leave Law, p. 12 (June 1993) (discussing the policy adopted by the Virginia Department of Personnel and Training)). The Court does not explain how the provision of social benefits either on a gender-neutral level (as with the parenting leave) or in a way permitted by this Court's case law (as with the pregnancy disability leave) offends the Constitution. Instead, the Court seems to suggest that a pattern of unconstitutional conduct may be inferred solely because a State, in providing its citizens with social benefits, does not make these benefits as generous or extensive as Congress would later deem appropriate.

The Court further chastises the States for having "provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs." *Ante*, at 11; see also *ibid.* ("[F]our States provided leave only through administrative regulations or personnel policies"). The Court does not argue the States intended to enable employers to discriminate in the provision of family leave; nor, as already noted, is there evidence state employers discriminated in the administration of leave benefits. See *supra*, at 7. Under the Court's reasoning, Congress seems justified in abrogating state immunity from private suits whenever the State's social benefits program is not enshrined in the statutory code and provides employers with discretion.

Stripped of the conduct which exhibits no constitutional infirmity, the Court's "exten[sive] and specifi[c] . . . record

of unconstitutional state conduct," *ante*, at 12, n. 11, boils down to the fact that three States, Massachusetts, Kansas, and Tennessee, provided parenting leave only to their female employees, and had no program for granting their employees (male or female) family leave. See *ante*, at 10–11, nn. 6 and 7 (citing Mass. Gen. Laws, ch. 149, §105D (West 1997); Kan. Admin. Regs. 21–32–6(d) (1997); Tenn. Code Ann. §4–21–408(a) (1998)). As already explained, *supra*, at 6, the evidence related to the parenting leave is simply too attenuated to support a charge of unconstitutional discrimination in the provision of family leave. Nor, as the Court seems to acknowledge, does the Constitution require States to provide their employees with any family leave at all. *Ante*, at 15. A State's failure to devise a family leave program is not, then, evidence of unconstitutional behavior.

Considered in its entirety, the evidence fails to document a pattern of unconstitutional conduct sufficient to justify the abrogation of States' sovereign immunity. The few incidents identified by the Court "fall far short of even suggesting the pattern of unconstitutional discrimination on which §5 legislation must be based." *Garrett*, 531 U. S., at 370; see also *Kimel*, 528 U. S., at 89–91; *City of Boerne*, 521 U. S., at 530–531. Juxtaposed to this evidence is the States' record of addressing gender-based discrimination in the provision of leave benefits on their own volition. See generally Brief for State of Alabama et al. as *Amici Curiae* 5–14.

Our concern with gender discrimination, which is subjected to heightened scrutiny, as opposed to age- or disability-based distinctions, which are reviewed under rational standard, see *Kimel*, *supra*, at 83–84; *Garrett*, *supra,* at 366–367, does not alter this conclusion. The application of heightened scrutiny is designed to ensure gender-based classifications are not based on the entrenched and pervasive stereotypes which inhibit women's

progress in the workplace. *Ante*, at 13–14. This consideration does not divest respondents of their burden to show that "Congress identified a history and pattern of unconstitutional employment discrimination by the States." *Garrett*, *supra,* at 368. The Court seems to reaffirm this requirement. *Ante*, at 6 ("We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States . . ."); see also *ante*, at 12 ("[T]he 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"). In my submission, however, the Court does not follow it. Given the insufficiency of the evidence that States discriminated in the provision of family leave, the unfortunate fact that stereotypes about women continue to be a serious and pervasive social problem would not alone support the charge that a State has engaged in a practice designed to deny its citizens the equal protection of the laws. *Garrett*, *supra,* at 369.

The paucity of evidence to support the case the Court tries to make demonstrates that Congress was not responding with a congruent and proportional remedy to a perceived course of unconstitutional conduct. Instead, it enacted a substantive entitlement program of its own. If Congress had been concerned about different treatment of men and women with respect to family leave, a congruent remedy would have sought to ensure the benefits of any leave program enacted by a State are available to men and women on an equal basis. Instead, the Act imposes, across the board, a requirement that States grant a minimum of 12 weeks of leave per year. 29 U. S. C. §2612(a)(1)(C). This requirement may represent Congress' considered judgment as to the optimal balance between the family obligations of workers and the interests of employers, and the States may decide to follow these guidelines in de-

signing their own family leave benefits. It does not follow, however, that if the States choose to enact a different benefit scheme, they should be deemed to engage in unconstitutional conduct and forced to open their treasuries to private suits for damages.

Well before the federal enactment, Nevada not only provided its employees, on a gender-neutral basis, with an option of requesting up to one year of unpaid leave, Nev. Admin. Code §284.578(1) (1984), but also permitted, subject to approval and other conditions, leaves of absence in excess of one year, §284.578(2). Nevada state employees were also entitled to use up to 10 days of their accumulated paid sick leave to care for an ill relative. §284.558(1). Nevada, in addition, had a program of special "catastrophic leave." State employees could donate their accrued sick leave to a general fund to aid employees who needed additional leave to care for a relative with a serious illness. Nev. Rev. Stat. §284.362(1) (1995).

To be sure, the Nevada scheme did not track that devised by the Act in all respects. The provision of unpaid leave was discretionary and subject to a possible reporting requirement. Nev. Admin. Code §284.578(2)(3) (1984). A congruent remedy to any discriminatory exercise of discretion, however, is the requirement that the grant of leave be administered on a gender-equal basis, not the displacement of the State's scheme by a federal one. The scheme enacted by the Act does not respect the States' autonomous power to design their own social benefits regime.

Were more proof needed to show that this is an entitlement program, not a remedial statute, it should suffice to note that the Act does not even purport to bar discrimination in some leave programs the States do enact and administer. Under the Act, a State is allowed to provide women with, say, 24 weeks of family leave per year but provide only 12 weeks of leave to men. As the counsel for

the United States conceded during the argument, a law of this kind might run afoul of the Equal Protection Clause or Title VII, but it would not constitute a violation of the Act. Tr. of Oral Arg. 49. The Act on its face is not drawn as a remedy to gender-based discrimination in family leave.

It has been long acknowledged that federal legislation which "deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *City of Boerne*, 521 U. S., at 518; see also *ante*, at 15 (in exercising its power under §5 of the Fourteenth Amendment, Congress "may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text'" (quoting *Kimel*, 528 U. S., at 81)). The Court has explained, however, that Congress may not "enforce a constitutional right by changing what the right is." *City of Boerne, supra,* at 519. The dual requirement that Congress identify a pervasive pattern of unconstitutional state conduct and that its remedy be proportional and congruent to the violation is designed to separate permissible exercises of congressional power from instances where Congress seeks to enact a substantive entitlement under the guise of its §5 authority.

The Court's precedents upholding the Voting Rights Act of 1965 as a proper exercise of Congress' remedial power are instructive. In *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966), the Court concluded that the Voting Rights Act's prohibition on state literacy tests was an appropriate method of enforcing the constitutional protection against racial discrimination in voting. This measure was justified because "Congress documented a marked pattern of unconstitutional action by the States." *Garrett*, 531 U. S., at 373 (citing *Katzenbach*, *supra,* at 312, 313); see also *City of Boerne, supra,* at 525 ("We noted evidence

in the record reflecting the subsisting and pervasive discriminatory—and therefore unconstitutional—use of literacy tests") (citing *Katzenbach, supra,* at 333–334). Congress' response was a "limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment." *Garrett, supra,* at 373. This scheme was both congruent, because it "aimed at areas where voting discrimination has been most flagrant," *Katzenbach*, 383 U. S., at 315, and proportional, because it was necessary to "banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century," *id.,* at 308. The Court acknowledged Congress' power to devise "strong remedial and preventive measures" to safeguard voting rights on subsequent occasions, but always explained that these measures were legitimate because they were responding to a pattern of "the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination." *City of Boerne, supra,* at 526–527 (citing *Oregon* v. *Mitchell*, 400 U. S. 112 (1970); *City of Rome* v. *United States*, 446 U. S. 156 (1980); *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966)).

This principle of our §5 jurisprudence is well illustrated not only by the Court's opinions in these cases but also by the late Justice Harlan's dissent in *Katzenbach* v. *Morgan*. There, Justice Harlan contrasted his vote to invalidate a federal ban on New York state literacy tests from his earlier decision, in *South Carolina* v. *Katzenbach*, to uphold stronger remedial measures against the State of South Carolina, such as suspension of literacy tests, imposition of preclearance requirements for any changes in state voting laws, and appointment of federal voting examiners. *Katzenbach* v. *Morgan*, *supra,* at 659, 667; see also *South Carolina* v. *Katzenbach*, *supra,* at 315–323. Justice Harlan explained that in the case of South Carolina there was "'voluminous legislative history' as well as

judicial precedents supporting the basic congressional findings that the clear commands of the Fifteenth Amendment had been infringed by various state subterfuges. . . . Given the existence of the evil, we held the remedial steps taken by the legislature under the Enforcement Clause of the Fifteenth Amendment to be a justifiable exercise of congressional initiative." 384 U. S., at 667 (quoting *South Carolina* v. *Katzenbach*, *supra,* at 309, 329–330). By contrast, the New York case, in his view, lacked a showing that "there has in fact been an infringement of that constitutional command, that is, whether a particular state practice . . . offend[ed] the command of the Equal Protection Clause of the Fourteenth Amendment." 384 U. S., at 667. In the absence of evidence that a State has engaged in unconstitutional conduct, Justice Harlan would have concluded that the literacy test ban Congress sought to impose was not an "appropriate remedial measur[e] to redress and prevent the wrongs," but an impermissible attempt "to define the *substantive* scope of the Amendment." *Id.,* at 666, 668.

For the same reasons, the abrogation of state sovereign immunity pursuant to Title VII was a legitimate congressional response to a pattern of gender-based discrimination in employment. *Fitzpatrick* v. *Bitzer,* 427 U. S. 445 (1976). The family leave benefit conferred by the Act is, by contrast, a substantive benefit Congress chose to confer upon state employees. See *City of Boerne, supra,* at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect"). The plain truth is Congress did not "ac[t] to accomplish the legitimate end of enforcing judicially-recognized Fourteenth Amendment rights, [but] instead pursued an object outside the scope of Section Five by imposing new, non-remedial legal obligations on the states." Beck, The Heart of Federalism:

Pretext Review of Means-End Relationships, 36 U. C. D. L. Rev. 407, 440 (2003).

It bears emphasis that, even were the Court to bar unconsented federal suits by private individuals for money damages from a State, individuals whose rights under the Act were violated would not be without recourse. The Act is likely a valid exercise of Congress' power under the Commerce Clause, Art. I, §8, cl. 3, and so the standards it prescribes will be binding upon the States. The United States may enforce these standards in actions for money damages; and private individuals may bring actions against state officials for injunctive relief under *Ex parte Young*, 209 U. S. 123 (1908). What is at issue is only whether the States can be subjected, without consent, to suits brought by private persons seeking to collect moneys from the state treasury. Their immunity cannot be abrogated without documentation of a pattern of unconstitutional acts by the States, and only then by a congruent and proportional remedy. There has been a complete failure by respondents to carry their burden to establish each of these necessary propositions. I would hold that the Act is not a valid abrogation of state sovereign immunity and dissent with respect from the Court's conclusion to the contrary.