THE STATE OF THE NATION, NOT THE STATE OF THE RECORD: FINDING PROBLEMS WITH JUDICIAL “REVIEW” OF ELEVENTH AMENDMENT ABROGATION LEGISLATION

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I. INTRODUCTION

Two centuries ago, for better or for worse, constitutional supremacy rested where Chief Justice John Marshall placed it. In a moment of pernicious partisanship or constitutional prowess or both, he declared it to be “emphatically the province and duty of the judicial department to say what the law is.”

Before the reader moves on, however, it is important to note that this Note is not another on Marbury v. Madison. Nevertheless, the bicentennial of Chief Justice Marshall’s historic statement has been short-lived. In the context of the Eleventh Amendment, Marbury (and the proposition of judicial review for which it stands) is no longer good law.

For purposes of the Eleventh Amendment, Marbury’s precepts and progenies have been replaced by a doctrine once befit for Congress, but now beholden to the Court: the Supreme Court’s recent requirement that in order to abrogate Eleventh Amendment immunity, Congress must physically document massive findings.2

And despite upholding congressional abrogation of the Eleventh Amendment for the first time in over a decade, the Supreme Court’s 2003 decision in Nevada Department of Human Resources v. Hibbs3 only perpetuated the problem.4 In the past seven years, the Court has assured that the Eleventh Amendment will not only reach its pinnacle, but also (1) rebalance the Fourteenth Amendment’s longstanding scrutiny framework, (2) continue to allow states to avoid legal responsibility, (3) assure aggrieved plaintiffs no remedy,5 and finally, (4) make certain that Congress

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2. See discussion infra Parts II.B, III.B-C.
4. See discussion infra Part III.C.
5. Contra Marbury v. Madison, 5 U.S. (1 Cranch) at 163 (“The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.”); THE FEDERALIST NO. 43, at 291 (James Madison) (Jacob E. Cooke ed., 1961) (noting that “a right implies a remedy”). Of course, from a remedial standpoint, the Eleventh Amendment’s elimination of a private individual’s suit for money damages does not (technically) leave that individual remediless. There remain inferior options, such as the enforcement of federal statutes through a suit by the United States Department of Justice, as well as a private action for prospective injunctive relief under the legal fiction of Ex parte Young, 209 U.S. 123 (1908).
will have little breathing space in which to act. By forcing a judicial fact-finding procedure on Congress, and then conducting its own substantive “strict scrutiny” of those findings, the Court has overstepped the express bounds set two hundred years ago in Marbury by performing a legislative—as opposed to a judicial—function. Part II of this Note briefly summarizes the history and rapid acceleration of judicial “review” in abrogation decisions.

This recent aggrandizement of Marbury and venture into the procedural prerogative of a coequal branch raises serious separation of powers concerns. The result is precedential, constitutional, and institutional catastrophe that, in time, will do more harm than good for future courts, legislators, and a constitutional governing system of coequal departments.

By virtue of Fourteenth Amendment jurisprudence and legislation, the history and practicalities of federal lawmaking, and by the proper scope of judicial review under decisions stretching back to Marbury, it is the Author’s contention that the power to make law pursuant to the

6. See discussion infra Parts III.B, IV, V.
7. See discussion infra Part III.B-C.
8. In this Note, the term “abrogation” refers exclusively to congressional abrogation of state sovereign immunity, whether that immunity stems from the Eleventh Amendment or the historical precepts that embody it. For a description of both, see generally Alden v. Maine, 527 U.S. 706, 728-79 (1999) (“The Eleventh Amendment confirmed, rather than established, sovereign immunity as a constitutional principle; it follows that the scope of the States’ immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design.”); Hans v. Louisiana, 134 U.S. 1, 16 (1890) (explaining that “[t]he suability of a State without its consent was a thing unknown to the law”); The Federalist No. 81, at 548-49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. . . . Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal.”). Throughout this Note, all references to the terms “Eleventh Amendment immunity” and “sovereign immunity” should be read to include both sources.
9. See discussion infra Part III (chronicling this recent shift in the Court’s judicial “review” over the abrogation power of Congress).
10. U.S. Const. amend. XIV, § 5 [hereinafter § 5] (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).
11. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. . . . [This] judicial power of the United States is extended to all cases arising under the constitution.”) (emphases added).
assessment of national concerns and societal conditions has been properly bequeathed to Congress, not the courts. Likewise, Congress’s power to
do so has, will, and should extend beyond the state of the legislative record. This Note calls for a wholesale reversal of all Eleventh Amendment abrogation case law to the contrary. In its place, the Supreme Court should reinstate its Seminole Tribe v. Florida\(^\text{13}\) abrogation analysis, which, by narrowing the dispositive inquiry to two questions,\(^\text{14}\) properly heeded the sovereign immunity lessons of pre-ratification history\(^\text{15}\) while simultaneously elucidating the practical (and temporal) distinctions between congressional authority under Article I and congressional power under Section Five of the Fourteenth Amendment.\(^\text{16}\) In its most basic form, this abrogation schematic properly pinpoints Congress’s power to act,\(^\text{17}\) not how to act once the power question has been conceded.

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\(^{13}\) Seminole Tribe v. Florida, 517 U.S. 44.

\(^{14}\) See discussion infra Part II.B (outlining these two questions).

\(^{15}\) See generally Paul E. McGreal, Saving Article I From Seminole Tribe: A View from the Federalist Papers, 55 SMU L. Rev. 393, 412-20 (2002) (outlining the historical significance of state sovereign immunity—particularly to framers such as Alexander Hamilton—and its corresponding limit on federal power, endorsing the argument that the several states retained their immunity even after ratifying the Constitution, save for three narrow exceptions).

\(^{16}\) See, e.g., Seminole Tribe v. Florida, 517 U.S. at 64-66 (noting that the Court’s seminal holding in *Hans v. Louisiana*, 134 U.S. 1, 16 (1890) would be eviscerated if Congress were allowed, under Article I, to expand the scope of federal jurisdiction under Article III, and as a result, limit the power of an amendment (Amendment Eleven) that was added after, and thus logically acts as a limitation on, Articles I and III); McGreal, *supra* note 15, at 411-21 (making a historical argument in support of broad sovereign immunity, particularly when congressional invocation of § 5 is absent); see also infra Part III.

\(^{17}\) See Seminole Tribe v. Florida, 517 U.S. at 59 (“Thus our inquiry into whether Congress has the power to abrogate unilaterally the States’ immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?”) (citing Fitzpatrick
For purposes of this Note, the foregoing will be accomplished using Eleventh Amendment abrogation jurisprudence as an analytical baseline. After Part III assesses the Eleventh Amendment abrogation scene before and after Hibbs, Part IV analyzes two aforementioned calamities: crises of Constitution and institution. Part V concludes by urging the Court to banish its “legislative record” requirement in abrogation cases, calling for a return to the Seminole Tribe18 analysis—no more, no less. Such a remedy allows the Court to retain all that is correct in its Eleventh Amendment jurisprudence and discard all that is fundamentally wrong. The abrogation analysis left standing will enable the Court to take proper cognizance of the constitutional, institutional, and practical aspects of lawmaking in such a way as to provide the respect due its coequal neighbor.

II. JUDICIAL REVIEW AND ABROGATION: THE ORIGINS

A. The Province and Duty to Say What the Law Is

Chief Justice [Marshall] says [that] “there must be an ultimate arbiter somewhere.” True, there must; but does that prove it is either party? The ultimate arbiter is the people of the Union, assembled by their deputies in convention, at the call of Congress . . . . Let them decide to which they mean to give an authority claimed by two of their organs.19

Until recently, the litmus test of time embraced the above words, leaving Jefferson’s final arbiter—the people—with the last word in the court of history. The significance of Chief Justice Marshall’s declaration as a doctrine and Marbury’s scope as a momentous ruling was, historically speaking, unrecognized in practice.20 This reflected both the insignificance

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18. See id. at 72-73 (preventing the use of Article I “to circumvent the constitutional limitations placed upon federal jurisdiction” by Article III).
20. WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW, at ix (2000) (noting that “[t]he case . . . did not bring about a revolution in the legal system or the politics of the times,” as well as the fact that “later American courts . . . have changed the way in which judicial review functions”); see infra note 25 and accompanying text; see also AKHIL REED AMAR, AMERICA’S CONSTITUTION: A GUIDED TOUR ch. 6, at 7 (forthcoming 2005) (advancing a similar argument). Cf. 2 GEORGE LEE HASKINS & HERBERT A. JOHNSON, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 136-81 (1981) (describing
of the Supreme Court as a constitutional player, and the vast power of Congress as legislator and constitutional arbiter via “popular sovereignty.”

The jurisprudential history of Section Five of the Fourteenth Amendment (Section Five) demonstrates this point. Deferring to the mandate of the people through their elected representatives, the Supreme Court as a relatively feeble institution during the late eighteenth and early nineteenth centuries).

21. Or, in other words, the people qua sovereign. For an excellent account of the historical perception of judicial review, see AMAR, supra note 20, ch. 6, at 1, 5-14 (comparing the modern portrayal of the Marshall Court as final arbiter with the reality of a weak judiciary, noting that the “Constitution itself presents a more balanced picture, listing the judicial branch third, pronouncing the Justices ‘supreme’ over other judges but not over other branches,” and that, in the view of its framers, “much of the [government’s] success, democratically and geostrategically, would depend on men other than life-tenured judges”). In fact, “[o]nly in the late twentieth century did the Court begin to describe itself as ‘the ultimate interpreter’ of the Constitution.” Id. at 12; see also EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT 66-67 (1938) (noting the superior oath power of the president and executive branches as compared to the judiciary, the oaths of which “come from an act of Congress”). Also not to be forgotten is the historic role of the Executive as final arbiter, which, along with legislative review, outweighed the functional authority of judicial review during the first 150 years of constitutional governance in America. AMAR, supra note 20, chs. 5-6. Andrew Jackson’s (Bank) “Veto Message” is particularly emblematic:

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over judges. . . . The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.

Andrew Jackson, Veto Message, (July 10, 1832), in 3 MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1145 (James D. Richardson ed., 1897); see also Sanford Levinson, Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn’t Either, 38 WAKE FOREST L. REV. 553, 571 (2003) (alluding to the power of executive and legislative officials as “full-scale constitutional interpreters” alongside the federal judiciary).

22. See § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”).
Court, between 1883 and 1997, did not invalidate a single piece of federal legislation on the basis that Congress had exceeded its power under Section Five. Active judicial review was the exception, deference the rule. One commentator has explained that

the early Supreme Court would generally end up deferring to laws that had been approved by America’s most distinguished statesman in the House, Senate, and Presidency. By 1850, although the Court had invalidated more than thirty state statutes, it had only once declined to carry out a provision of federal law—and even then the case (Marbury v. Madison) had involved a tiny sentence buried in a sprawling statute, a sentence regulating a technical issue of judicial procedure.

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23. Ruth Colker & James J. Brudney, Dissing Congress, 100 MICH. L. REV. 80, 83 n.10 (2001). The two decisions positioned on each side of this 115-year gap were The Civil Rights Cases, 109 U.S. 3 (1883) and City of Boerne v. Flores, 521 U.S. 507 (1997). In the former, the Court held that Congress lacked the authority to enforce federal constitutional rights against private conduct via § 5. The Civil Rights Cases, 109 U.S. at 23-26. In the latter, the Court found the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-1 to -4 (1994), unconstitutional as exceeding the scope of § 5 enforcement power. City of Boerne v. Flores, 521 U.S. at 534-36.

A broadening of constitutional baselines yields a similar rarity of judicial interference with the prerogatives of Congress, even when taking into account the extremely activist Lochner Era. See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.3, at 442-46 (7th ed. 2004) (discussing the judicial activism typified by the era). Moreover, from 1789 until Justice Roberts’s 1937 “switch in time that saved nine” in West Coast Hotel v. Parrish, 300 U.S. 379 (1937), the Supreme Court invalidated—in whole or in part—only 84 laws (only 62 in full). WILFRED C. GILBERT, PROVISIONS OF FEDERAL LAW HELD UNCONSTITUTIONAL BY THE SUPREME COURT OF THE UNITED STATES 95 (1936). The Court decided over 40,000 cases during that period. Id.


25. AMAR, supra note 20, ch. 6, at 7; see also Levinson, supra note 21, at 559 (“I take it that everyone agrees that the substantive legal topic of Marbury—i.e., the ability of Congress to add to the original jurisdiction of the Supreme Court—is of no real significance;” for instance, “[n]ot even William Marbury believed that his commission was of ‘fundamental importance,’ as evidenced by the fact that he apparently made no effort to litigate his case further.”). But see Éric J. Segall, Why I Still Teach Marbury (And So Should You): A Response to Professor Levinson, 6 U. PA. J. CONST. L. 573, 574 (2004) (noting that the substantive decision in Marbury involved “some of the most fundamental questions about our form of government and our Constitution”).
By contrast, the current Court—in less than a decade—has found Congress to have exceeded its constitutional authority no less than thirty times.26 Nowhere has this trend become more vivid than in cases involving Congress's abrogation power over the Eleventh Amendment,27 which presumes that states may be sued in the first instance if Congress properly so provides.28 Likewise, at no time has it become more institutionally
dangerous than in the past seven years.29

This judicial stranglehold on Congress’s Section Five enforcement power and concomitant explosion of state sovereign immunity began with the slew of abrogation cases handed down after the Court’s 1996 decision in *Seminole Tribe*. For nearly a decade, these rulings have continued apace.30 Results have shielded the states from liability, pierced the remedial alternatives of aggrieved plaintiffs, and severed the lawmaking capabilities of Congress under Section Five.31 In the span of less than a

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state . . . . If this is the necessary consequence of the language of the Constitution and the law, the result is no less startling and unexpected than was the original decision of this court, that under the language of the Constitution and of the judiciary act of 1789, a State was liable to be sued by a citizen of another State, or of a foreign country. That decision was made in the case of *Chisholm v. Georgia*, and created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States. This amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court.

Hans v. Louisiana, 134 U.S. 1, 10-11 (1890) (citation omitted). *But see* Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 954 (2000) (“That sovereign immunity may have long provenance—as did prayer in schools, as did the suppression of women, as did Jim Crow laws—does not end the questions of whether the immunity is constitutionally compelled, how the immunity can be overcome, how broadly it extends, and who shares in it.”).

29. See cases cited supra note 26; discussion infra Part III.B-C.

30. See cases cited supra note 26 (excluding *Seminole Tribe* and *City of Boerne*); see discussion infra Parts II.B, III.B.

31. Professor Akhil Amar has analyzed the current Court’s Eleventh Amendment jurisprudence as follows:

No individual can sue her own or any other state in federal court unless the defendant’s constitutional immunity is in some special way waived or abrogated. Sovereign immunity ousts all federal jurisdiction, whether in law, equity, or admiralty; whether the suit is based on state law, congressional statute, or the Constitution itself; and whether or not state liability would most fully remedy a constitutional wrong perpetrated by the state itself. The state thus enjoys “sovereign” immunity even when it has violated a limitation on that sovereignty imposed by the ultimate sovereign, the American People. All of this is, in a word, nonsense.

Amar, supra note 12, at 1473 (footnote omitted). For a more detailed list of the types of lawsuits the Eleventh Amendment allows and disallows, see Scott Dodson, *The Metes and Bounds of State Sovereign Immunity*, 29 HASTINGS CONST. L.Q. 721, 721-23
decade, the Eleventh Amendment has become both a shield and sword.32

This Section Five facelift has increasingly derived its power not from a misinterpretation of the Eleventh Amendment,33 but rather, from a sharp increase in the quantity of abrogation prerequisites demanded by the Court.34 Recently, a trilogy of cases quietly introduced a new element into the analysis: the burden on Congress to document “a history and pattern of . . . discrimination by the States.”35 Until the decision in Hibbs, this burden was never met,36 sending aggrieved plaintiffs and a handcuffed Congress packing. Under this new burden, the chance that a state would be held accountable for its conduct was almost as futile as Congress’s corresponding leeway in its (diluted) role as national legislator.37 Merely keeping track of the ever-changing abrogation elements is hard enough to do.

B. For the Record: A Summary of Congress’s Abrogation Burden

Before massive findings became the rule,38 the Eleventh Amendment’s transformation from shield to sword to both began with Congress. In cases such as Atascadero State Hospital v. Scanlon,39

(2002).

32. Todd B. Tatelman, Comment, Nevada Department of Human Resources v. Hibbs: The Eleventh Amendment in a States’ Rights Era: Sword or Shield?, 52 CATH. U. L. REV. 683, 720-25 (2003) (attempting to predict the Court’s then-upcoming Hibbs ruling). Tatelman focuses more on the outcome of the circuit split than on the novelty and probable impact of the Court’s new abrogation element: the findings burden. Id. at 690-98. The circuit split was resolved in Hibbs. See infra note 135.

33. This topic—the interpretation and scope of the Eleventh Amendment itself—has dominated the scholarly debate regarding the Amendment for some time. See supra note 12 (listing numerous works). It does not dominate the content of this Note.

34. See discussion infra Parts II.B, III.B.


37. See discussion infra Parts III.B, IV.B. See generally NOONAN, supra note 12, at 1-9 (hypothecating the grave situation faced by aggrieved plaintiffs, in particular, employees of the several states). Judge Noonan spends relatively little time assessing Congress’s legislative predicament, but where he does, his analysis is excellent. See id. at 147-50. This Note attempts to elaborate in that direction.

38. See discussion infra Part III.B-C.

Pennsylvania v. Union Gas Company,\textsuperscript{40} and Dellmuth v. Muth,\textsuperscript{41} the Court held that state sovereign immunity could be abrogated under numerous provisions of the Constitution, so long as Congress “ma[d]e its intent to do so ‘unmistakably clear’” in the language of the statute at issue.\textsuperscript{42} In Seminole Tribe, the Court limited the dispositive inquiry—and thus Congress’s abrogation authority—to one provision: Section Five of the Fourteenth Amendment.\textsuperscript{43} This admonition was straightforward and made constitutional sense. If a federal law fit within the broad scope of Section Five, states could be sued for violating that law.\textsuperscript{44} If not, Congress could not act, and states enjoyed immunity from suit.\textsuperscript{45}

But simple congressional invocation of Section Five was never to become the predictable blank check foreshadowed by the logical decisions in Union Gas and Seminole Tribe. Less than a decade after Union Gas, the

\begin{itemize}
  \item \textsuperscript{41} Dellmuth v. Muth, 491 U.S. 223 (1989).
  \item \textsuperscript{42} Pennsylvania v. Union Gas Co., 491 U.S. at 7 (citing Atascadero State Hosp. v. Scanlon, 473 U.S. at 242); accord Dellmuth v. Muth, 491 U.S. at 227-28; Green v. Mansour, 474 U.S. 64, 68 (1985). Even the Seminole Tribe Court understood this limited principle (before ultimately modifying it):

  \begin{itemize}
    \item \textsuperscript{43} See Seminole Tribe v. Florida, 517 U.S. at 64-66 (eliminating congressional abrogation power under Article I, thus leaving § 5 as Congress’s sole abrogation tool); id. at 59 (discussing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), where the Court held “that § 5 of the Fourteenth Amendment allowed Congress to abrogate the immunity from suit guaranteed by that Amendment”); see, e.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80 (2000) (explaining that after Seminole Tribe, “private petitioners . . . may maintain . . . suits against the States . . . if, and only if, the [statute in question] is appropriate legislation under § 5”) (emphasis added).
    \item \textsuperscript{44} ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 210 (2001).
    \item \textsuperscript{45} Id.
  \end{itemize}
\end{itemize}
Court stiffened, and would grant abrogation only if Congress (1) continued to "mak[e] its intention [to do so] unmistakably clear" and (2) used remedial legislation that (3) fit within the scope of Section Five (only).

While these additions made the abrogation inquiry a bit more searching, abrogation was still (theoretically) achievable; the three-pronged analysis, while rigorous, was constitutionally justified. At no time was mandatory recordkeeping alluded to; in fact, such a requirement was rejected out of hand. Beyond any peradventure of doubt, Congress's

47. See City of Boerne v. Flores, 521 U.S. 507, 519, 536 (1997) (invalidating a nonremedial scheme enacted by Congress (the RFRA)). The Court has, however, continued to state that Congress is not limited to remedial legislation under § 5; Congress also has the power to deter. Id. Nevertheless, this idea has become less of a concession and more of a window dressing in abrogation cases. See infra notes 98, 106.

Hard to square with the results in recent cases, the "broad swath" statement reads as follows:

“It is for Congress in the first instance to ‘determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference.” Congress’ § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress’ power “to enforce” the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.

Kimel v. Fla. Bd. of Regents, 528 U.S. at 80-81 (quoting City of Boerne v. Flores, 521 U.S. at 517-18, 536; Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)) (emphasis added; alteration in original) (citations omitted); see also Miss. Univ. for Women v. Hogan, 458 U.S. 718, 732 (1982) (stating that § 5 enforcement power is a “broad power indeed”) (citing Ex parte Virginia, 100 U.S. 339, 346 (1880)).

48. See cases cited supra note 43 and accompanying text; see also Melissa Hart, Conflating Scope of Right with Standard of Review: The Supreme Court’s “Strict Scrutiny” of Congressional Efforts to Enforce the Fourteenth Amendment, 46 VILL. L. REV 1091, 1093 (2001) (explaining that “until just five years ago [in the decision of Seminole Tribe], it was widely understood that Congress could charge the states with obeying federal anti-discrimination laws so long as those laws were validly passed pursuant to any of Congress’ enumerated powers”).

49. See supra notes 15-17 and accompanying text.

50. See, e.g., Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646 (1999) (explaining that “the lack of support in the legislative record is not determinative”); City of Boerne v. Flores, 521 U.S. at 531-32 (finding the lack of findings not dispositive, stating that “[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles but ‘on due regard for the decision of the body constitutionally appointed to decide.’ [I]t is for Congress to determine the method by which it will reach a decision.”) (quoting Oregon v. Mitchell,
ability to legislate based on the state of the nation was kept intact. And if that legislation was enacted pursuant to Section Five, congressional leeway would be granted so long as the enactment was consistent, in letter or spirit, to its constitutional genesis.\footnote{For a classic summary of this broad power, see \textit{Ex parte Virginia}, 100 U.S. 339 (1879), where the Court stated as follows:}

\begin{quote}
Whatever legislation is \textit{appropriate}, that is, adapted to carry out the objects the amendments have in view, whatever \textit{tends} to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.
\end{quote}

\textit{Id.} at 345-46 (emphases added); \textit{see discussion infra Part III.A.}\footnote{Cf. \textit{City of Boerne v. Flores}, 521 U.S. 519-29 (demarcating the “remedial” bounds of Congress’s § 5 power in a case not involving the Eleventh Amendment).}

However, where the \textit{Seminole Tribe} analysis found ringing support in constitutional structure and history, that justification for subsequent abrogation requirements would ring hollow. What resulted instead was more armor for the states, fewer weapons for Congress, and additional substantive decisionmaking by the Court. With the accrual of time, the remedial\footnote{\textit{See cases cited supra note 43 and accompanying text.}} and Section Five\footnote{Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) (internal quotation marks omitted). With the exception of \textit{Federal Maritime Commission v. South Carolina State Ports Authority}, 535 U.S. 743, 753-69 (2002), non-waiver Eleventh Amendment cases have stated the same. \textit{Tennessee v. Lane}, 124 S. Ct. 1978, 1986 (2004); \textit{Nev. Dep’t of Human Res. v. Hibbs}, 538 U.S. 721, 728 (2003); \textit{Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank}, 527 U.S. at 646-47.} requirements quietly accumulated a novel grouping of subparts.

First, for Congress to abrogate successfully (to wit, for Congress to merely \textit{act}), it must find “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”\footnote{The word “some” is used here to demonstrate the liberality of this requirement during the Court’s 1996 to 1999 Terms. This “some” has since been replaced by an expected \textit{sum} of documented findings that—while presumably great in number—has been neither quantified nor justified by the Supreme Court. \textit{See sources cited infra note 68 and accompanying text.}} Next, for a law to meet this “congruence and proportionality” test, there must be \textit{some}\footnote{The word “some” is used here to demonstrate the liberality of this requirement during the Court’s 1996 to 1999 Terms. This “some” has since been replaced by an expected \textit{sum} of documented findings that—while presumably great in number—has been neither quantified nor justified by the Supreme Court. \textit{See sources cited infra note 68 and accompanying text.}} finding of a “widespread and persisting deprivation of constitutional rights” of the sort Congress has faced in enacting proper
prophylactic [Section] Five legislation.”56 In other words, something unbroken in the several states needs no constitutional fixing by Congress.57

And as discussed below,58 four more cases have established the lack of physical documentation as an additional dispositive requirement.59 “The Court increasingly appears to require a legislative record to justify enactments, and it then probes the record to determine its sufficiency.”60

56. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. at 645 (quoting City of Boerne v. Flores, 521 U.S. at 526). This has also been referred to as evidencing a “history” or “pattern of constitutional violations.” Id. at 640, 645; see Kimel v. Fla. Bd. of Regents, 528 U.S. at 83 (using the latter phrase). The Court in Garrett combined the two terms. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 368 (2001) (“[W]e examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States . . . .”).

57. One noted constitutional law scholar recently defined the “congruence and proportionality” standard as a remedy for impermissible “over-enforce[ment]” of, inter alia, the Fourteenth Amendment. Ronald D. Rotunda, The Eleventh Amendment, Garrett, and Protection for Civil Rights, 53 ALA. L. REV. 1183, 1213 (2002). Professor Rotunda analogized as follows:

If a highway patrolman arrests you for traveling 55 m.p.h. in a 65 m.p.h. zone, you would not be satisfied by the patrolman’s response that he was merely “over-enforcing” the traffic laws. You would object to being subjected to phantom restrictions. Similarly, some states were upset with the phantom restrictions that RFRA imposed [in, for example, City of Boerne].

Id.

58. See discussion infra Parts II.B-III.

59. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 729-34 (2003); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 372; Kimel v. Fla. Bd. of Regents, 528 U.S. at 61; Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. at 646. Compare City of Boerne v. Flores, 521 U.S. at 531-32 (finding the lack of documented pervasive violations not to be fatal, stating that “[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles but ‘on due regard for the decision of the body constitutionally appointed to decide[,]’” and that “it is for Congress to determine the method by which it will reach a decision”) (quoting Oregon v. Mitchell, 400 U.S. 112, 207 (1970) (Harlan, J., concurring in part and dissenting in part)), and Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. at 646 (explaining that “the lack of support in the legislative record is not determinative”), with Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 368 (“Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled.”). See discussion infra Part III.

60. William W. Buzbee & Robert A. Schapiro, Legislative Record Review, 54 STAN. L. REV. 87, 98-99 (2001) (focusing on judicial review of the legislative record in areas such as the Commerce Clause, Reconstruction Amendments, administrative agency rulemaking, and the political process).
The “findings” requirement, once considered an advantageous but unnecessary Section Five enforcement element, is now mandatory. An “unmistakably clear” statement, “remedial legislation,” and “congruence and proportionality,” are not enough today for the states or the Court. In this fatiguing process, the Court has not only “undermined Congress’s ability to decide for itself how and whether to create a record in support of pending legislation,” it has provided no law to guide Congress in its attempt to satisfy these quasi-legislative coos and bellows.

61. City of Boerne v. Flores, 521 U.S. at 531-33 (striking down the RFRA as neither congruent nor proportional to alleged remedial ends, but stating that the “lack of support in the legislative record, however, is not RFRA’s most serious shortcoming. Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles . . . .”) (emphasis added).

62. See, e.g., Nev. Dep't of Human Res. v. Hibbs, 538 U.S. at 729 (mandating documented findings in order for Congress to legislate in the sphere of Eleventh Amendment abrogation); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 368 (same).


64. Cf. City of Boerne v. Flores, 521 U.S. at 517, 527, 532 (analyzing this requirement in a non-Eleventh Amendment case).

65. Id. at 520.

66. See discussion infra Part III.B-C.

67. Colker & Brudney, supra note 23, at 83 (analyzing the issue under administrative law principles before the decisions in Federal Maritime Commission and Hibbs were handed down). See also Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 376 (Breyer, J., dissenting) (“Reviewing the congressional record as if it were an administrative agency record, the Court holds the statutory provision before us, 42 U.S.C. § 12202, unconstitutional.”).

68. See discussion infra Parts III.C.2-4, IV.B. Compare Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. at 654 (Stevens, J., dissenting) (“[I]t is quite unfair for the Court to strike down Congress’ Act based on an absence of findings supporting a requirement this Court had not yet articulated,” especially when “[t]he legislative history of the Patent Remedy Act makes it abundantly clear that Congress was attempting to hurdle the then-most-recent barrier this Court had erected in the Eleventh Amendment course—the ‘clear statement’ rule of Atascadero.”) (citation omitted), and Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI. L. REV. 1175, 1179-80 (1989) (arguing against ad hoc inquiries, and instead stressing the need for courts to hand down clear, sustainable principles to better guide those affected as well as those interpreters who follow), and Tennessee v. Lane, 124 S. Ct. 1978, 2007-08 (2004) (Scalia, J., dissenting) (“I have generally rejected tests based on such malleable standards as ‘proportionality,’ because they have a way of turning into vehicles for the implementation of individual judges’ policy preferences.”), with, e.g., Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80-82 (2000) (outlining the often malleable inquiry—based primarily on individual policy preferences—administered by the Court in § 5 abrogation cases).
III. THE RISE OF FINDINGS AND DEMISE OF ABROGATION

Judicial deference or activism did not emerge in an Eleventh Amendment vacuum. Before discussing the ironies and inconsistencies of modern abrogation jurisprudence, it is important to target the period in which the Court began to scrutinize Congress’s legislative findings, and in what lawmakers context(s) it did so.

A. Deferential Beginnings

To this end, one might be surprised to learn that until City of Boerne and its adjacent sovereign immunity progeny, the Supreme Court had never invalidated Section Five lawmaking based on its own substantive review of the formal record compiled. Moreover, as some commentators have noted, the Court, until very recently, had never even mandated a written record, let alone an “adequate” one, under any legislative context.

In the past half-century, deference to congressional findings has been exemplified in monumental cases such as South Carolina v. Katzenbach, Katzenbach v. Morgan, and Fitzpatrick v. Bitzer, where the Court responded to Section Five legislation with a consistent philosophy:

71. See discussion infra Part III.A-B. Compare Buzbee & Schapiro, supra note 60, at 95 (noting that “in contrast to court or agency settings, the final product of an enacted bill consists of the statutory text, but often lacks explanatory materials,” and, as the Supreme Court itself has accepted, “even a law enacted with virtually no accompanying history and placed within thousands of pages of appropriations allocations is valid law as long as its relation to previous law is evident in its text”), with Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. at 729 (demanding that “Congress [physically] evidence . . . a pattern of constitutional violations on the part of the States in the area” sought to be remedied by the use of § 5 legislation).
74. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); see id. at 456-57 (deferring to Congress, and finding valid abrogation of Eleventh Amendment immunity through § 5 of the Fourteenth Amendment; describing the limiting nature the latter amendment has on the principles that embody the former; elucidating the proper role of the judiciary with regards to national legislation); see also Chemerinsky, supra note 44, at 191-95, 203-05 (chronicling the broad § 5 authority historically given Congress); Laurence H. Tribe, American Constitutional Law § 16.3, at 1443 (2d ed. 1988) (“Often only the Court’s imagination has limited the allowable purposes ascribed to government.”).
It was for Congress, as the branch that made this judgment, to assess and weigh the various conflicting considerations—the risk or *pervasiveness of the discrimination* in governmental services, the effectiveness of eliminating [a state’s discrimination] as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the [state classification/law/policy]. *It is not for us to review the congressional resolution of these factors.*

Commenting on this case in which he played a vital part, former Professor and Watergate Special Prosecutor Archibald Cox explained that

the *Morgan* case left no doubt that section 5 of the fourteenth amendment gives Congress power to deal with conduct outside the scope of section 1 and within the reserved powers of the states where the measurement is a means of securing the state’s performance of its fourteenth amendment duties, *regardless of its past compliance or violations.*

From the famous “footnote four” until the mid-1990s, judicial

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75. Katzenbach v. Morgan, 384 U.S. at 653 (emphases added). Countless cases echo this philosophy; because recitation of them all necessitates numerous pages, a brief sampling will have to do. See, e.g., Astoria Fed. Sav. & Loan Ass’n v. Solimino, 501 U.S. 104, 113-14 (1991) (finding Age Discrimination in Employment Act provision denying preclusive effect to state agency rulings acceptable because “[i]t . . . may well be that Congress thought state agency consideration generally inadequate to ensure full protection against age discrimination in employment,” despite Congress making no formal finding to that effect); Fullilove v. Klutznick, 448 U.S. 448, 478 (1980) (Burger, C.J.) (plurality opinion) (“Congress, of course, may legislate without compiling the kind of ‘record’ appropriate with respect to judicial or administrative proceedings.”); Perez v. United States, 402 U.S. 146, 156 (1971) (stating that “Congress need [not] make particularized findings in order to legislate[,]” even in areas where the states have historically been sovereign).

76. Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 103 (1966) (emphasis added); see City of Boerne v. Flores, 521 U.S. 507, 518 (1997) (“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 and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’”) (quoting Fitzpatrick v. Bitzer, 427 U.S. at 455) (emphasis added).

77. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (explaining that Reconstruction Amendment legislation review would be extremely deferential, unless the law/classification in question was found to discriminate against suspect classes or fundamental rights). Two commentators have echoed this trend:
review of Section Five legislation—including abrogation—was, in a word, deferential. Legislative flexibility rather than judicial rigidity distinguished it. The absence of a discriminatory past was not dispositive. The state of the nation was the basis of legislation. Congress could not change the content of the Constitution, “but it [could] add teeth so that the Constitution’s rule ha[d] practical bite.” Even through 1997—the eve of sovereign immunity’s explosion—comparative Supreme Court case law involving legislative record review echoed a similar message.

The Supreme Court generally has deferred to legislative determinations of whether a proper predicate exists to validate challenged legislation. Outside of the areas of suspect classes and fundamental rights, the Court eschews an independent assessment of the predicate state of affairs. The Court’s deferential stance has given rise to two general principles. First, Congress need not make any findings or compile any evidence. Instead, the Court credits the legislative judgment, examining only whether the legislative choice is “rational.” Indeed, the Court has stated that Congress need not make any actual determinations about such legislative facts. The Court has asserted that it will presume that the necessary predicate exists and that it will strike down the statute only if no reasonable basis exists to support the implied conclusion. Second, if Congress does make findings or develop other evidence, the Court will afford great weight to such legislative materials.

Buzbee & Schapiro, supra note 60, at 103.

78. See supra notes 70-77 and accompanying text.
79. See discussion infra Part IV.B.2.
80. Endres v. Ind. State Police, 334 F.3d 618, 628 (7th Cir. 2003).
81. The current Court’s initial dive into legislative record jurisprudence came in First Amendment decisions—cases protecting individual rights, not states’ rights. The result was a doctrine of substantial deference to the predictive judgments of Congress. E.g., Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 632-34, 646-49, 652, 662-64 (1994). Despite remanding the case to clarify the facts, a plurality of the Court in Turner I emphasized that
courts must accord substantial deference to the predictive judgments of Congress. Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. As an institution, moreover, Congress is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon an issue as complex and dynamic as that presented here. And Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.

Id. at 665-66 (Kennedy, J.) (plurality opinion) (internal punctuation and citations omitted); see also Turner Broad. Sys., Inc. v. FCC (Turner II), 520 U.S. 180, 195-96 (1997) (upholding the federal “must carry” provision and ruling that Congress did not need to amass formal findings in order to legislate); Robertson v. Seattle Audubon
B. Activist Ends: The Eleventh Amendment Abrogation Cases

But times have changed. Skepticism has taken the place of deference, and judicial arrogation has left little room for congressional abrogation. If City of Boerne's congruence and proportionality test82 narrowed Congress's ability to vindicate the rights of individuals against state malfeasance,83 the sovereign immunity explosion that followed it shattered Congress's power to legislate around the Eleventh Amendment.84 The recent decisions of Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,85 Kimel v. Florida Board of Regents,86 and Board of Trustees of the University of Alabama v. Garrett87 are exemplary of this constitutional conundrum. All three cases considered the validity of federal statutes authorizing suits against state governments.88 All three failed the new judicially created ad hoc abrogation test.89


83. See discussion supra Part II.B; Chemerinsky, supra note 44, at 191 (noting the viewpoint that Congress has a narrow scope of power under § 5 and can only prevent or provide remedies for violations for those rights recognized by the Supreme Court).

84. To wit, abrogate the Eleventh Amendment. See generally Robert C. Post & Reva B. Siegel, Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel, 110 Yale L.J. 441, 512 (2000) (“[H]aving worked so hard in Seminole Tribe to establish state Eleventh Amendment immunity from suits predicated upon federal commerce power, the Court was not about to cede to Congress free rein to override that immunity under Section 5.”); see cases cited supra note 26.


88. That is, the statutes abrogated state sovereign immunity. It is important to note that the decision of College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999), could easily be included in this group, but in order to avoid redundancy, it is not. College Savings Bank involved use of a trademark law to abrogate the Eleventh Amendment. See id. at 668-69 (discussing the Trademark Remedy Clarification Act and the Trademark Act of 1946). The Court ultimately found “that the sovereign immunity of the State of Florida was neither validly abrogated by the Trademark Remedy Clarification Act, nor voluntarily waived.” Id. at 691.

89. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 360; Kimel v. Fla. Bd. of Regents, 528 U.S. at 80, 91; Fla. Prepaid Postsecondary Educ. Expense Bd. v.
1. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank

*Florida Prepaid* involved a federal law authorizing suits for patent infringement against the states.90 A patentee sued a state entity in federal court, claiming patent infringement.91 The thresholds of *Atascadero*92 and *Seminole Tribe*93 were satisfied, as Congress made “unmistakably clear”94 its intent to abrogate and acted pursuant to the Fourteenth Amendment in enacting the Patent Remedy Act.95

However, while that may have met abrogation standards in 1996,96 it was not good enough in 1999. Unlike its Section Five predecessors of the past half-century,97 any mention of deference to Congress (and its evaluation of the state of the nation) was missing from the *Florida Prepaid* decision.98 Far from posing even a negligible burden on states that chose to...
blatantly infringe on citizens’ patent rights, the Court—for the first time in the abrogation context—hoisted a strict burden of findings upon Congress’s shoulders. Because “Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations,” the Court held that the Patent Remedy Act did not validly abrogate the sovereign immunity of the State of Florida. 99

Florida Prepaid resulted in the conflicting proposition that while patents are property protected by the Fourteenth Amendment from being taken by state governments without due process or just compensation, 100 a citizen has no individual legal recourse to prevent such an occurrence. 101 Because the federal courts have exclusive jurisdiction of patent law, 102 by barring suits in that forum, the Court in Florida Prepaid effectively barred suits across the country, and—by default—constitutionalized the ability of states to infringe patents with impunity.

2. Kimel v. Florida Board of Regents

The decision in Kimel gave a university similar unbridled discretion, in this instance to discriminate against its employees on the basis of age. 103 Absent again in the Court’s opinion was any clear holding that the weakness of the legislative record was not dispositive. 104 The case involved a suit by current and former faculty of Florida State University who alleged that the University violated the Age Discrimination in Employment Act (ADEA) by failing to provide promised pay adjustments to its elderly employees. 105 In ruling against the plaintiffs, the Court explained that due

99. Id. at 647 (emphasis added).
100. Technically, protection is afforded by the Fifth Amendment through the process of incorporation, whereby that Amendment is protected against state action by the Fourteenth Amendment. See U.S. Const. amends. V, XIV; Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 235-39 (1897) (applying the Takings Clause of the Fifth Amendment to the several states through the Due Process Clause of the Fourteenth Amendment).
101. NOONAN, supra note 12, at 144-46.
104. See id. at 62-93 (finding no such mention). Contra, e.g., Fullilove v. Klutznick, 448 U.S. 448, 478 (1980) (Burger, C.J.) (plurality opinion) (“Congress, of course, may legislate without compiling the kind of ‘record’ appropriate with respect to judicial or administrative proceedings.”); Perez v. United States, 402 U.S. 146, 156 (1971) (“Congress need [not] make particularized findings in order to legislate . . . .”). See supra notes 70-77 and accompanying text.
105. Kimel v. Fla. Bd. of Regents, 528 U.S. at 69-70. Plaintiffs sued under the
to “the lack of evidence of widespread and unconstitutional age discrimination by the States,” Congress did not meet its heightened abrogation burden.

Our examination of the ADEA’s legislative record confirms that Congress’ 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports.

In light of the Court’s “strict scrutiny” of the legislative record, Kimel’s result is disturbing in two additional ways. First is the very notion of holding Congress to the stiff “widespread and persistent” documented findings burden that the Court first sprung upon its coequal neighbor in Florida Prepaid. To wit, how could any bench expect the sitting Congress (or, for that matter, plaintiffs’ bar) to accumulate an unarticulated mass of missing findings in the short amount of time between the publishing of this new standard in Florida Prepaid (June 23, 1999) and the date of oral arguments in Kimel (October 13, 1999)? Moreover, did the “otherwise discriminate against” component of the ADEA. Id.; see 29 U.S.C. § 623(a)(1) (1994 & Supp. III 1997).

106. Kimel v. Fla. Bd. of Regents, 528 U.S. at 91 (“[W]e hold that the ADEA is not a valid exercise of Congress’ power under § 5 of the Fourteenth Amendment. The ADEA’s purported abrogation of the States’ sovereign immunity is accordingly invalid.”). For good measure, the Court led with its customary window dressing: “Although that lack of support is not determinative of the § 5 inquiry, Congress’ failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.” Id. (emphasis added) (citation omitted).


108. See supra notes 98-99 and accompanying text.

109. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 627 (1999); Kimel v. Fla. Bd. of Regents, 528 U.S. at 62 (listing dates). Other commentators have posed the same question when considering the Garrett decision. See Colker & Brudney, supra note 23, at 86 (“[T]he Court in Garrett demanded a depth and breadth of documentation to support the exercise of Section 5 authority that Congress could not possibly have foreseen in 1990 when it enacted the Americans with
Court actually expect the 1974 Congress to a priori adhere to a findings requirement first formally enunciated in the Fall of 1999? Isn’t that asking a bit much of your congressman or congresswoman? Were not some members of the 1974 Congress dead before the all-important decision in *Florida Prepaid* was handed down?

Secondly, despite advance notice of only three months, petitioners Kimel and the United States came prepared with congressional findings based on the state of the nation. This included personal letters from constituents and aggrieved citizens, testimony from state officials, and detailed reports establishing decades of discriminatory state hiring practices. But— emblematic of the very problem the new “findings” disabilities Act.”). Justice Stevens has concurred in this critique. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. at 654 (“It is quite unfair for the Court to strike down Congress’ Act based on an absence of findings supporting a requirement this Court had not yet articulated. The legislative history of the Patent Remedy Act makes it abundantly clear that Congress was attempting to hurdle the then-most-recent barrier this Court had erected in the Eleventh Amendment course—the ‘clear statement’ rule of *Atascadero*.”) (Stevens, J., dissenting) (citation omitted).


burden creates—the Court, assuming a quasi-legislative role, disagreed with these findings, and accordingly, vetoed any attempt to utilize Congress’s abrogation power.\textsuperscript{113}

3. Board of Trustees of the University of Alabama v. Garrett

A year later, on the eve of the Court’s decision in \textit{Garrett}, respondents Garrett and Ash probably acknowledged (along with Congress) the fact that the legislators who drafted the Americans with Disabilities Act (ADA)\textsuperscript{114} possessed insufficient foresight to respond to the massive documentation burden required by today’s Supreme Court.\textsuperscript{115}

Applying that same legal test to the wealth of information it compiled over two decades of study, hearings, reports, and testimony regarding the use of age in employment decisionmaking nationwide in a variety of contexts, Congress concluded that employment decisions based on age are in general too arbitrary or irrational to pass constitutional muster.

\textit{Id.} (citation omitted); \textit{see also} Colker & Brudney, \textit{supra} note 23, at 109 (noting that in finding legislative record support inadequate, “the Court expressly challenged a key legislative proponent’s floor statements describing employment discrimination against the elderly, and a California legislative study documenting age discrimination by public agencies”) (footnote omitted).

It is also important to note that in making the 1992 amendments to the ADEA, Congress had documented evidence of state discrimination from the 1980s to early 1990s, and had taken account of the fact that, over 20 years later, more than half the states still had no age discrimination laws to protect public employees. Brief for Respondents, Appendix at 2a-25a, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (Nos. 98-791, 98-796). In addition, petitioner United States made clear that Congress had purposely pointed to a plethora of case law involving age discrimination that was found unconstitutional. \textit{Id.} at 8-9 & n.8; \textit{see, e.g.}, Gault v. Garrison, 569 F.2d 993, 997 (7th Cir. 1977) (“[W]e cannot sanction the total lack of procedural equality suffered by teachers who have reached the age of 65 without a record showing the presence or absence of a justifiable and rational state purpose.”); Cooper v. Nix, 496 F.2d 1285, 1286-87 (5th Cir. 1974) (upholding an injunction banning a university from arbitrarily exempting students twenty-three years old and over from an on-campus residence requirement); Indus. Claim Appeals Office v. Romero, 912 P.2d 62, 64, 66-70 (Colo. 1996) (finding an equal protection violation in a workers’ compensation scheme which eliminated benefits for permanently and totally disabled claimants age sixty-five or older, but provided benefits to individual in the same age group “who receive[d] permanent partial disability benefits [or] . . . permanent total disability benefits paid from [a] subsequent injury fund”) (emphasis omitted).

\textsuperscript{113} See Kimel v. Fla. Bd. of Regents, 528 U.S. at 89-91.

\textsuperscript{114} 42 U.S.C. §§ 12101-12213 (2000).

\textsuperscript{115} That is, they could not see into the future. \textit{Cf.} Colker & Brudney, \textit{supra} note 23, at 86 (commenting that the “depth and breadth of documentation to support the exercise of Section 5 [abrogation] authority” demanded by the Court was
Nevertheless, to make sure that the lack of a paper trail would not sound the death knell to vital federal legislation again, respondents, including the United States as amicus curiae, diligently compiled a voluminous mass of legislative history.  

The issue in Garrett was whether Congress could abrogate state sovereign immunity when Title I of the ADA had been violated.  Central to this analysis, according to the Court, was “whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled.”  The Court answered this question in the negative, and proceeded to issue its now-familiar diatribe on the (in)sufficiency of the congressional record.  

First, despite thousands of pages of evidence detailing age discrimination, the Court concluded that “Congress assembled only . . . minimal evidence of unconstitutional state discrimination in employment
against the disabled.” And, as was the case in *Florida Prepaid* and *Kimel*, the Court never explained how much evidence would be needed. Its silence here speaks volumes about the current state of the Eleventh Amendment abrogation inquiry.

Second, the evidence that was analyzed was subjected to a level of scrutiny unmatched since the *Lochner* Era. For example, the Court rebutted the voluminous findings of the *Congressional Task Force on the Rights and Empowerment of Americans with Disabilities*. It dismissed

121. *Id.* at 370 (emphasis added). *But see* Brief for the United States at 12, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (No. 99-1240) (noting that “Congress and this Court have long acknowledged the Nation’s ‘history of unfair and often grotesque mistreatment’ of persons with disabilities”) (citation omitted); *see id.* n.11 (collecting many such instances); Alexander v. Choate, 469 U.S. 287, 295 n.12 (1985) (“To be sure, well-cataloged instances of invidious discrimination against the handicapped do exist.”).

Demanding a certain amount of findings has significant problems, especially if the amount is never quantified. And even if it is, practical and institutional limitations still abound. The Court seems to forget this. *See Noonan, supra* note 12, at 145 (“When the court . . . has adopted a methodology that seeks to quantify the evil Congress is seeking to remedy, it is indefensible to ignore the size of the protected class. . . . The numbers become small only when the court counts only the incidents described in congressional reports.”).

122. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 368-74 (finding insufficient evidence in the ADA’s legislative history); *see also* Post & Siegel, *supra* note 84, at 433-44 (noting the Court’s newfound tendency to invalidate civil rights legislation on grounds neither named nor justified).

123. *See generally* Chemerinsky, *supra* note 44, at 454-70 (discussing the demanding scrutiny typified by the era).

124. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 370-72 (scrutinizing the findings of that body); *see, e.g.*, S. REP. No. 101-116, at 8-9 (1989), *quoted in* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 377 (Breyer, J., dissenting) (quoting testimony of Justin Dart, Chairman, Task Force on the Rights and Empowerment of Americans with Disabilities (documenting “massive, society-wide discrimination”). Congress created this task force to assess the state of the nation and the potential need for comprehensive legislation. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 377 (Breyer, J., dissenting). This body “held hearings in every State, attended by more than 30,000 people, including thousands who had experienced discrimination first hand.” *Id.* at 377-78 (citing *From ADA to Empowerment*, Task Force on the Rights and Empowerment of Americans with Disabilities 16 (Oct. 12, 1990)). Task force hearings, coupled with Congress’s own studies and independent hearings, resulted in the conclusion that, in the area of employment, “stereotypic assumptions” and “purposeful unequal treatment” were rampant in the several states, and that “[t]wo-thirds of all disabled Americans between the age of 16 and 64 [were] not working at all,” despite their overwhelming desire to do so. *Id.* at 378 (quoting 42 U.S.C. § 12101(a)(6)-(7) (1990)). The congressionally appointed task force found “hundreds of instances of adverse treatment at the hands of state officials—instances in which a
hundreds of documented complaints by aggrieved citizens as “anecdotal accounts” of mere opinion. It completely ignored over three hundred instances of discrimination by state governments in the legislative record. Despite never articulating the amount of findings sufficient to abrogate state sovereign immunity, or offering a clear reason why a dead Congress should have predicted the Court’s new legislative record requirement when enacting Title I of the ADA, the Court was clear on two matters: (1) its new findings hoops would have to be jumped through in order to abrogate, and (2) that, in this endeavor, Congress would wear cement blocks for shoes.

In conjunction with the constitutional and precedential problems resulting from the Court’s impossible legislative record scrutiny, the practical results of Florida Prepaid, Kimel, and Garrett are confusing and contradictory. For example, while it is undisputed that Congress may

person with a disability found it impossible to obtain a state job, to retain state employment, [or] to use the public transportation that was readily available to others in order to get to work . . . .” Id. at 379.

125. Id. at 370, app. C at 391-424. This callous approach was taken despite, for example, evidence of a state that regularly discriminated in hiring for an average period of five years after cancer treatment “based . . . on coworkers’ misguided belief that ‘cancer is contagious,’” as well as the complaint that a school for the deaf, without reason, “refused to exempt a deaf teacher . . . from a ‘listening skills’ requirement.” Id. at 381-82 (Breyer, J., dissenting) (citations omitted).

Judge Noonan has addressed the increasing labeling of Congress’s findings as “anecdotal” in the context of Fourteenth Amendment legislation:

In th[e] treatment of the evidence before Congress, another test is implied and used: Anecdotes don’t count. Anecdotes don’t count? How have legislators over the centuries worked? Stories they have heard, stories of their own lives, stories of family, friends, constituents have been the stuff of legislative intelligence.

NOONAN, supra note 12, at 148.

126. Compare Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 370 (asserting that the evidence Congress assembled was “minimal”), with id. at 377 (Breyer, J., dissenting) (calling the congressional record “massive”). In his dissenting opinion, Justice Breyer attached a thirty-nine page appendix outlining this vast record of state discrimination against the disabled in employment and related public services. See id., apps. A-C, at 389-424 (providing a state-by-state breakdown of formally recorded evidence of discrimination); see supra note 125 (noting two such examples).

This Note contends that such evidence—the concerns of the nation’s populace—provides the very basis by which Congress is both empowered and expected to act. See discussion infra Parts IV.B, V.

127. Cf. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.1, at 394-97 (4th ed. 2003) (noting the conflicting and confusing arguments the Supreme Court has
properly enact legislation to protect a state’s citizens from discrimination in employment, after the aforementioned trilogy it is equally well-settled that Congress may not protect these same people—to wit, Congress may not help vindicate the rights of these citizens by allowing for suits against states in state or federal court. Oddly, this demands that state officers and judges be bound to the “supreme Law of the Land,” while simultaneously allowing them to avoid legal responsibility for not upholding their oaths. This was the uneven playing field William Hibbs stepped onto during the spring of 2003.

C. Nevada Department of Human Resources v. Hibbs

But the result of William Hibbs’s lawsuit was unlike any other abrogation case decided by the Rehnquist Court. He won. Through its

made); see also Larry D. Kramer, Foreword: We the Court, 115 HARV. L. REV. 4, 148 (2001) (questioning, after Kimel and Garrett, whether the Court’s longstanding promise that Congress can “prohibit ‘a somewhat broader swath of conduct, including that which is not itself forbidden by the [Fourteenth] Amendment’s text’” is now just “empty rhetoric”) (quoting Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001)).

128. See, e.g., ADA, 42 U.S.C. § 12101(b)(4) (2000) (enacting protective legislation pursuant to Congress’s “power to enforce the fourteenth amendment and to regulate commerce”).

129. See, e.g., Alden v. Maine, 527 U.S. 706, 758-60 (1999) (ruling that, absent valid waiver or abrogation, a state is immune from suit in its own courts).

130. See, e.g., Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 372-74 (ruling that, absent valid waiver or abrogation, a state is immune from suit in federal court).

131. U.S. CONST. art. VI. (Supremacy Clause).

132. Cf. Howlett v. Rose, 496 U.S. 356, 372-74 (1990) (demanding that states vigorously enforce federal law so as not to discriminate against federal causes of action); Eric J. Segall, 5 U.S. (1 Cranch) 137, 175, 16 CONST. COMMENT. 569, 573 (1999) (pushing the “Congress and the President [to] take seriously their oaths to uphold the Constitution because the Court is rarely there as a backstop”).

133. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 725, 740 (2003) (finding for the plaintiff and upholding the § 5 power of Congress to abrogate state sovereign immunity with respect to lawsuits under the family-care provisions of the Family and Medical Leave Act of 1993 (FMLA), thus allowing a male state employee to recover money damages against the State of Nevada for its failure to comply with the family-care leave provision of the FMLA). Shortly after this Note was submitted for publication, the Supreme Court handed down its opinion in Tennessee v. Lane, 124 S. Ct. 1978 (2004), which found for the plaintiffs for just the second time in the post-Seminole Tribe abrogation context. Id. at 1994. Justice Stevens, writing for a five-Justice majority, held that Title II of the ADA, as applied to cases implicating the fundamental right of access to the courts, validly abrogated the Eleventh Amendment.
Id. In light of the Court’s decision in Garrett, see Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001) (holding that Title I of the ADA did not validly abrogate sovereign immunity), its subsequent decision in Lane will undoubtedly raise the eyebrows, voices, and pens of numerous scholars, practitioners, and jurists. When reviewing the Court’s multiple opinions in Lane, one thing is clear: apart from the questions presented, each opinion was laced with commentary on Hibbs. Many of the Justices—even those who agreed with the result in Hibbs—disagreed with certain rationale used (or hinted at) in that decision. See Tennessee v. Lane, 124 S. Ct. at 1996 (Ginsburg, J., with whom Souter, J., and Breyer, J., joined, concurring). Others candidly opined that Hibbs was wrongly decided, and pushed to rehear the issue. See id. at 2007-13 (Scalia, J., dissenting) (proposing a new § 5 “enforcement” test); id. at 2013 (Thomas, J., dissenting) (“I . . . continue to believe that Hibbs was wrongly decided, I write separately only to disavow any reliance on Hibbs in reaching this conclusion.”).


The circuit roundup before Hibbs was an alarming one; FMLA jurisprudence was more of a sliver than a split. See MARK W. BENNETT ET AL., EMPLOYMENT RELATIONSHIPS: LAW & PRACTICE § 4.05(C)(3) (Supp. 2004) (noting the near unanimity in circuits invalidating abrogation in FMLA cases). Apart from the Ninth Circuit, all eight circuits to have heard the issue found abrogation invalid. Laro v. New Hampshire, 259 F.3d 1, 11 (1st Cir. 2001); Lizzi v. Alexander, 255 F.3d 128, 134 (4th Cir. 2001); Townsel v. Missouri, 233 F.3d 1094, 1096 (8th Cir. 2000); Chittister v. Dep’t of Cmty. & Econ. Dev., 226 F.3d 223, 229 (3d Cir. 2000); Kazmier v. Widmann, 225 F.3d 519, 529 (5th Cir. 2000); Sims v. Univ. of Cincinnati, 219 F.3d 559, 566 (6th Cir. 2000); Hale v. Mann, 219 F.3d 61, 69 (2d Cir. 2000); Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 193 F.3d 1214, 1220 (11th Cir. 1999), rev’d on other grounds sub nom. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). Nevertheless, it is important to note, as the Ninth Circuit did in Hibbs v. Department of Human Resources, that of all these cases, only Kazmier and Hibbs dealt with the family-care provision of the FMLA, which was enacted to combat, inter alia, gender discrimination. Hibbs v. Dep’t of Human Res., 273 F.3d at 850; see also Kazmier v. Widmann, 225 F.3d at 525-26 (stressing the gender discrimination issue). This fact made the other cases, in regards to the abrogation analysis, inapposite.
1. **Case in Brief**

In April and May of 1997, William Hibbs, an employee of the Nevada Department of Human Resources, Welfare Division, asked for and was eventually granted the full amount of unpaid leave offered by the FMLA: twelve weeks. Hibbs planned to use this leave intermittently from May 1 to December 30, 1997, in order to care for his ailing wife. In June of 1997, Hibbs requested 379.8 additional hours of “catastrophic leave,” of which 200 were granted. Three months later, Hibbs was granted 180 additional hours of such leave. A month later, Hibbs’s employer, who had been erroneously counting his (paid) catastrophic leave concurrently with his unpaid FMLA leave, notified Hibbs that his twelve weeks of FMLA leave had been exhausted. On December 22, 1997, William Hibbs was fired.

The Supreme Court’s decision, written by Chief Justice Rehnquist,

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137. *Id.* For more information on the details of the FMLA, see [MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 4.29 (4th ed. 1999)](http://www.uiowa.edu/hr/benefits/catastrophic/index.html) (outlining leave periods and procedures of the FMLA). Hibbs’s wife was allegedly suffering from a “serious health condition” as defined by 29 U.S.C. § 2612(a)(1)(C); she was recovering from neck surgery. *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. at 725.

138. Family “catastrophic leave” consists of leave for an illness and injury resulting in a medical condition likely to result in the inability of the employee to report to work for any number of days to attend to an immediate family member. *See NEV. REV. STAT. 284.362(1)(a) (1995)* (defining “catastrophic leave” for Nevada program in place during the *Hibbs* litigation). Employees receive such leave from donations by their co-employees. *Id.* at 284.362. Catastrophic leave is thus paid leave. *See id.* at 284.3623 (outlining transfer of paid leave hours). For an example of a catastrophic leave program, see The University of Iowa, University Human Resources: Catastrophic Leave Program, at http://www.uiowa.edu/hr/benefits/catastrophic/index.html (last visited Feb. 15, 2005).

139. *Hibbs v. Dep’t of Human Res.*, 273 F.3d at 848.

140. *Id.* at 849.

141. *Id.*

142. *Id.* Hibbs then filed suit in the United States District Court for the District of Nevada, arguing that the family-care provision of FMLA (1) had been violated, and (2) was a valid effort to enforce the Fourteenth Amendment’s Equal Protection Clause by requiring that leave be given to all employees. *Id.* He argued, inter alia, that the FMLA was designed to combat the sexist tendency of employers to assume that women, rather than men, should be taking responsibility for such care. *Id.* at 855. His claims were pursuant to provisions of the FMLA that created a private right of action to seek both equitable relief and money damages “against any employer (including a public agency),” that “interfere[s] with, restrain[s], or den[i]es the exercise of” FMLA privileges. 29 U.S.C. §§ 2615(a)(1), 2617(a)(2).

143. The Supreme Court granted certiorari on June 24, 2002. *Nev. Dep’t of
began much the same way the *Garrett, Kimel, and Florida Prepaid* decisions had four, five, and six years ago.\(^{144}\) This time, however, the Court’s seminal question presented came out from the shadows; no longer an inapposite factor,\(^{145}\) the record was now the rule. That is, the Court explicitly based its decision on the amount of “adequate” findings accumulated, stating the key inquiry blandly, as follows: “We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area [of gender discrimination].”\(^{146}\)

Taking pains to distance its holding from those in *Kimel* and *Garrett*,\(^{147}\) Chief Justice Rehnquist labored to legitimize the very findings his own Court had routinely branded insufficient to prove the widespread and pervasive constitutional deprivations necessary to abrogate.\(^{148}\) The

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Human Res. v. Hibbs, 536 U.S. 938 (2002). Because the Court faced a Ninth Circuit decision which broke from all other circuits presented with an FMLA abrogation issue, see supra note 136, many commentators read the grant of certiorari as a predictable reversal of the Ninth Circuit decision. See, e.g., Michael C. Dorf, *Supreme Court October Term 2002 Preview—Part One*, at http://writ.news.findlaw.com/dorf/20021002.html (last visited Feb. 15, 2005) (“This is likely to be another 5-4 victory for states’ rights.”).

\(^{144}\) That is, after quickly disposing of the “unmistakably clear” statement element, see *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989), the Chief Justice presented a familiar question: “This case turns, then, on whether Congress acted within its constitutional authority when it sought to abrogate the States’ immunity for purposes of the FMLA’s family-leave provision.” Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 726 (2003). As discussed earlier, this language comes from *Seminole Tribe* and *Fitzpatrick v. Bitzer*. See *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (“Thus our inquiry into whether Congress has the power to abrogate unilaterally the States’ immunity from suit is narrowly focused on one question: Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?” In other words, did Congress use § 5?) (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976) (emphasis added)).

\(^{145}\) Contra *City of Boerne v. Flores*, 521 U.S. 507, 531-32 (1997) (explaining that the lack of documented pervasive violations is not dispositive, stating that “[j]udicial deference, in most cases, is based *not on the state of the legislative record Congress compiles* but ‘on due regard for the decision of the body constitutionally appointed to decide.’ . . . It is for Congress to determine the method by which it will reach a decision.’”) (emphasis added) (quoting *Oregon v. Mitchell*, 400 U.S. 112, 207 (1970)); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 646 (1999) (explaining that “the lack of support in the legislative record is not determinative” on the question of abrogation) (emphasis added). See discussion supra Part III.A; cases cited supra note 81.

\(^{146}\) Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. at 729.

\(^{147}\) See id. at 735 (“We reached the opposite conclusion in *Garrett* and *Kimel*.”).

\(^{148}\) See discussion supra Part III.B.
Court first pointed to the history of the many state laws limiting female employment opportunities as well as the grueling path of lawmaking and precedent that failed to prevent gender discrimination. To prove that the discriminatory administration of leave policies and benefits was “still widespread,” Chief Justice Rehnquist next highlighted evidence in the legislative record showing a differential in the private sector between the percentage of female employees covered by maternity-leave programs and that of male employees covered by paternity-leave programs. This information, along with prodigious amounts of testimony and factual information from the congressional record attesting to discriminatory leave policies by employers in both the private and public sector, sealed the deal for the six-Justice majority.

The result was odd. Just two years before Hibbs was decided, the same Court faced strikingly similar findings in Garrett, where Congress’s information consisted almost entirely of discrimination in the private sector, personal testimony, and reported accounts of discrimination. The
Court responded harshly, deeming all such information irrelevant, “anecdotal,” isolated, and ultimately inadequate.153

But in *Hibbs*, such information was somehow deemed sufficient to establish a history and pattern of gender discrimination by the States. The majority opinion held that the documented findings demonstrated a “pervasive” and impermissible “sex-role stereotype that caring for family members is women’s work.”154 Congress, for the first time, had shown the Rehnquist Court the “widespread and persisting deprivation of constitutional rights”155 necessary to abrogate a state’s sovereign immunity from suit.156 Victory had finally been achieved. Right?

2. Wrong

The *Hibbs* decision shocked many in the media and world of academe.157 It will likely do the same for many practitioners, but for the

153. *Id.* at 370; see supra notes 107, 109, 121, 124-26 and accompanying text; see also Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89-91 (2000) (criticizing Congress’s record in similar terms). It is interesting to note the most of Congress’s findings in *Hibbs* were of private employers as well. *See* Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. at 730-32.

154. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. at 731. For example, the Court emphasized Congress’s finding that “[f]ifteen States provided women up to one year of extended maternity leave, while only four provided men with the same.” *Id.* Facts such as these influenced the Court to agree with Congress’s findings that the “denial or curtailment of women’s employment opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second,” and the “parallel stereotypes presuming a lack of domestic responsibilities for men.” *Id.* at 736 (quoting *Family and Medical Leave Act of 1987: Joint Hearing Before the House Comm. on Post Office and Civil Service*, 100th Cong. 2-5 (1987)).

155. *Id.* at 757 (quoting City of Boerne v. Flores, 521 U.S. 507, 526-27 (1997)).

156. *Id.* at 723, 735-40.

157. See, e.g., James E. Bond, *Eleventh Amendment Sovereignty: Much Ado About Nothing?*, CATO SUP. CT. REV., 2002-2003, at 223, 225 (“In Nevada [Department of Human Resources] v. Hibbs . . . the Chief deserted his troops. Leaving Justices Kennedy, Scalia, and Thomas to warm their hands around the perhaps flickering federalism campfire, Rehnquist and his law school classmate Justice O’Connor joined the ‘Anti-Sovereign Immunity Four’. . . .”); Lisa J. Banks & Debra S. Katz, *A Pro-Employee Trend*, NAT’L L.J., Aug. 4, 2003, at S7 (“*Hibbs* constitutes a notable departure from its recent trend of shielding states from the reach of anti-discrimination statutes pursuant to the 11th Amendment. That Rehnquist authored this opinion seems at first blush to be remarkable . . . .”); Michael Kinsley, *Rehnquist’s Surprise*, WASH. POST, May 30, 2003, at A23 (heralding the decision as, inter alia, a liberal victory, and a “very odd opinion,” explaining that “Rehnquist[’s opinion] disappointed . . . conservatives,” and adding that most “expected to add the *Hibbs* case to a series of rulings in which [the Court] has held that state governments are exempt from federal
wrong reasons. On May 27, 2003, William Hibbs and Congress may have won a single battle, but the Supreme Court’s framework in *Hibbs* prolonged an unconstitutional war.

Commentators have pointed, and likely will continue to point, to what at first glance seems to be the decisive factor in *Hibbs*: gender discrimination. In fact, one noted scholar recently explained that “*Hibbs* allows Congress to operate at a much higher level than did the earlier [abrogation] cases,” for “in enacting the FMLA[,] Congress was dealing with gender discrimination, and gender discrimination[,] unlike age or disability discrimination[,] implicates the core of the Fourteenth Amendment’s Equal Protection Clause.” This analysis was utilized by Chief Justice Rehnquist, who attempted to soften the (potential) aberration of *Hibbs* by explaining:

> [D]iscrimination on the basis [of age or disability] is not judged under a heightened review standard . . . [but] passes muster if there is a rational basis for doing so . . . .

Here, however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test . . . it was easier for Congress to show a pattern of state constitutional violations.

Here, Professor Vikram Amar and Chief Justice Rehnquist are categorically correct—heightened scrutiny is much harder for a state to

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158 See Greenhouse, *supra* note 157, at A22 (attempting to explain *Hibbs* by virtue of gender discrimination, which simply gave “Congress . . . more freedom to devise remedies” and abrogate sovereign immunity); Kinsley, *supra* note 157, at A23 (focusing on Chief Justice Rehnquist’s gender discrimination argument).


160 Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. at 735-36 (citations omitted).
overcome, which in turn makes it easier for Congress to act.\textsuperscript{161} However, the problem is that neither of their justifications goes far enough. At second glance, the initial and immediate success of the Hibbs ruling is overshadowed by the disastrous methodology used by the Court.

3. \textit{Scrutiny for Whom?}

In Fourteenth Amendment jurisprudence, Congress has no special burden of proof. Typically, the (allegedly) discriminating state bears the burden.\textsuperscript{162} This much is hornbook law. Moreover, in the context of Section Five remedial legislation, “courts typically grant enormous deference to Congress,” but this “deference . . . appears altogether lacking in the legislative record review cases,”\textsuperscript{163} including, for the most part, Hibbs.

The issue here is a presumption of constitutionality. In the absence of suspect classifications or fundamental rights, the Court typically presumes the reasonableness of any state legislative classification or policy on a rational basis\textsuperscript{164} and accordingly, eschews an independent assessment of the legislative record.\textsuperscript{165} Under rational basis scrutiny, the alleged discrimination is presumed \textit{constitutional} until proven otherwise; under heightened scrutiny, the opposite holds true.\textsuperscript{166} When state law, policy, or

\begin{itemize}
\item[161.] \textit{See} Craig v. Boren, 429 U.S. 190, 197-99 (1976) (outlining a more difficult state burden under intermediate scrutiny; classifications “must serve important governmental objectives and must be substantially related to achievement of those objectives”).
\item[162.] CHEMERINSKY, \textit{supra} note 44, at 529-31 (discussing levels of scrutiny to be applied to certain government actions being challenged as unconstitutional).
\item[163.] Buzbee & Schapiro, \textit{supra} note 60, at 143.
\item[164.] CHEMERINSKY, \textit{supra} note 44, at 531-35.
\item[165.] \textit{See}, \textit{e.g.}, Buzbee & Schapiro, \textit{supra} note 60, at 103. Professors Buzbee and Schapiro write:
\begin{quote}
[This] deferential stance has given rise to two general principles. First, Congress need not make any findings or compile any evidence. Instead, the Court credits the legislative judgment, examining only whether the legislative choice is “rational.” Indeed, the Court has stated that Congress need not make any actual determinations about such legislative facts. The Court has asserted that it will presume that the necessary predicate exists and that it will strike down the statute only if no reasonable basis exists to support the implied conclusion. Second, if Congress does make findings or develop other evidence, the Court will afford great weight to such legislative materials.
\end{quote}
\item[166.] \textit{Cf.} CHEMERINSKY, \textit{supra} note 44, at 529-30 (explaining this burden-shifting process).
\end{itemize}
action is involved in matters of heightened scrutiny, its presumption of constitutionality is immediately nullified, and the burden of proof is placed on the state to defend its actions.167

Very well. This could help explain the outcome of abrogation cases like Kimel and Garrett, and reaffirm the arguments made by Chief Justice Rehnquist and Professor Vikram Amar.168 To wit, because Florida and Alabama were—at most—discriminating against the disabled and elderly, their “legal” treatment of those groups was presumed constitutional, to which Congress’s legislative record failed in proving otherwise.169

But inherent in this Court’s new “legislative record review” lies serious and unrecognized problems. While level of review basics170 may serve to explain the results in Kimel and Garrett,171 Hibbs serves as an extreme example, exemplary of two major jurisprudential problems ingrained in the Court’s new findings requirement in abrogation cases.

First, if gender discrimination—which the Hibbs court found172—is truly deserving of intermediate scrutiny, then the fact that “it was easier for Congress to show a pattern of state constitutional violations”173 is an irrelevant answer. Such an explanation threatens to sit the Court’s

167. Id. at 529; see also United States v. Virginia, 518 U.S. 515, 533 (1996) (noting that, under intermediate scrutiny, “[t]he burden of justification is demanding and it rests entirely on the State”) (citing Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982)).

168. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001) (finding an insufficient showing of a history and pattern of discrimination); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (same); supra notes 159-60 and accompanying text.

169. See supra note 161 and accompanying text; Amar, supra note 159, at 350. But cf. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 387-88 (Breyer, J., dissenting) (“[I]t is difficult to understand why the Court, which applies minimum rational-basis review to statutes that burden persons with disabilities, subjects to far stricter scrutiny a statute that seeks to help those same individuals.”) (internal punctuation and citation omitted); discussion supra Part III.B.

170. See, e.g., NOWAK & ROTUNDA, supra note 23, § 14.3, at 687-92 (discussing equal protection standards of review); id. at 687 (outlining the rational basis test).

171. See Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 367-68 (“States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational.”); Kimel v. Fla. Bd. of Regents, 528 U.S. at 83 (“States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.”).


173. Id. at 736 (Rehnquist, C.J.).
longstanding Equal Protection framework on its head.\textsuperscript{174} The real answer is that Congress, benefited by intermediate scrutiny, \textit{should not have been forced to accumulate such a pattern}. Remember, it had yet to act while numerous states were discriminating against \textit{men and women} (not the elderly or disabled\textsuperscript{175}) in state leave policies.\textsuperscript{176} Congress was not doing the discriminating and thus was not the party to be encumbered with the heavy burden: the State of Nevada was. This, again, is proper because under intermediate scrutiny \textit{“[t]he burden of justification is demanding and it rests entirely on the State.”}\textsuperscript{177} On grounds neither named nor justified, the Court made a decision that will last longer than William Hibbs’s victory celebration: it flipped the burden.\textsuperscript{178}

The majority opinion sought to distract the reader from this fact, emphasizing instead how much “easier” it would be for Congress to meet its legislative record burden.\textsuperscript{179} Paying lip service to the true structure of intermediate scrutiny,\textsuperscript{180} the Court moved the presumption of constitutionality from Congress’s remedial legislation onto the violator’s discriminatory policies.\textsuperscript{181} The Court, in essence, told the State of Nevada (and all other potential state litigants) that intermediate scrutiny\textsuperscript{182} does not

\begin{itemize}
\item \textsuperscript{174} The framework I refer to here is the strict, intermediate, and rational basis scrutiny analysis. \textit{See}, e.g., DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY 177-88, 299-337 (3d ed. 2003) (chronicling the past and present equal protection levels of judicial scrutiny); NOWAK & ROTUNDA, \textit{supra} note 23, § 14.3, 685-710 (same).
\item \textsuperscript{175} As in \textit{Kimel} and \textit{Garrett}. \textit{See} Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. at 360-61, 366-67 (discussing the ADA and rational basis review); \textit{Kimel} v. Fla. Bd. of Regents, 528 U.S. at 66-67, 83-84 (discussing the ADEA and rational basis review).
\item \textsuperscript{176} At least Chief Justice Rehnquist’s majority in \textit{Hibbs} thought so. \textit{See supra} notes 151-56 and accompanying text.
\item \textsuperscript{178} \textit{Nev. Dep’t of Human Res. v. Hibbs}, 538 U.S. 721, 729 (2003) (“We now inquire whether \textit{Congress} had evidence of a pattern of constitutional violations on the part of the States in this area [of gender discrimination].”) (emphasis added).
\item \textsuperscript{179} \textit{Id.} at 736. But again, that dodges the issue.
\item \textsuperscript{180} \textit{See}, e.g., \textit{Craig} \textit{v. Boren}, 429 U.S. 190, 197-98 (1976) (outlining intermediate scrutiny); CHMERINSKY, \textit{supra} note 44, at 644 (same).
\item \textsuperscript{181} \textit{See supra} note 178 and accompanying text.
\item \textsuperscript{182} Luckily, the Court has avoided an abrogation case involving strict scrutiny, for transferring the presumption of unconstitutionality from the (allegedly) discriminating state onto Congress’s back in such a case would be an even more egregious break from established scrutiny precedent. \textit{See Korematsu v. United States}, 323 U.S. 214, 216 (1944) (outlining, for the first time, the presumption of unconstitutionality); United States \textit{v. Carolene Prods. Co.}, 304 U.S. 144, 152 n.4 (1938)
apply to their actions; that every discriminatory policy will be presumed constitutional; that Congress will always bear the arduous burden of proving otherwise; and that Congress will almost always fail to meet that burden.\footnote{See discussion \textit{supra} Part III.B (noting failures).} The Supreme Court not only told States not to worry—it created a static level of review that encourages them not to care.

4. \textit{Justification: The Eleventh Amendment as a Fundamental Right}

The power of the Eleventh Amendment is the only conceivable justification for this burden-flipping contradiction. The only explanation: the Supreme Court has elevated state sovereign immunity to a fundamental right.\footnote{This notion has been—at most—briefly mentioned in recent works. \textit{See} Christina Bohannan, \textit{Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives}, 77 N.Y.U. L. REV. 273, 286-87 (2002). If analytically true, the Court would have created the first non-individual fundamental right.} Only such a move could explain why its status can trump the Fourteenth Amendment’s presumptions and protections against race, national origin, and gender discrimination.\footnote{\textit{See} discussion \textit{supra} Part III.C.3.} But therein lies the second problem. To allow for the Eleventh Amendment to limit the scope of the Fourteenth would be to explicitly contravene the Court’s timing rationale in \textit{Fitzpatrick},\footnote{See also Ronald D. Rotunda, \textit{The Eleventh Amendment, Garrett, and Protection for Civil Rights}, 53 ALA. L. REV. 1183, 1203-04 (2002) (“A major purpose of the Fourteenth Amendment was to give Congress the power to remedy state violations of individual rights, so it should not be too surprising that the Fourteenth Amendment modifies the earlier-enacted Eleventh Amendment.”).} outlined—ironically—by then-Associate Justice Rehnquist:

\textit{W}e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of \S\ 5 of the Fourteenth Amendment. . . . \textit{T}he substantive provisions of the Fourteenth Amendment . . . themselves embody significant limitations on state authority. When Congress acts pursuant to \S\ 5, not only is it exercising legislative

(foreshadowing the presumption of unconstitutionality). But if the \textit{Kimel-Garrett-Hibbs} finding requirement continues, it is only a matter of time before the Court is faced with a suspect classification/fundamental rights case and will be forced to make a choice between state sovereign immunity and individual dignity.

183. See discussion \textit{supra} Part III.B (noting failures).
184. This notion has been—at most—briefly mentioned in recent works. See Christina Bohannan, \textit{Beyond Abrogation of Sovereign Immunity: State Waivers, Private Contracts, and Federal Incentives}, 77 N.Y.U. L. REV. 273, 286-87 (2002). If analytically true, the Court would have created the first non-individual fundamental right.
185. \textit{See} discussion \textit{supra} Part III.C.3.
186. \textit{Fitzpatrick v. Bitzer}, 427 U.S. 445, 456-57 (1976) (finding congressional abrogation of Eleventh Amendment immunity through \S\ 5 of the Fourteenth Amendment; describing the limiting nature the latter has on the principles that embody the former); see also Ronald D. Rotunda, \textit{The Eleventh Amendment, Garrett, and Protection for Civil Rights}, 53 ALA. L. REV. 1183, 1203-04 (2002) (“A major purpose of the Fourteenth Amendment was to give Congress the power to remedy state violations of individual rights, so it should not be too surprising that the Fourteenth Amendment modifies the earlier-enacted Eleventh Amendment.”).
authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is “appropriate legislation” for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.  

By ignoring the inherent limits the Reconstruction Amendments place on state sovereign immunity, the Court has attempted to overrule the monumental holding of *Fitzpatrick* and the “broad swath” of Fourteenth Amendment power for which it stands. This is as dangerous as it is impermissible. The Court should not limit Fourteenth Amendment protections (by an amendment that preceded it) in order ensure the under-enforcement of constitutional rights. The “dignity” of state immunity should not trump the dignity of individual rights.


188. See *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966) (stating that “§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment”); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982) (stating that § 5 enforcement power is a “broad power indeed”). See *supra* note 186 and accompanying text for a summary of *Fitzpatrick’s* holding. The “timing rationale” is a clear example of an affirmative grant of federal power to such a degree that any corresponding grant of (concurrent) state power which preceded it would be contradictory, confusing, and constitutionally repugnant.

189. See *Seminole Tribe v. Florida*, 517 U.S. 44, 59 (1996) (“In *Fitzpatrick*, we recognized that the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution.”).

190. In fact, to allow for such would raise questions beyond the Eleventh Amendment. For instance, if the Eleventh Amendment could limit the Fourteenth, the Tenth Amendment could limit the Eleventh as well as all Reconstruction Amendments, resurfacing issues such as literacy requirements, poll taxes, segregation, and theoretically, even slavery.

191. The dignity rationale is an overriding theme in many of the current Court’s Eleventh Amendment abrogation cases. See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (“The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”); *Alden v. Maine*, 527 U.S. 706, 715 (1999) (explaining the historic notion that states “are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty”); *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (“The Eleventh Amendment does not exist solely in order to preven[ ]t federal-court judgments that must be paid out of a
Nevertheless, by holding Congress to an elusive “strict scrutiny” standard regarding the documentation of findings, the Court has manipulated the limited principles of *Marbury* on a level that threatens to alter the very foundations of American governance—specifically, by attacking the way in which Congress works. This result is much different than the Court’s decision, say, in *City of Boerne*. Concededly, Congress’s motive in passing the RFRA, which was the act at issue in *City of Boerne*, was most likely to circumvent the Court’s authority “to say what the law is,” and Congress paid the price for it. However, its purpose in the most recent abrogation cases was wholly the opposite: simply an attempt to satisfy the ambiguous “legislative record” guidelines set by the Court. This makes these latter cases tougher to swallow, for instead of trying to make an end run around *Marbury*’s admonition, Congress was simply following what the Court had declared the law to be. However, despite that attempted obedience, Congress continues to pay an even heavier price to the State’s treasury; it also serves to avoid ‘the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.’") (quoting Hess v. Port-Authority Trans-Hudson Corp. 513 U.S. 30, 48 (1994); Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)); see also Brutus XIII, *The Judicial Power: Can An Individual Sue a State?*, N.Y.J. (Feb. 21, 1788), reprinted in 2 *The Debate on the Constitution* 222, 223 (Bernard Bailyn ed., 1993) (outlining the dignity rationale of the states). Brutus saw the ability of federal courts to hear cases in which a State was a party defendant as potentially “humiliating and degrading to a government, and [something] the supreme authority of no State ever submitted to.” *Id.* “Brutus” was the pseudonym of New York delegate and ardent Anti-Federalist Robert Yates. Jonathan Turley, *Registering Publius: The Supreme Court and the Right to Anonymity*, CATO SUP. CT. REV., 2001-2002, at 57, 59 n.17.


193. See discussion *supra* Part I; discussion *infra* Part IV.


196. *City of Boerne v. Flores*, 521 U.S. at 536 (finding the RFRA unconstitutional as exceeding the scope of the § 5 enforcement power).

197. See discussion *supra* Part III.B (outlining the abrogation guidelines).

198. *Marbury v. Madison*, 5 U.S. (1 Cranch) at 177 (“It is emphatically the province and duty of the judicial department to say what the law is.”) (emphasis added).
price.\textsuperscript{199} Chief Justice Marshall would roll in his grave at this sight, for “[i]t is emphatically the province and duty of the judicial department to say what the law is,”\textsuperscript{200} not how to make it.

IV. FINDING CALAMITIES

The power to say what the law is is to interpret the Constitution so as to set down clear guidelines for when Congress can and cannot act—the situations in which its actions are in harmony with or repugnant to the Constitution. That is what \textit{Seminole Tribe} did, and the Court’s decision there was correct.\textsuperscript{201}

\footnotesize

\textsuperscript{199} See discussion \textit{supra} Part III.B-C (noting the same results despite ardent attempts to satisfy the Court’s “legislative record” demands).

\textsuperscript{200} Marbury v. Madison, 5 U.S. (1 Cranch) at 177 (emphasis added).

Displaying his ardent aversion to ambiguous, ad hoc, and malleable judicial tests, Justice Scalia, recently and classically, outlined the very separation of powers problem inherent in the Court’s newfound abrogation analysis:

\footnotesize

[S]uch flabby tests [such as the one currently employed by the Court], [are] a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worse still, it casts this Court in the role of Congress’s taskmaster. Under it, the courts (and ultimately this Court) must regularly check Congress’s homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional. As a general matter, we are ill advised to adopt or adhere to constitutional rules that bring us into constant conflict with a coequal branch of Government. And when conflict is unavoidable, we should not come to do battle with the United States Congress armed only with a test ([such as] “congruence and proportionality”) that has no demonstrable basis in the text of the Constitution and cannot objectively be shown to have been met or failed. As I wrote for the Court in an earlier case, “low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.”

Tennessee v. Lane, 124 S. Ct. 1978, 2008-09 (2004) (Scalia, J., dissenting) (quoting \textit{Plaut v. Spendthrift Farm, Inc.}, 514 U.S. 211, 239 (1995)). It is the Author’s contention that Justice Scalia—as well as his co-Justices—should do more than decry the problems of this futile standard and instead take up the task of its resolution in the Court’s upcoming Term, by finally establishing a more practical, definable, predictable, and constitutional abrogation standard.

\textsuperscript{201} \textit{Seminole Tribe} v. Florida, 517 U.S. 44, 59, 64-66 (1996) (limiting, by the process of elimination, all abrogation attempts to § 5 of the Fourteenth Amendment, and finding no constitutional authority to allow for articles which preceded the Eleventh Amendment to act as a limitation on it; rather, the principle worked in the opposite direction: the Eleventh Amendment was a limit on all jurisdiction-conferring articles that preceded it). This decision was deeply rooted in American Constitutional history. See, \textit{e.g.}, \textit{THE FEDERALIST NO. 81}, at 548-49 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). Hamilton wrote:
But as Professor Robert Dahl recently stated: “A judicial veto is one thing; judicial legislation is quite another.”202 Unfortunately, *Hibbs* is simply a reminder that current abrogation jurisprudence is marred by the latter, the Court telling Congress not merely what the law is, *but how to make the law*, and then determining if Congress has succeeded in its mandatory show and tell.203 The foregoing materials have explained how this new scrutiny flagrantly disregards voluminous precedent, including the precepts of *Marbury v. Madison*.204

However, this new standard does more than transgress a half century of precedent:205 it lodges judicial judgments in an area where politically responsible choices are supposed to govern.206 Indeed, the Supreme Court’s current abrogation requirement shakes the governing system that balances coequal power and crucifies the very document207 the Court alleges to uphold. To help warn against this usurpation, one must first notify the reader of its existence by elucidating the constitutional and institutional encroachments that have already occurred.

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal.

*Id.*; see also Paul E. McGreal, *Saving Article I from Seminole Tribe: A View from the Federalist Papers*, 55 SMU L. REV. 393 (2002) (affirming the Court’s abrogation limitation (to solely § 5) in *Seminole Tribe* as, inter alia, consistent with the sovereignty principles as enunciated by Hamilton).


203. See discussion supra Parts II.B, III.B-C (noting Congress's repeated failure to do so); see also supra note 200 (Justice Scalia commenting on such a test).

204. See discussion supra Part III.

205. Compare discussion supra Part III.A, with discussion supra Part III.B.

206. Buzbee & Schapiro, supra note 60, at 90 (“This kind of review threatens to impose procedural and substantive constraints on legislative action that have no support in precedent or in constitutional text or structure.”).

207. Here, I refer to the United States Constitution.
A. Of Constitution

Imposing the requirement that Congress formally document findings of pervasive constitutional deprivations is far from the simple “province and duty to say what the law is.”208 Not only do those two actions occur at different institutional junctures, but they reside, constitutionally, in two distinct branches. Likewise, nothing in the Constitution requires Congress to compile a formal record before legislating.209 A closer look at the law that guides these coequal branches reveals that the current Court’s legislative record requirements specifically violate the Rules and Journal Clauses of the Constitution.210

The elements and requirements of these clauses are minimal. They stress, if anything, the withholding of information, not the divulging of it. While the Rules Clause writes a blank check for “[e]ach House [to] determine the Rules of its Proceedings,”211 the Journal Clause cashes very little of it in, stating that

[e]ach House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.212

209. And as we noted above, case law before the year 2000 similarly concurred. See discussion supra Part III.A.
210. U.S. CONST. art. I, § 5, cls. 2 & 3. No court has ever interpreted these weak clauses to require a comprehensive legislative record that documents all information before embarking on legislative process. See A. Christopher Bryant & Timothy J. Simeone, Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes, 86 CORNELL L. REV. 328, 383-89 (2001) (noting the lack of a legislative record requirement, and in fact, emphasizing the opposite: the reliance on informal, unwritten and, at times, nonchalant sources of information); see also Robertson v. Seattle Audubon Soc’y, 503 U.S. 429, 434-37, 438-41 (1992) (showing substantial deference to Congress and agencies in upholding a law enacted with almost no legislative findings or history and hidden within numerous pages of appropriations allocations); Buzbee & Schapiro, supra note 60, at 95 (discussing same); cf. Katzenbach v. Morgan, 384 U.S. 641, 646-47 (1966) (upholding a literacy test ban which was added to statute on the Senate floor with almost no support in the record).
211. U.S. CONST. art. I, § 5, cl. 2.
212. Id. § 5, cl. 3. There exists very little scholarship concerning the Journal Clause, which has also been referred to as the Publication Clause. Louis S. Raveson, Unmasking the Motives of Government Decisionmakers: A Subpoena for Your Thoughts?, 63 N.C. L. REV. 879, 890 n.85 (1985). For a brief history of this clause, see
These are the only procedural (“record”) requirements the Constitution places on the exercise of legislative authority. To be sure, however, time has accumulated a collection of procedural rules, restrictions, and lawmaking guidelines. Nevertheless, the sole power to create such requirements was given not to the courts, but Congress. The Constitution also left to “Congress’s determination the manner of record to compile in support of legislation.”

The first interpreters of the Constitution shared this constitutional vision: a minimalist role regarding Congress’s procedures—paper and pen set aside in favor of unlimited deliberation, vigor, and word of mouth. Taking advantage of the freedom and privacy given them, America’s earliest statesmen customarily made law behind locked doors and without a shred of formal findings. More specifically, as Professor David Currie explains:

[N]either chamber interpreted the journal provision to require a verbatim transcript of its proceedings. Senate [lawmaking deliberations] were not reported at all until the public was finally admitted to hear them, and House debates made it into print only because it was in the interest of private entrepreneurs to record them. . . . Nobody seems to have argued . . . that a full and accurate public record was indispensable . . . .


213. Besides, of course, the act of legislating itself. See U.S. Const. art. I, § 1 (“All legislative Powers herein granted shall be vested in . . . Congress . . . .”).

214. See 1 Annals of Congress 20-22 (Joseph Gales ed., 1789) (creating procedural rules for lawmaking in the Senate); id. at 97-102 (same for the House of Representatives).

215. Bryant & Simeone, supra note 210, at 376 (emphasis added).

216. David P. Currie, 2 The Constitution in Congress 10-11 (1997). The “word of mouth” value is ironic when compared to the current Court’s view of such information. See discussion supra Part III.B (noting the Court’s use of the terms “isolated sentences” and “anecdotal accounts” when rebutting congressional findings).

217. Currie, supra note 216, at 10. The argument for closed doors was twofold: to foster uninhibited deliberation while also valuing tradition by following the same format used by the Continental Congress. Id. n.27 (citing Harry Ammon, James Monroe: The Quest for National Identity 82, 84 (1971)). Personal experiences of modern statesmen have also described the lawmaking process as not accustomed to a published method and often secluded for that very reason. See Woodrow Wilson, Constitutional Government in the United States 103-06 (1908).

218. Currie, supra note 216, at 10-11 (footnotes omitted).
Early Supreme Court decisions reverberate the same, “read[ing] the Rules and Journal Clauses as providing Congress broad discretion to determine how to report and record its consideration of proposed legislation.” Such deference was grounded in “[t]he respect [the courts owed] to coequal and independent departments of the federal government.” This same deference is noticeably lacking from the current context of Eleventh Amendment abrogation, where the Court is more than willing to veto a law based on the insufficient state of the formal legislative record.

As a result, the Constitution is not all that is compromised. By ignoring the limiting precepts of Marbury, the Constitution, and nearly a century and a half of precedent, the current Court’s actions constitute an illegitimate reallocation of decisionmaking authority and legislative power—an abdication of the institutional precepts of American Government. Additionally, and perhaps ironically, this harkens back to simple questions implicitly answered by Chief Justice Marshall in Marbury: who should decide the law, and who the facts? Who is to determine the state of the Constitution, and who the state of the nation?

220. Id. at 377 (quoting Field v. Clark, 143 U.S. 649, 672 (1892) (alteration in original)); see also United States v. Ballin, 144 U.S. 1, 5 (1892). The Ballin court stated:

The Constitution empowers each house to determine its rules of proceedings . . . . [A]ll matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just . . . . The power to make rules is . . . continuous[,] . . . absolute[,] and beyond the challenge of any other body or tribunal.

Id. at 5 (emphasis added).
221. See discussion supra Part III.B-C.
222. Compare discussion supra Part III.A, with discussion supra Part III.B-C.
223. See Buzbee & Schapiro, supra note 60, at 136-43 (arguing that such a reallocation finds its roots in judicial distrust of Congress). As one court has stated:

“[T]here would seem to be no more impropriety in the legislature seeking to go behind the final record of a court, for the purpose of determining whether or not it had obeyed the constitutional directions in making such a record, than there would be in the courts seeking to go behind the final record made by the legislative department.”

B. Of Institution

Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them.224

1. Supreme Court

The Court is not a congress. Courts live in a sanitized and finite world, isolated from political responsibility, unschooled in the art of legislative expertise, and oftentimes out of touch with the state of the nation.225 They are the sovereigns of the concrete case or controversy,226 impartial decisionmakers of a limited set of circumstances. Or as Jefferson

225. None of which are bad things for courts, for such qualities increase the likelihood of, inter alia, the judicial bulwarks of independence and impartiality.
226. U.S. CONST. art. III, § 2, cl. 1; see CORWIN, supra note 21, at 2 (“[T]he Court’s power to interpret the Constitution . . . is exercised only in connection with, and for the purpose of, the decision of ‘cases.’”); Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 IOWA L. REV. 1267, 1273 (1996) (“The power to interpret the laws is an incident to th[e] case- or controversy-deciding function; courts must interpret because they must decide.”); Attorney General Edwin Meese, Letter, President’s Right to Challenge a Law, N.Y. TIMES, May 21, 1985, at A26 (“Courts decide disputes between parties, not abstract questions of law.”); see also NOWAK & ROTUNDA, supra note 23, § 2.12, at 65-66 (discussing the Article III “case or controversy” limitations).

For a historical analysis of this limitation, see DAHL, supra note 202, at 18 (commenting on the limiting of judicial power to cases brought before the court, stating that “it is likely that a substantial majority of [the Constitutional Convention’s delegates] intended that federal judges should not participate in making government laws and policies, a responsibility that clearly belonged not to the judiciary but to the legislative branch”). In fact, a prominent portion of the Virginia Plan creating a council of revision (which was comprised of the Executive and members of the Supreme Court) was summarily rejected by the Convention at-large. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 83-84 (Max Farrand ed., 1966). President Washington himself was later to find out—the hard way—that the delegates meant what they had said. See RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 78-79 (5th ed. 2003) (noting the declination of the 1793 Supreme Court to provide “messenger” Secretary of State Thomas Jefferson with an advisory opinion regarding, inter alia, Washington’s stance of neutrality during the France-England conflicts); see also Muskrat v. United States, 219 U.S. 346, 362 (1911) (noting the lack of jurisdiction to provide an advisory opinion); Hayburn’s Case, 2 U.S. (2 Dall.) 409, 410 n.a (1792) (holding that the judiciary is prohibited from being assigned nonjudicial acts).
put it, “the last resort in relation to the other departments of the
government, but not in relation to the rights of the parties” before it.227

In this environment, the term “record” has an enormously different
meaning than it does in the legislative arena.228 Judicial “records” consist
primarily of adjudicative facts,229 relating directly to the conduct of
concrete parties which gives rise to a legal conflict.230 An adjudicative

227. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in
Jefferson, supra note 19, at 378 (interpreting The FEDERALIST No. 81, at 542
(Alexander Hamilton) (Jacob E. Cooke ed., 1961)) (internal quotation marks and
emphasis omitted); see also Farber, supra note 202, at 416 (“Judicial potency should be
distinguished from judicial supremacy. It is one thing to say that, in a case properly
before it, a court can forbid another official from acting contrary to its own view of the
Constitution,” while by contrast, “[i]t is another thing to say that officials must follow
the courts’ view of the Constitution when no case has yet been brought or in
circumstances where no case could ever be brought.”).

228. This is assuming that the type of “legislative record” the current Court
discusses even exists. See Buzbee & Schapiro, supra note 60, at 92 (arguing that “a
complete or ‘formal’ legislative record does not exist”). Although Professors Buzbee
and Schapiro speak mainly within the context of administrative agency processes, their
analysis is extremely helpful here.

229. As contrasted with legislative facts. For an explanation of the distinction
between the two, see Association of National Advertisers, Inc. v. FTC, 627 F.2d 1151
(D.C. Cir. 1979), wherein the court stated:

The factual predicate of adjudication depends on ascertainment of “facts
concerning the immediate parties—who did what, where, when, how, and with
what motive or intent.” By contrast, the nature of legislative fact is ordinarily
general, without reference to specific parties. Adjudicative and legislative
facts are also used differently[.]

. . . .

. . . [L]egislative facts, [unlike adjudicative facts], are crucial to the
prediction of future events and to the evaluation of certain risks . . .

Id. at 1161-62 (quoting 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE §
15.03, at 353 (1958) (“[A]djudicative facts are those to which the law is applied in the
process of adjudication. They are the facts that normally go to the jury in a jury case,”
while “[l]egislative facts are the facts which help the tribunal determine the content of
law and of policy and help the tribunal to exercise its judgment or discretion in
determining what course of action to take.”)).

230. Professors Buzbee and Schapiro explain as follows:

For example, a trial court will, at the end of a trial process, have made a record
of information introduced and received and of the process by which the
information came before the tribunal. Every word spoken in open court in that
proceeding is typically, in the American legal system, on the record.
record consists of a formally compiled and limited pool of information “used in the context of a closed legal proceeding in which a decisionmaker can base[] her decision.”231 Ordinarily, courts are not to be guided by legislative policy considerations or political persuasion, but rather, by the state of the record.232

Moreover, the judiciary, unlike Congress, possesses no spontaneous power of motion. Rather, it is the only branch that, in order to act, must be called into action by the application of others. Courts may not proceed ad libitum. Its judges and justices are “rigidly bound [by] walls . . . unseen by

Buzbee & Schapiro, supra note 60, at 92. Of course, adjudicative facts are also found in formal approaches such as the marshalling of evidence during pretrial discovery, presenting formal witness or expert testimony, and the like. See, e.g., FED. R. CIV. P. 26(b)(1) (allowing for pretrial discovery of “any matter, not privileged, that is relevant”); FED. R. EVID. 702-706 (pertaining to expert testimony).

231. Buzbee & Schapiro, supra note 60, at 92.

232. And, of course, existing law and precedent. The case law on this point is prodigious, covering a variety of unrelated jurisprudential issues, but nevertheless containing a common mantra. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 66 n.5 (1981) (“[T]his court is not competent or empowered to sit as a super-executive authority to review the decisions of the Executive and Legislative branches of government. . . .”); Simmons v. United States, 406 F.2d 456, 459 (5th Cir. 1969); Johnson v. Louisiana, 406 U.S. 356, 388 (1972) (Douglas, J., dissenting) (“My chief concern is one often expressed by the late Mr. Justice Black,” namely, “the prospect of nine men appointed for life sitting as a super-legislative body to determine whether government has gone too far. The balancing was done when the Constitution and Bill of Rights were written and adopted.”); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (“We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) (“Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.”); Dennis v. United States, 341 U.S. 494, 526 (1951) (Frankfurter, J., concurring) (“Above all we must remember that this Court’s power of judicial review is not ‘an exercise of the powers of a super-legislature.’”) (quoting Burns Baking Co. v. Bryan, 264 U.S. 504, 534 (1924)). The words accredited to Sir Thomas More are apt here:

The law, Roper, the law. I know what’s legal, not what’s right. And I’ll stick to what’s legal.

the average layman,” 233 but clearly dictated by the Constitution. 234

Thus, for the Court to use the term “legislative record” 235 in its new abrogation test is quite confusing, for it asks Congress—a non-adjudicative body—to compile information about parties who are (often times) neither privy to the conflict nor necessary predicates for Congress to legislate. Conversely, in reviewing the “legislative record,” the Court—a non-legislative body—makes personal judgments about the legislative evidence Congress has compiled. 236 This role reversal enables the Court to favor its own hunch as to what constitutes “widespread and persisting deprivation of constitutional rights,” 237 instead of deferring to Congress’s. Judge Noonan argues that such a “review” is

a particularly bold way of exercising supremacy over Congress, or, to put it another way, of the court itself playing a legislative part. Inevitably, in such a review, some pieces of the record before Congress will strike some members of the court more forcefully than the same pieces of evidence will strike other members of the court. What is more natural? The justices are all acting as legislators, exercising their own good judgment as to what is probative and what is irrelevant and so making up their own minds as to whether the legislation that was passed should have been passed.

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234. U.S. Const. art. III, § 2, cl. 1. History, tradition, and common sense have helped maintain the different environments of (legislative) chamber and courtroom. See Chief Judge Carl McGowan of the United States Court of Appeals, D.C. Circuit, remarks at the Association of American Law Schools (AALS), Section on Administrative Law (Jan. 4, 1981):

[Asking whether agency rulemaking should] be assimilated to lawmaking by the Congress itself, or to the adversary trial carried on in the sanitized and insulated atmosphere of the courthouse[:]. Anyone with experience of both knows that a courtroom differs markedly in style and tone from a legislative chamber. The customs, the traditions, the mores, if you please, of the processes of persuasion, are emphatically not the same. What is acceptable in the one is alien to the other.

Id.
236. See discussion supra Part III.B-C.
237. See Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. at 729 (“We now inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area [of gender discrimination].’’); see also supra note 56 and accompanying text.
... What, in the eyes of the minority, are thousands of examples of discrimination by the states... are reduced, in the eyes of the majority, to a handful of anecdotes...  

Moreover, for the Court to even demand that such a formal “legislative record” show “a history and pattern of... discrimination by the States,” is unrealistic to expect, if not impossible to perform. This is because Congress’s legislative universe—unlike the Court’s—is not constrained to materials compiled in a formal record.

2. Congress

That is to say, Congress is not a court. Congress’s “legislative record”—if such a thing even exists—is not reducible to documentation. Moreover, such a record “is not a description of an existing body of material, [but] rather a normative construct,” a grouping of opinions expressing value judgments as contrasted with stating facts or creating records.

Legislative practicalities are emblematic of this fact. For example, legislators make laws differently than a court parses through facts and records. Congress's facts, cases, and controversies involve innumerable parties and exist outside the finite world of the judiciary. Its finished


240. But cf. Saul M. Pilchen, Politics v. the Cloister: Deciding When the Supreme Court Should Defer to Congressional Factfinding Under the Post-Civil War Amendments, 59 NOTRE DAME L. REV. 337, 362-69 (1984) (arguing that Congress’s fact-finding ability can be constrained politically in ways that the Court's cannot).

241. See Buzbee & Schapiro, supra note 60, at 96 (“No set of compiled written materials will provide a comprehensive record of what influenced legislative action. Certainly the Congressional Record's transcript of spoken or written legislator statements reveals only the near culmination of the process and will likely include only the views of strong proponents and opponents.”).

242. Id. at 92.


244. Many yet to be singled-out or even born, let alone subject to the discrimination sought to be remedied. Cf. Ass’n of Nat’l Advertisers, Inc. v. FTC, 627
product is the collaboration of numerous sources—many incapable of description, let alone recordation—such as “the impact of . . . competing bills on a subject, constituent communications, lobbying pressure, electoral considerations, and comments by other governmental bodies.”

Congress’s widespread and persistent findings transcend formal records, which makes the current Court’s abrogation demands practically unattainable, and arguably, ridiculous.

To pretend that Congress’s formal legislative record contains all the facts supporting its lawmaking judgment is to underestimate the enormous amount of informal information that shapes legislators’ decisions on a day-to-day basis. To wit, it is to forget the legislative role in a representative democracy. Legislators “make laws they think fit the situations they have heard about” from constituents, colleagues, city leaders, lobbyists, loyalists, taxpayers, family, friends, foes—hopefully, the entire nation.

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F.2d 1151, 1162 (D.C. Cir. 1979) (“[L]egislative facts[, unlike adjudicative facts,] are crucial to the prediction of future events and to the evaluation of certain risks.”).

245. See, e.g., id. at 1165 (“No court to our knowledge has imposed procedural requirements upon a legislature before it may act. Indeed, any suggestion that congressmen may not prejudge factual and policy issues is fanciful. A legislator must have the ability to exchange views with constituents and to suggest public policy that is dependent upon factual assumptions.”); see also NOONAN, supra note 12, at 148 (“How have legislators over the centuries worked? Stories they have heard, stories of their own lives, stories of family, friends, constituents have been the stuff of legislative intelligence.”).

246. Buzbee & Schapiro, supra note 60, at 96. Also not to be forgotten is that these pressures are not always designed to serve the “controversy” at hand. See Bryant & Simeone, supra note 210, at 384 (opining that Congress’s self-informing mechanisms “are self-consciously orchestrated to serve other legitimate purposes [rather than the bill at hand] as well: gauging the political benefits and risks of a specific legislative proposal and informing, shaping, and directing public discourse on matters of national concern, among others”).

247. NOONAN, supra note 12, at 146 (“[Legislators] form their ideas of congruence and proportion, as most people do, intuitively.”).

248. See supra notes 246-47 and accompanying text; infra notes 250-51 and accompanying text. It is also unreasonable to pretend that the legislative record actually reflects representatives’ own thoughts. See, e.g., Endres v. Ind. State Police, 334 F.3d 618, 629 (7th Cir. 2003) (“Often a ‘legislative record’ reflects only the ability of advocacy groups to have favorable tidbits recited by tame witnesses during staged hearings.”).

249. See Abraham, supra note 233, at 287 (“Our constitutional constellation . . . does not conceive of the courts as society’s primary law-makers; it does not provide for government by the judiciary . . . [in] a representative democracy.”).

250. NOONAN, supra note 12, at 146.

251. This reality, for example, makes the Court’s recent labeling of Congress’s
Congress moves spontaneously whenever it legislates. It need not stop for every case nor wait for a live controversy to propel into action. Its power lies not in paper, but in the people.252

Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit recognized this practical and institutional reality in one of the most recent cases to address the legislative record portion of the Hibbs decision.253 Despite the Seventh Circuit failing to find valid findings as “anecdotal” very weak. Judge Noonan has expressed this concern, inquiring: “Anecdotes don’t count. Anecdotes don’t count? How have legislators over the centuries worked? Stories they have heard, stories of their own lives, stories of family, friends, constituents have been the stuff of legislative intelligence.” Id. at 148.

252. See Jefferson, supra note 19, at 456-57 and accompanying text; cf. CORWIN, supra note 21, at 229 (espousing the view of the Constitution as a serviceable instrument and a “People’s Law”); McConnell, supra note 194, at 155-56 (arguing that the judiciary should grant Congress a great deal of discretion when Congress interprets the Bill of Rights because Congress, unlike the courts, directly reflects the will of the people); Segall, supra note 132, at 574 (“Judges should only reverse the judgment of other political institutions if there is an irreconcilable variance between that decision and the Constitution. In all other cases, let the people decide.”); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 151 (1893) (espousing an earlier theory of popular constitutionalism, and arguing that the Supreme Court not rule an act of Congress unconstitutional unless that act is unconstitutional beyond all reasonable doubt). An institutional explanation of this counter-majoritarian practicality was recently articulated by Justice Breyer in Board of Trustees of the University of Alabama v. Garrett:

Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy. Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification. Unlike judges, Members of Congress can directly obtain information from constituents who have firsthand experience with discrimination and related issues.

Moreover, unlike judges, Members of Congress are elected.

Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 384 (2001) (Breyer, J., dissenting) (citation omitted). But see Pilchen, supra note 240, at 369 (“Because courts—relative to legislatures—are sheltered from politics, their factfinding ability in a particular case may exceed that of the political branch.”) (footnotes omitted).

253. See Endres v. Ind. State Police, 334 F.3d 618, 628 (7th Cir. 2003) (“The Court stressed in Hibbs that Congress compiled a legislative record showing that many states used to discriminate explicitly on account of sex and may continue to do so . . . in the absence of preventative legislation.”).
abrogation, the court seemed to opine that the Supreme Court’s legislative record requirement was as impracticable as it was institutionally bankrupt. Two points stand out.

First, the reality that many types of discrimination lack a sizable legislative record does not appear to bother the Seventh Circuit as much as it does the Supreme Court, due to the likely fact that, in Judge Easterbrook’s words, such discriminatory “history [is] written elsewhere for all to see.” Second, even if such a record were capable of documentation and compilation, its contents would be far from neutral, and most likely, inauthentic: “Often a ‘legislative record’ reflects only the ability of advocacy groups to have favorable tidbits recited by tame witnesses during staged hearings.” In other words, a weak legislative record is not indicative of a lack of discrimination, but rather, vice versa: the legislative record is a weak measuring stick by which to assess a history of discriminatory treatment. The proper gauge, according to Judge Easterbrook, underscores the very problem with the Supreme Court’s formal findings “review”: “Section 5 does not condition legislative power on the ability of interest groups or committee chairmen to ladle anecdotes into hearing transcripts. Legislative power under § 5 depends on the state of the world, not the state of the Congressional Record.”

In tune with the proper role of judicial review, Judge Easterbrook’s comments expose the Supreme Court’s newfound abrogation test for what it is: an unworkable standard, devoid of precedential, constitutional, and institutional support, all of which explain that it is the emphatic province

254. Id. at 629. The court came to this conclusion for a number of reasons, including the statute in question (Title VII) resting on the Commerce Clause instead of § 5, the validity of a general rule of neutral applicability as discussed in Employment Division v. Smith, 494 U.S. 872, 879-80 (1990), and the lack of a history of religious discrimination in the Indiana State Police Department. Endres v. Ind. State Police, 334 F.3d at 628-30.

255. Cf. id. at 629 (“Legislative power under § 5 depends on the state of the world, not the state of the Congressional Record.”).

256. Id.

257. Id. At first glance, this comment might appear to support the Supreme Court’s strict scrutiny of the record and the labeling of such evidence “anecdotal,” “isolated,” and “irrelevant.” See discussion supra Part III.B. However, such a conclusion misreads Judge Easterbrook’s argument—he opines not that a weak legislative record is indicative of a lack of discrimination, but rather, that such a record is a weak way to determine a history of discrimination. Endres v. Ind. State Police, 334 F.3d at 629.

258. Id.

259. Id. (emphasis added).
and duty of Congress to legislate based on the state of the nation, not the state of the record. This duty, however, is unconstitutionally thwarted by the Court’s new abrogation demands, wherein Congress is treated like a reviewing court and the Court like a do-nothing legislature.

V. CONCLUSION

If history, precedent, and institutional practicalities teach us anything about judicial review, it is that “[t]he Supreme Court, our ultimate appellate tribunal, is much better at saying what the government may not do than in prescribing what the government must do and how it must go about doing it.” The Rehnquist Court’s current abrogation decisions—including Hibbs—are emblematic of this fact. The newfound abrogation requirement that Congress physically document massive findings imposes new unconstitutional burdens that handcuff Congress’s ability to respond to pressing public concerns. History and practice demonstrate that these national problems are not always reducible to facts, let alone able to be adequately assembled in a formal record for the Court. Pages of records, however, are exactly what make abrogation jurisprudence turn in the twenty-first century, resulting in a maximization of the conflict between interbranch “constitutionalism” and participatory democracy.

To allow for such arrogation of power by a non-elective branch is, in a word, dangerous. It aggrandizes judicial review and thereby disregards the limited precepts of *Marbury v. Madison*, reverses the legal burdens deeply

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260. *See supra* note 259 and accompanying text. Another commentator has argued that, to solve the nation’s most pressing problems, the Supreme Court should refrain from declaring [Congress’s] interpretations [of the Constitution] unconstitutional, not just because by practicing self-restraint the unelected Court thereby negatively promotes participatory democracy by staying its own undemocratic hand, but also because by respecting the different, even radically different, interpretations of the aspirational Constitution rendered by the Congress, the Court positively promotes congressional and hence popular responsibility for those democratically shared principles that constitute us. Not coincidentally, it would by doing so also further the democratization—long overdue—of the Constitution itself.


261. Abraham, *supra* note 233, at 287 (emphasis in original). Professor Abraham concluded that “the latter is essentially the task of the political branches.” *Id.*

262. *See discussion supra* Part III.B-C.


264. *See* West, *supra* note 260, at 267-68 (discussing the differing interpretations of the Constitution by the Supreme Court and Congress).
rooted in Fourteenth Amendment jurisprudence, shakes the balance of coequal powers, and silences the final arbiters of the United States: the people. Such a result will further compromise what little faith the polity has in its judiciary and democracy, ultimately relegating the principles of American Government to that of an old “religion whose temples are allowed to remain, but in which no one longer believes.”

To prevent the aforementioned catastrophes, the Court must undo what it has done. It must return its abrogation jurisprudence to Seminole Tribe’s prohibition, rather than maintain the Kimel, Garrett, and Hibbs prescription. Only then will Congress retain its Section Five authority in the context of the Eleventh Amendment; only then will its legislation be based on the state of the nation; only then will it be responsive to the demands of the true Sovereign; and only then will the power of judicial review return to where Chief Justice Marshall last placed it.

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265. See supra notes 19, 252 and accompanying text.
266. ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA 596 (J.P. Mayer & Max Lerner eds., George Lawrence trans., Harper & Row 1966) (1835).
267. See President Franklin D. Roosevelt, “Fireside Chat” Discussing the Plan for Reorganization of the Judiciary (Mar. 9, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 130 (Samuel I. Rosenman ed., Russell & Russell 1941) (“[W]e cannot yield our constitutional destiny to the personal judgment of a few men who, being fearful of the future, would deny us the necessary means of dealing with the present. . . . The Court itself can best undo what the Court has done.”).