

STEVENS, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 01–1368

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

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

[May 27, 2003]

JUSTICE STEVENS, concurring in the judgment.

Because I have never been convinced that an Act of Congress can amend the Constitution and because I am uncertain whether the congressional enactment before us was truly “needed to secure the guarantees of the Fourteenth Amendment,” I write separately to explain why I join the Court’s judgment. *Fitzpatrick v. Bitzer*, 427 U. S. 445, 458 (1976) (STEVENS, J., concurring in judgment) (quoting *Katzenbach v. Morgan*, 384 U. S. 641, 651 (1966)).

The plain language of the Eleventh Amendment poses no barrier to the adjudication of this case because respondents are citizens of Nevada. The sovereign immunity defense asserted by Nevada is based on what I regard as the second Eleventh Amendment, which has its source in judge-made common law, rather than constitutional text. *Pennsylvania v. Union Gas Co.*, 491 U. S. 1, 23 (1989) (STEVENS, J., concurring). As long as it clearly expresses its intent, Congress may abrogate that common-law defense pursuant to its power to regulate commerce “among the several States.” U. S. Const., Art. I, §8. The family-care provision of the Family and Medical Leave Act of 1993 is unquestionably a valid exercise of a power that is “broad enough to support federal legislation regulating the

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terms and conditions of state employment.” *Fitzpatrick*, 427 U. S., at 458 (STEVENS, J., concurring in judgment).^{*} Accordingly, Nevada’s sovereign immunity defense is without merit.

^{*} See Stevens, “Two Questions About Justice,” 2003 U. Ill. L. Rev. ____ (forthcoming) (manuscript on file with U. Ill. Law Review) (discussing *Fitzpatrick*).