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A Federal Age Discrimination Remedy Violates State Eleventh Amendment Immunity: *Kimel v. Florida Board of Regents*

Constitutional Law — Eleventh Amendment — Fourteenth Amendment Enforcement Clause — Age Discrimination in Employment Act (ADEA) — The United States Supreme Court held that despite the unmistakably clear intent of Congress to abrogate the states' Eleventh Amendment immunity from private lawsuits, the Age Discrimination in Employment Act's purported abrogation is invalid as it is not an appropriate exercise of the Fourteenth Amendment enforcement power of Congress.


Petitioners, in three separate federal actions, sued their state employers alleging, *inter alia*, that their employers discriminated against them based upon age in violation of the Age Discrimination in Employment Act ("ADEA" or "Act").\(^1\) In 1994, Roderick MacPherson and Marvin Narz sued their employer, the University of Montevallo, alleging that the university retaliated against them for having filed an earlier discrimination charge, and that the university's evaluation system favored younger faculty.\(^2\) In the second case, in 1995, J. Daniel Kimel, Jr. and other current and former employees of the Florida State University sued the Florida Board of Regents alleging that the university's allocation of funds adversely affected the pay of more senior employees, most of whom were older.\(^3\) The third action arose in May 1996, with

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1. *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 636 (2000). The ADEA, 29 U.S.C. §§ 621-634 (1994), makes it unlawful for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1).


Wellington Dickson suing his employer, the Florida Department of Corrections, alleging that his employer denied his promotion because of his age.\(^4\)

In all three cases, the state defendants moved to dismiss the complaints based upon their Eleventh Amendment immunity.\(^5\) In *MacPherson v. University of Montevallo*,\(^6\) the District Court for the Northern District of Alabama granted the motion, while the District Court for the Northern District of Florida denied the motions in both Florida cases.\(^7\) The plaintiffs in *MacPherson* and the Florida state defendants appealed to the Eleventh Circuit Court of Appeals, and the appeals were consolidated.\(^8\) The United States intervened\(^9\) to defend the ADEA's abrogation of the Eleventh Amendment immunity of the States.\(^10\)

The court of appeals, in a divided panel opinion, held that the ADEA does not abrogate the States' Eleventh Amendment immunity; therefore, the Act's private right of action against the states is invalid.\(^11\) Judge Edmondson stated that Congress was unsuccessful in abrogating the State's immunity because the ADEA lacked unmistakably clear language of congressional intent to do so.\(^12\) Judge Cox concurred in the result that the States are immune

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4. Id. Dickson alleged that the discriminatory conduct occurred over a five-year period, while he was in his late 50's and early 60's. Brief for Petitioners at 7, *Kimel* (Nos. 98-791, 98-796).

5. *Kimel*, 120 S. Ct. at 637. The Eleventh Amendment of the United States Constitution states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.


8. Id. at 639. The orders in the two Florida state cases, although interlocutory, were appealable under the collateral order doctrine. *Kimel* v. Florida Bd. of Regents, 139 F.3d 1426, 1429 (11th Cir. 1998). This doctrine allows [the] appeal of an interlocutory order that conclusively determines an issue collateral to the merits of the underlying action, but which is effectively unreviewable from a final judgment. BLACK'S LAW DICTIONARY 262 (6th ed. 1990). A district court's denial of a state's Eleventh Amendment immunity conclusively determines that a state is not immune from suit Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 143-44 (1993). This order must be immediately reviewable; otherwise, the states' Eleventh Amendment immunity right would be effectively lost. Id.

9. Intervention allows a party, not originally named in the lawsuit, to enter the action because she has a personal stake in the outcome. BLACK'S LAW DICTIONARY 820 (6th ed. 1990). The United States can intervene in any proceeding in a United States court wherein the constitutionality of an act of Congress is at issue. 28 U.S.C. § 2403 (1994).


11. *Kimel*, 139 F.3d at 1433.

12. *Kimel*, 120 S. Ct. at 639. "In order to determine whether Congress has abrogated the States' sovereign immunity, we must ask two questions: first, whether Congress has
from ADEA suits, but on different grounds. He did not resolve the "thorny issue of Congress's intent," but instead found that Congress exceeded its constitutional authority granted by the enforcement provision of the Fourteenth Amendment. Judge Cox held that the ADEA bestows rights far beyond those embodied in the Fourteenth Amendment and that the Act's remedies are not proportional to any infringement of older persons' constitutional rights. Chief Judge Hatchett disagreed with his colleagues. He concluded that Congress's intent in the ADEA is unmistakably clear, and the statute is a proper exercise of its Fourteenth Amendment enforcement powers.

The United States Supreme Court granted certiorari to resolve a split among the federal courts of appeals on whether the ADEA properly abrogates the Eleventh Amendment immunity of the states. In resolving this issue, the Court addressed two questions. Did Congress unequivocally express its intent to abrogate that immunity, and, if so, did it act under proper constitutional authority?

Writing for the majority, Justice O'Connor began by reiterating the Court's "simple but stringent test" that the language of the statute must convey Congress's unmistakable intent to abrogate the states' immunity from suit in federal court. In 1974, Congress

unequivocally expressed its intent to abrogate the immunity; and second, whether Congress has acted pursuant to a valid exercise of power." Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996) (citation omitted).

13. *Kimel*, 120 S. Ct. at 639
15. *Kimel*, 120 S. Ct. at 639. The Fourteenth Amendment of the United States Constitution provides: "No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The amendment further provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.
18. *Id*.
21. *Id*.
22. The four-part decision commanded a 5-4 majority in Parts I, II, and IV, and a 7-2 majority in Part III. *Kimel*, 120 S. Ct. at 636.
amended the Fair Labor Standards Act (FLSA)\textsuperscript{24} to allow an employee to maintain an action "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."\textsuperscript{25} The ADEA incorporates this enforcement provision by reference in § 626(b).\textsuperscript{26} The \textit{Kimel} Court found that the ADEA's incorporation of the FLSA's enforcement provision clearly demonstrates Congress's intent to permit private employees to sue state employers in federal court.\textsuperscript{27}

The respondents, however, argued that Congress failed to make its intent to abrogate state immunity unmistakably clear in § 626(b).\textsuperscript{28} They claimed that the ADEA contains its own, separate enforcement provision in § 626(c)(1) to the derogation of the incorporation reference in § 626(b).\textsuperscript{29} In rejecting this point, the Court noted that it has previously explained that the ADEA's separate enforcement options in § 626(c)(1) are coterminous with the incorporated provisions of the FLSA.\textsuperscript{30} The Court also rejected the respondent's contention that the phrase "court of competent jurisdiction" in the FLSA's § 216(b) obscured congressional intent.\textsuperscript{31} The Court further noted that § 216(b) contains no ambiguity as judged by the language of the section itself, which authorizes employee suits against States "in any Federal or State court of competent jurisdiction."\textsuperscript{32}

The majority disagreed with Justice Thomas's dissent that argued that Congress failed to recognize that its 1974 amendment of the
FLSA would create an additional abrogation provision within the ADEA.\textsuperscript{33} For the majority, it was clear that Congress deliberated on the full consequences of abrogation because it amended both the FLSA and the ADEA in the very same statute.\textsuperscript{34} Furthermore, the Court implied that the dissenters' version of the clear statement inquiry led to an unwarranted inference of ambiguity.\textsuperscript{35} For the seven-member majority, the "clear textual statement" of the statute was sufficient evidence of Congress's intent to abrogate.\textsuperscript{36}

Once the Court concluded that Congress unequivocally intended to abrogate the states' Eleventh Amendment immunity, it next considered whether Congress acted under an effective grant of constitutional authority.\textsuperscript{37} Justice O'Connor first noted that the Court had already considered the amended ADEA and its relation to state governments.\textsuperscript{38} In \textit{EEOC v. Wyoming},\textsuperscript{39} the Court held that the Equal Employment Opportunity Commission's ("EEOC") enforcement of the ADEA is consonant with the Article I commerce power\textsuperscript{40} of Congress.\textsuperscript{41} In ruling that the EEOC could enforce the Act in federal court, the Court had found it unnecessary to address whether the ADEA was valid under Section

\begin{itemize}
  \item [33.] Id. Justice Thomas, joined by Justice Kennedy, dissented from only Part III of the opinion. \textit{Id.} at 654 (Thomas, J., dissenting). The two justices concurred with Parts I, II, and IV in holding that Congress exceeded its Fourteenth Amendment enforcement power. \textit{Id.} at 654 n.1.
  \item [35.] \textit{Kimel}, 120 S. Ct. at 642. The majority stated:
    \begin{quote}
    In any event, we have never held that Congress must speak with different gradations of clarity depending on specific circumstances of the relevant legislation (e.g., amending incorporated provisions as opposed to enacting a statute for the first time). The clear statement inquiry focuses on what Congress did, not when it did so. We will not infer ambiguity from the sequence in which a clear textual statement is added to the statute.
    \end{quote}
  \item [36.] \textit{Id.}
  \item [37.] \textit{Id.}
  \item [38.] \textit{Id.}
  \item [39.] 460 U.S. 226 (1983).
  \item [40.] The Commerce Clause of the United States Constitution provides: "Congress shall have Power . . . to regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.
  \item [41.] \textit{Kimel}, 120 S. Ct. at 642. In \textit{EEOC v. Wyoming}, the ADEA was found not to be a violation of the principles of state sovereignty embodied in the Tenth Amendment, as construed in \textit{National League of Cities v. Usery}, 426 U.S. 833 (1976), overruled by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985). \textit{EEOC}, 460 U.S. at 236. The \textit{EEOC} Court concluded that even if the ADEA affected an attribute of state sovereignty, the Act does not "directly impair . . . traditional areas of governmental function." \textit{EEOC}, 460 U.S. at 239 (quoting \textit{Nat'l League of Cities}, 426 U.S. at 851).
\end{itemize}
5 of the Fourteenth Amendment. In the present case, however, the petitioners, as private party plaintiffs, placed the issue directly before the Court.

Recalling its decision in *Seminole Tribe v. Florida*, the Court reaffirmed that Congress may not abrogate the states' immunity under the Article I Commerce Clause. The majority rejected Justice Stevens's later dissenting view that *Seminole Tribe* was a departure from the Court's constitutional jurisprudence. The majority considered *Seminole Tribe* to be a "valid and natural" result of *Hans v. Louisiana*, which was "rendered over a full century ago." The Court declared its adherence to the *Seminole Tribe* holding that Congress does not have the power under Article I to subject the states to private suits. Since the ADEA could not abrogate state immunity under Article I, the Court stated that the petitioners might maintain their suits only if the ADEA is appropriate legislation under Section 5 of the Fourteenth Amendment.

To the majority, the dispositive issue was whether the ADEA was appropriate legislation under the enforcement provision of the Fourteenth Amendment. Justice O'Connor began this analysis by noting that the Court, in *City of Boerne v. Flores*, had recently reaffirmed that Section 5 is an affirmative grant of power to

42. *Kimel*, 120 S. Ct. at 642.
43. Id. at 643.
46. *Kimel*, 120 S. Ct. at 643.
47. 134 U.S. 1 (1890).
48. Id. The majority firmly noted: "[T]he present dissenters' refusal to accept the validity and natural import of decisions like *Hans* . . . makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution." *Id.*
49. *Id.* at 644-45.
50. *Id.* at 644. "This Court has found authority to abrogate under only two constitutional provisions: the Fourteenth Amendment . . . and, in a plurality opinion, the Interstate Commerce Clause, *Pennsylvania v. Union Gas* [overruled]." *Seminole Tribe*, 517 U.S. at 44-45.
52. 521 U.S. 507 (1997).
Congress to enforce the Fourteenth Amendment.\textsuperscript{53} \textit{City of Boerne} stated that, although enforcement consists of both remedying and deterring violations of rights protected by the amendment, Congress may not alter the "substantive meaning" of the Fourteenth Amendment.\textsuperscript{54} As the \textit{Kimel} Court noted, appropriate legislation enforces a right, but does not define a right.\textsuperscript{55} To decide whether the ADEA was appropriate legislation, Justice O'Connor applied the "congruence and proportionality" test set forth in \textit{City of Boerne}.\textsuperscript{56} In doing so, the majority concluded that the ADEA exceeded Congress's Section 5 enforcement powers.\textsuperscript{57}

The Court concluded that the ADEA was disproportionate to any conceivable discriminatory state conduct.\textsuperscript{58} Unlike racial classifications, which are immediately suspect, the Court reiterated that states may discriminate with respect to age, provided the classification rationally relates to a legitimate state interest.\textsuperscript{59} In reviewing rational basis scrutiny as applied to discrimination, the majority noted that a state is allowed to use age as a proxy for a person's other attributes as long as the age classification is reasonable.\textsuperscript{60} The Court further noted the wide latitude its age-related equal protection jurisprudence affords the states under the rational basis standard.\textsuperscript{61} In contrast, the ADEA, the majority concluded, places substantially more restrictions on state

\textsuperscript{53} \textit{Kimel}, 120 S. Ct. at 644.
\textsuperscript{54} Id.
\textsuperscript{55} Id. (citing \textit{City of Boerne}, 521 U.S. at 519).
\textsuperscript{56} Id. The Court explained as follows:

While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and it must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. \textit{City of Boerne}, 521 U.S. at 519-20.
\textsuperscript{57} \textit{Kimel}, 120 S. Ct. at 645.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 646.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 645-47. For example, in \textit{Massachusetts Board of Retirement v. Murgia}, 427 U.S. 307 (1976) (per curiam), the Court rejected an equal protection challenge to a Massachusetts statute requiring state police officers to retire at 50. \textit{Murgia}, 427 U.S. at 317. The Court recognized that the state has a legitimate interest in ensuring that its police officers are physically capable of protecting the public. \textit{Id.} at 314. Since physical performance declines with age, the state could rationally conclude that a mandatory retirement age of 50 would further this interest. \textit{Id.} at 315. The fact that individualized fitness testing would further this interest more effectively, or that age as a proxy for fitness is inaccurate in certain individual cases, did not violate the Equal Protection Clause. \textit{Id.} at 314-15.
employers than required by the Equal Protection Clause.62

The petitioners, attempting to show otherwise, argued that the ADEA's bona fide occupational exception prevented the Act from expanding the substantive contours of the Fourteenth Amendment.63 The Court rejected this contention, and stated that the bona fide occupational qualification is more restrictive than the rational basis standard as applied to the Equal Protection Clause.64 In fact, the Court noted that even with the ADEA's exception provision, the standard of review required by the Act bordered on heightened scrutiny.65

The Court held that while the ADEA bestows rights beyond those embodied in the Fourteenth Amendment, this does not necessarily make the Act inappropriate.66 Reaffirming its view in City of Boerne, the Court wrote that strong remedial measures are appropriate when the constitutional infraction requires strong action by Congress.67 Therefore, the Court next examined the ADEA's legislative record for evidence that would support such expansive legislation.68

Justice O'Connor pointedly stated that Congress's findings failed to reveal any pattern of age discrimination.69 The Court dismissed the petitioner's evidence purporting to show discrimination against state employees as consisting "almost entirely of isolated sentences

62. Id. The Court stated that § 623(a)(1) of the ADEA made all age discrimination unlawful. Id.


64. Kimel, 120 S. Ct. at 647. The Court recalled its decision in Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985). In this case, employees sued Western Air Lines for violating the ADEA by requiring flight engineers to retire at age 60. Criswell, 472 U.S. at 405. The employer asserted that age is a bona fide occupational qualification ("BFOQ"), reasonably necessary for safe operation. Id. at 406. The Court concluded that the "reasonable necessity" for allowing the BFOQ defense is significantly different from the "reasonableness" of rational basis scrutiny. Id. at 419-21. The ADEA presumes that age discrimination is unlawful, and the BFOQ defense is meant to be a rare exception to a general rule. Id. at 421.

65. Kimel, 120 S. Ct. at 648. "The exception simply makes clear that the employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." Id. (citation omitted).

66. Id.

67. Id.

68. Id.

69. Id. "Our examination of the ADEA's legislative record confirms that Congress's 1974 extensions of the Act to the States was an unwarranted response to a perhaps inconsequential problem." Id. at 648-49.
clipped from floor debates and legislative reports." Congress's finding of substantial age discrimination in the private sector was insufficient to permit the Court to infer a similar pattern of bias by the states. Reviewing the ADEA's legislative record as a whole, the Court found no reason to believe that there was a widespread problem of age discrimination among state employees.

Based on the broad reach of the ADEA's substantive provisions, and the lack of evidence of unconstitutional age discrimination by the states, the Court held that the ADEA exceeds Congress's Fourteenth Amendment enforcement powers and that the Act's abrogation of state immunity is invalid. Although the Court foreclosed a federal avenue of relief for state employees, it noted that ample protections still exist at the state level. According to the Court, state age discrimination statues permit state employees to recover money damages in all but two states.

In his dissenting opinion, Justice Stevens stridently rejected the majority's view of the Eleventh Amendment's limitation on the Article I powers of Congress. Justice Stevens called the reasoning of Seminole Tribe "so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order" that it should not be given the "deference or respect" normally afforded by stare decisis. According to Justice Stevens, the proper guardian of state sovereignty is not the judiciary, but Congress. To him, the five-member majority of Seminole Tribe misapplied the "ancient judge-made doctrine of sovereign immunity" to "aggrandize" the judicial branch. For Justice Stevens, the ADEA's abrogation of state immunity is within the Article I commerce power of Congress as is the Act's authorization of

70. Kimel, 120 S. Ct. at 649. "Like the assorted sentences petitioners cobble together from a decade's worth of congressional reports and floor debates, the California study does not indicate that the state had engaged in any unconstitutional age discrimination." Id.
71. Id.
72. Id.
73. Id. at 650.
74. Id.
75. Kimel, 120 S. Ct. at 650 n.1. The Court cited statutes in all states except Alabama and South Dakota.
76. Id. at 650 (Stevens, J., dissenting). Justice Souter, Justice Ginsburg, and Justice Breyer joined Justice Stevens, dissenting in part and concurring in part. Id. The same four justices also dissented in Seminole Tribe, 517 U.S. at 76. Id.
77. Kimel, 120 S. Ct. at 653.
78. Id. at 651.
79. Id. at 651-52 & n.3.
private remedies against unconsenting states.\textsuperscript{80}

Justice Thomas dissented from the majority opinion on the narrow issue of whether Congress made its intent to abrogate the states' Eleventh Amendment immunity unmistakably clear.\textsuperscript{81} Justice Thomas's fundamental objection derived from Congress's failure to express its intention to abrogate within the text of the ADEA itself.\textsuperscript{82} He did not reject the notion that Congress could abrogate through an incorporating reference, nor did he even dispute that the ADEA, in fact, incorporates some of the enforcement provisions of the FLSA.\textsuperscript{83} However, for him it was "open to debate whether" Congress intended the FLSA's private right of action to apply to the ADEA as well.\textsuperscript{84} While Justice Thomas accepted some of the majority's reasoning as plausible, he concluded that the language of the statute, nevertheless, fell short of the unmistakably clear standard.\textsuperscript{85} For Justice Thomas, a "permissible inference" is no substitute for the "unequivocal declaration" required by the unmistakably clear inquiry.\textsuperscript{86}

The majority, on the other hand, viewed its rationale as grounded in well-established precedent, naturally derived from over a century's jurisprudence surrounding the Eleventh Amendment.\textsuperscript{87} While the \textit{Kimel} Court dated its analysis of the Eleventh Amendment as extending over just one century, the full extent of its jurisprudence actually encompasses more than two.

The Eleventh Amendment was adopted specifically to overrule

\textsuperscript{80} \textit{Id.} at 651-52.
\textsuperscript{81} \textit{Id.} at 664 (Thomas, J., dissenting). Justice Thomas quoted the so-called "clear statement" rule of \textit{Atascadero State Hospital v. Scanlon}, 473 U.S. 234 (1985). "Congress may abrogate . . . only by making its intention unmistakably clear in the language of the statute." \textit{Kimel}, 120 S. Ct. at 654 (quoting \textit{Atascadero State Hospital}, 473 U.S. at 242). "This rule 'assures that the legislature has in fact faced and intended to bring into issue, the critical matters involved in the judicial decision.' " \textit{Kimel}, 120 S. Ct. at 654 (quoting \textit{Will v. Michigan Dept. of State Police}, 491 U.S. 58, 65 (1989)).
\textsuperscript{82} \textit{Kimel}, 120 S. Ct. at 654.
\textsuperscript{83} \textit{Id.} at 657.
\textsuperscript{84} \textit{Id.}

Where Congress amends an Act whose provisions are incorporated by other Acts, the bill under consideration does not necessarily mention the incorporating references in those other Acts, and so fails to inspire confidence that Congress deliberated on the consequences of the amendment for the other Acts. That is the case here. . . . And, given the purposes of the clear statement rule . . . I am unwilling to indulge the fiction that Congress, when it amended § 216(b), recognized the consequences for a separate Act (the ADEA) that incorporates the amended provision.
\textit{Id.} at 655-56.
\textsuperscript{85} \textit{Id.} at 658.
\textsuperscript{86} \textit{Id.} at 658.
\textsuperscript{87} \textit{Kimel}, 120 S. Ct. at 643.
the Supreme Court’s decision in *Chisholm v. Georgia*,\(^8\) which held that Article III of the Constitution authorizes a private citizen of one state to sue another state in federal court.\(^9\) The outrage *Chisholm* engendered among the states led the House of Representatives to propose this amendment just one day after the Court announced its decision.\(^0\) While the amendment literally appears to bar only federal diversity suits, *Hans v. Louisiana* established the doctrine that the Eleventh Amendment’s grant of state immunity prohibits suits by a state’s own citizens as well.\(^1\)

In *Hans*, a citizen of Louisiana brought an action in federal court to recover the accrued interest on certain state bonds that the state refused to honor.\(^2\) The plaintiff asserted that the court had federal question jurisdiction because the state’s repudiation of the bonds violated the Contracts Clause of the Constitution.\(^3\) In affirming the lower court’s dismissal of the case, the United States Supreme Court held that the Eleventh Amendment not only bars diversity suits, but also federal question suits by a state’s own citizens.\(^4\) In reaching this result, the Court interpreted the Eleventh Amendment as a constitutional recognition that the federal union is comprised of sovereign states.\(^5\) The *Hans* Court called it “almost an absurdity on its face” to presume that the states would have adopted the Eleventh Amendment had it contained a provision allowing the states to be hauled into federal court by their own citizens.\(^6\)

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8. 2 U.S. (2 Dall.) 419 (1793). Chisholm had sued Georgia before the Supreme Court in an action of assumpsit on behalf of his testator, a citizen of South Carolina. *Id.* at 420.


12. *Id.* at 1-3. The plaintiff, Hans, alleged that Louisiana had collected taxes for payment of certain bonds, but that it unlawfully diverted the funds to pay the general expenses of the state. *Id.* at 3.


15. *Id.* at 13.

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. . . . The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action independent of the sovereign will.

*Id.* (quoting *The Federalist* No. 81 (Alexander Hamilton)).

The *Hans* Court's recognition that the Eleventh Amendment embodies the principle of state sovereignty has remained the foundation of the Court's jurisprudence in this area for over a century. In the years since *Hans*, Congress has very rarely abrogated the states' immunity from suit in federal court. In fact, the Supreme Court has upheld abrogation by Congress in only two circumstances. In *Fitzpatrick v. Bitzer*, the Court held that the enforcement provision of the Fourteenth Amendment can preempt the state sovereignty embodied in the Eleventh Amendment. In only one other case, *Pennsylvania v. Union Gas Co.*, has the Court upheld congressional abrogation of the states' immunity.

In *Union Gas*, the Court held that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, effectively abrogated the states' immunity from private suits in federal court. In reaching this result, a plurality of four held that the plenary power of Congress to regulate interstate commerce would be incomplete without authority to authorize suits holding states liable for damages. Justice White provided the fifth vote for the result, although he wrote separately to stress that he disagreed with much of the plurality's reasoning. The fragmented holding of *Union Gas* proved to be short-lived as it was overruled just five years later in *Seminole Tribe*.

In *Seminole Tribe*, the Court was confronted with Congress's purported abrogation of state immunity in the Indian Gaming Regulatory Act ("IGRA"), which Congress enacted pursuant to its

98. *Id.* at 59.
104. *Id.* at 19-20. Justice Brennan delivered the opinion with respect to this part of the decision. *Id.* Justices Marshall, Blackmun, and Stevens joined. *Id.* The Constitution's Commerce Clause provides: "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.
105. *Union Gas*, 491 U.S. at 57 (White, J., concurring). Four justices joined in dissent, expressly rejecting the plurality's reasoning. *Id.* at 57. *See also Seminole Tribe*, 517 U.S. at 63 (summarizing the splintered reasoning in *Union Gas*).
107. 25 U.S.C. §§ 2701-2721 (1994). The provision of the statute at issue here concerned the congressional authorization of such gaming activities as "slot machines, casino games,
authority under the Indian Commerce Clause. The IGRA required a state to negotiate in good faith with its Indian tribes regarding gaming activities and permitted a tribe to enforce this provision in federal court. The five-member majority of Seminole Tribe considered the “deeply fractured decision” of Union Gas to be a “solitary departure from established law” that had been reaffirmed repeatedly since Hans v. Louisiana. The Seminole Tribe Court also questioned the precedential value of Union Gas, since a majority of the Court expressly rejected the reasoning of the four-member plurality. Given the fractured reasoning behind Union Gas and the hundred-plus years of constitutional jurisprudence adhering to Hans, the Seminole Tribe Court concluded that Union Gas was incorrectly decided and overruled it. Following the Court’s decision in Seminole Tribe, Fitzpatrick v. Bitzer remained the lone sentinel in holding that Congress may abrogate the states’ Eleventh Amendment immunity.

In Fitzpatrick, male employees sued their employer, the State of Connecticut, alleging that its retirement plan discriminated against them based upon their sex, in violation of the Civil Rights Act of 1964. The Supreme Court reversed the Court of Appeals for the Second Circuit, which held that the Civil Rights Act’s private enforcement provision violated the Eleventh Amendment because it

banking card games, dog racing, and lotteries within tribal territory.” Seminole Tribe, 517 U.S. at 48. Among the requirements for the gaming to be lawful was the existence of tribal-state agreement regulating the conduct of the gaming activities. Id. at 50.


109. Seminole Tribe, 517 U.S. at 47.

110. Id. at 64-66.

111. Id. at 66. “[T]he degree of confusion following a splintered . . . decision is itself a reason for reexamining that decision.” Id. (quoting Nichols v. United States, 511 U.S. 738, 746 (1994)).

112. Id.


114. Id. The Civil Rights Act authorized federal suits against a state employer if it discriminated because of “race, color, religion, sex, or national origin.” 42. U.S.C. § 2000e-2(a) (1994). Fitzpatrick and other current and retired male employees sued their employer, the State of Connecticut, alleging that the state’s retirement plan discriminated against them based on their sex. Fitzpatrick, 427 U.S. at 448. The state’s plan, in fact, discriminated based on sex by allowing women to retire five years earlier than men with identical service. Fitzpatrick v. Bitzer, 390 F.Supp 278, 279-80 (D. Conn. 1974). The plan also treated women preferentially in the rate of accrual of retirement benefits. Id. at 280. The district court, perhaps facetiously, noted the paternalistic attitude that led many states to adopt similar statutes: “The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.” Fitzpatrick, 390 F.Supp. at 282 (quoting Bradwell v. Illinois, 83 U.S. 130, 141 (1872)).
required payment of money damages from the state treasury.\footnote{115} In reaching its decision, the Supreme Court considered whether Section 5 of the Fourteenth Amendment\footnote{116} authorized Congress to abrogate the states' Eleventh Amendment immunity.\footnote{117}

The \textit{Fitzpatrick} Court answered this question by examining the nature of the Fourteenth Amendment's substantive prohibitions.\footnote{118} The Court noted that Section 1 of the Amendment directly restrains state conduct.\footnote{119} The Court then reasoned that legislation appropriate for enforcing the Amendment is an expressly sanctioned intrusion into state sovereignty.\footnote{120} Therefore, the Court concluded that the states' Eleventh Amendment immunity can be abrogated when Congress determines that such a remedy is appropriate for enforcing the Fourteenth Amendment.\footnote{121}

The \textit{Fitzpatrick} Court pointed out that the issue of whether the Civil Rights Act was, in fact, appropriate legislation was not raised.\footnote{122} The issue of whether an act of Congress is appropriate legislation arouse nearly two decades later in \textit{City of Boerne v. Flores}.\footnote{123}

In \textit{City of Boerne}, the City of Boerne, Texas, denied a building permit to enlarge a Catholic church because it considered the expansion inconsistent with the area's historic character.\footnote{124} The Archbishop of San Antonio sued in federal district court challenging the denial under the Religious Freedom Restoration Act ("RFRA").\footnote{125} The Archbishop alleged that the city infringed upon the parishioner's free exercise rights as protected by the Due Process Clause of the Fourteenth Amendment.\footnote{126} The district court held that

\begin{itemize}
\item \footnote{115} \textit{Fitzpatrick,} 427 U.S. at 450.
\item \footnote{116} "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." \textit{U.S. Const. amend. XIV, § 5.}
\item \footnote{117} \textit{Fitzpatrick,} 427 U.S. at 451.
\item \footnote{118} \textit{Id.} at 453-56.
\item \footnote{119} \textit{Id.} at 453. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." \textit{U.S. Const. amend. XIV, § 1.}
\item \footnote{120} \textit{Fitzpatrick,} 427 U.S. at 456.
\item \footnote{121} \textit{Id.}
\item \footnote{122} \textit{Id.} at 456 n.11.
\item \footnote{123} 521 U.S. 507 (1997).
\item \footnote{124} \textit{City of Boerne,} 521 U.S. at 512.
\item \footnote{125} \textit{Id.} One of the RFRA's stated purposes is to "provide a claim or defense to persons whose religious exercise is substantially burdened by the government." 42 U.S.C. § 2000bb(b) (1994).
\item \footnote{126} \textit{City of Boerne,} 521 U.S. at 519. \textit{See generally} \textit{Cantwell v. Connecticut,} 310 U.S. 296, 303 (1940) (holding that the "fundamental concept of liberty embodied" in the Due
the RFRA was unconstitutional because it exceeded the Fourteenth Amendment enforcement power of Congress. The court of appeals subsequently found the legislation to be appropriate and reversed. The Supreme Court granted certiorari to determine whether Congress exceeded its enforcement power under the Fourteenth Amendment.

Congress enacted the RFRA in response to the Supreme Court's decision in Department of Human Resources v. Smith. The Smith Court upheld the denial of unemployment compensation benefits to members of the Native American Church whose sacramental peyote use had caused them to lose their jobs. In Smith, the Court refused to balance the rights of the church members with the state's compelling interest in enforcing criminal laws. The Court held that generally applicable laws are equally enforceable against religious practices, and, consequently, the Native American Church members' use of peyote could lawfully be proscribed. In an attempt to ameliorate the consequences of Smith, Congress enacted the RFRA purportedly under its Fourteenth Amendment enforcement power "to restore the compelling interest test as set forth in Sherbert v. Verner."

In City of Boerne, the Court rejected Congress's attempt to impose a standard of review on the judiciary as fundamentally at odds with the separation of powers doctrine. The Court flatly
announced, "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."\textsuperscript{136} Congress properly enforces a right when there is "a congruence and a proportionality between the injury to be prevented or remedied and the means adopted to that end."\textsuperscript{137} Absent such congruence and proportionality, the Court ruled that a law is not enforcing a right, but impermissibly effecting a substantive change in the right.\textsuperscript{138}

The City of Boerne Court found that the RFRA failed the congruence and proportionality test.\textsuperscript{139} The Court found congruence lacking because the RFRA's legislative record failed to demonstrate modern examples of state-sponsored religious bigotry.\textsuperscript{140} While it appeared to the Court that the RFRA was unneeded legislation, it declared that this was not the RFRA's most serious shortcoming.\textsuperscript{141} The Court implied that failure to meet the congruence portion of the test is not always fatal, since judicial deference allows Congress its own reasons for its actions.\textsuperscript{142} Rather, the Court found the lack of proportionality between the purported injury and the remedy to be the Act's most serious shortcoming.\textsuperscript{143}

The Court found that by requiring a state to satisfy compelling interest scrutiny, the RFRA burdened the state by forcing it to defend its general regulatory laws against the highest standard of constitutional review.\textsuperscript{144} Were such a burden of scrutiny forced on the states, the Court suggested that many constitutionally

\begin{itemize}
\item 136. Id. at 519.
\item 137. Id. Congruence requires that Congress identify a pattern of state conduct violating the Fourteenth Amendment. Kimel, 120 S. Ct. at 645. Proportionality requires that the law proscribe conduct that at least has a likelihood of being unconstitutional, while not burdening conduct that passes constitutional muster. Id.
\item 138. City of Boerne, 521 U.S. at 520.
\item 139. Id. at 533.
\item 140. Id. at 530.
\item In contrast to the record which confronted Congress and the judiciary in the voting rights cases, the RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.
\item Id.
\item 141. Id. at 530-31.
\item 142. Id. at 531-32.
\item 143. City of Boerne, 521 U.S. at 534.
\item 144. Id. The Court interpreted the RFRA as requiring that the "[s]tate must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest." Id.
\end{itemize}
permissible laws would fail this heightened level of scrutiny. For these reasons, the *City of Boerne* Court held that the RFRA was not appropriate legislation for enforcing the Fourteenth Amendment. Consequently, its purported abrogation of state Eleventh Amendment immunity was invalid.

Two years after *City of Boerne*, the Supreme Court again applied the congruence and proportionality test to another statute purporting to abrogate the states' Eleventh Amendment immunity. In 1990, Congress enacted the Patent and Plant Variety Protection Remedy Clarification Act (the "Patent Remedy Act") to clarify that states may be sued in federal court for patent infringements. Shortly thereafter, College Savings Bank, a New Jersey chartered bank, sued the Florida Prepaid Postsecondary Education Expense Board, a state entity, for infringing on its patented college savings plan. In responding to Florida Prepaid's motion to dismiss on the grounds of sovereign immunity, College Savings asserted that the Patent Remedy Act is appropriate legislation for enforcing the Due Process Clause of the Fourteenth Amendment.

The *Florida Prepaid* Court reaffirmed the congruence and proportionality test set forth in *City of Boerne*. After restating the test, the Court concluded: "We thus held that for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth

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145. *Id.*
146. *Id.* at 532-36.
147. *Id.*
149. 35 U.S.C §§ 271(h), 296(a) (1994). Congress enacted this statute in response to several court decisions holding that existing patent laws did not clearly show that Congress intended to abrogate state immunity from suit. *Florida Prepaid*, 119 S. Ct. at 2203.
150. *Florida Prepaid*, 119 S. Ct. at 2203. "In response to *Chew* [v. California, 893 F.2d 331 (E.D. Cal. 1990)] and similar decisions, Congress enacted the Patent Remedy Act to 'clarify that States, instrumentalities of States, and officers and employees of States acting in their official capacity, are subject to suit in Federal court by any person for infringement of patents and plant variety protections.' " *Florida Prepaid*, 119 S. Ct. at 2203 (quoting Pub. L. No. 102-560, 106 Stat. 4230 (1990)).
151. *Florida Prepaid*, 119 S. Ct. at 2202-03.
152. *Id.* at 2204. Florida Prepaid moved to dismiss because of its Eleventh Amendment immunity from suit. *Id.* at 2203-04.
153. *Id.* at 2206-07. The Court also reaffirmed its ruling in *City of Boerne* regarding the scope of the enforcement power of Congress:

We recognized that "legislation which deters or remedies constitutional violations can fall within the sweep of Congress's 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." *Id.* at 2206 (quoting *City of Boerne*, 521 U.S. at 518).
Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."\textsuperscript{154} In applying the test to the Patent Remedy Act, the Court ruled that it was not appropriate Section 5 legislation.\textsuperscript{155}

As in \textit{City of Boerne}, the \textit{Florida Prepaid} Court noted that Congress failed to identify a "pattern of patent infringement by the States, let alone a pattern of constitutional violations."\textsuperscript{156} While the Court stated that a lack of supportive evidence is not fatal, it is still "critical" that Congress identify "the targeted constitutional wrong or evil" to be remedied.\textsuperscript{157} The Court remarked that the Patent Remedy Act might have been properly targeted had Congress identified a pattern of state patent infringement coupled with due process violations caused from states pleading Eleventh Amendment immunity.\textsuperscript{158} Lacking this, the Court concluded that the act is not proportionate to any legitimate "prophylactic" or remedial objective.\textsuperscript{159} By lacking proportionality, the Patent Remedy Act would potentially leave a state open to an unlimited array of infringement claims any time it used a patented product or process.\textsuperscript{160} Given the scant legislative history and the broad scope of the Act's reach, the Court concluded that the Patent Remedy Act was not appropriate legislation for enforcing the Fourteenth Amendment.\textsuperscript{161}

The reasoning of the decision in \textit{Kimel} closely paralleled the reasoning of \textit{City of Boerne} and \textit{Florida Prepaid}.\textsuperscript{162} The distinction in \textit{Kimel} is that the Court had to determine whether the ADEA is appropriate legislation for enforcing the Equal Protection Clause in

\textsuperscript{154} \textit{Id.} at 2207.

\textsuperscript{155} \textit{Id.} at 2210.

\textsuperscript{156} \textit{Florida Prepaid}, 119 S. Ct. at 2207. For example, the Court stated that the House Report cited only two instances of patent infringement suits against the states. \textit{Id}. The Court also stated that there was no evidence of due process violations, since alternative remedies for patent violations exist at the state level. \textit{Id.} at 2208.

\textsuperscript{157} \textit{Id.} at 2210. "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." \textit{City of Boerne}, 521 U.S. at 530 (quoting \textit{South Carolina v. Katzenbach}, 383 U.S. 301, 308 (1966)).

\textsuperscript{158} \textit{Florida Prepaid}, 119 S. Ct. at 2210.

\textsuperscript{159} \textit{Id.}

\textsuperscript{160} \textit{Id.} "Despite subjecting States to this expansive liability, Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed." \textit{Id.}

\textsuperscript{161} \textit{Id.}

combating age discrimination. After examining the Court's equal protection jurisprudence relating to age discrimination, it concluded that the ADEA was not appropriate legislation for enforcing the Fourteenth Amendment.

The *Kimel* Court noted that the Supreme Court has upheld state and federal laws against equal protection challenges in all three state-defendant age discrimination cases that it has previously decided. In *Massachusetts Board of Retirement v. Murgia*, the Court addressed an equal protection challenge to a Massachusetts statute requiring its state police officers to retire upon reaching the age of fifty. The *Murgia* Court declined to apply strict scrutiny to the statute because employment is not a fundament right, nor is age a suspect classification. Concluding that rational basis scrutiny is the appropriate standard of review, the Court held that the statute rationally relates to a legitimate state interest and is, therefore, constitutional. The *Murgia* Court recognized that the state has a legitimate interest in protecting the public and in assuring that its police offices are physically capable of performing their duties. Given that physical performance generally declines with age, the Court reasoned that the state could rationally use age as a proxy for measuring the physical capability of its officers. Although recognizing that age does not always accurately measure physical performance, and that Officer Murgia himself was in excellent condition, the Court concluded that the statute was still rational. Specific examples of physically capable, aged officers only suggest that the state did not implement the best system for evaluating its officers. The *Murgia* Court held that although age is an imperfect proxy for physical fitness, the Massachusetts statute does not violate the Equal Protection Clause.

The other two state-defendant, age-based equal protection cases

164. Id. at 647.
167. Id. at 312-13.
168. Id. at 314-15.
169. Id. at 314.
170. Id. at 315.
172. Id.
173. Id.
the Court decided closely followed *Murgia*. In *Vance v. Bradley*, officers of the Foreign Service brought suit alleging that the Service’s mandatory requirement to retire at age 60 violated the equal protection component of the Due Process Clause of the Fifth Amendment. The *Bradley* Court reaffirmed the ruling in *Murgia* that the proper standard of scrutiny for age discrimination is rational basis scrutiny. Since Congress could rationally conclude that the rigors of the Foreign Service necessitated younger, more vigorous officers, the Court upheld the mandatory retirement. Similarly, in *Gregory v. Ashcroft*, the Court upheld a provision in the Missouri State Constitution requiring its judges to retire at age 70. The Court recognized that age is an imperfect measure of an individual judge’s mental acuity; however, since the state need only satisfy rational basis scrutiny, the Court upheld the provision.

In light of this equal protection jurisprudence, the Court in *Kimel* found that the ADEA is “so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.” The *Kimel* Court found that the Act’s broad prohibition of age as an employment classification prohibits more than would be disallowed under the Constitution by the rational basis standard. The Court also found congruence between remedy and evil lacking because the legislative record of the ADEA revealed only that the Act’s purported abrogation of state immunity is “an unwarranted response to perhaps an inconsequential problem.”

The *Kimel* Court applied the congruence and proportionality test of *City of Boerne* to ADEA legislation designed to enforce the guarantees of the Equal Protection Clause. Just as in *City of Boerne* and *Florida Prepaid*, the Court found evidence of

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177. *Id.* at 110.
179. *Id.*
181. *Id.*
182. *Id.* at 648-49.
183. *Kimel*, 120 S. Ct. at 645.
unconstitutional conduct by the states tenuous at best and
determined that Congress enacted legislation that was
indiscriminate in its scope. Consequently, the Court held the
ADEA's purported abrogation of the states' sovereign immunity
invalid.

With *Kimel*, the Supreme Court has applied the congruence and
proportionality test three times, and each time it invalidated an act
of Congress. Does *Kimel* signal a change in the current Court's
concept of federalism, or is *Kimel* merely another entry in a
growing catalog of Fourteenth Amendment do's and don'ts?
Regardless of which is true, this trilogy of cases will be carefully
examined as an exponentially growing body of Eleventh
Amendment litigation works its way through the courts.

How might Congress respond to the decision in *Kimel*? Given
that the *Kimel* Court divided on the issue of whether Congress
clearly intended to abrogate, just as the court of appeals below did,
future legislation will probably contain what Judge Edmondson
called "magic words." That is, future legislation will probably
have within it language such as, "eleventh amendment immunity,"
"federal court," and "suit by any person." Perhaps a less prosaic

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184. *Id.* at 650.

Even if the California report had uncovered a pattern of unconstitutional age
discrimination in the State's agencies at the time, it nevertheless would have been
insufficient to support Congress's 1974 extensions of the ADEA to every State of the
Union. The report simply does not constitute evidence that unconstitutional age
discrimination had become a problem of national import.

*Id.* (citing *Florida Prepaid*, 119 S. Ct. at 2208).

185. *Kimel*, 120 S. Ct. at 650.

186. *Hundertmark v. Florida Dept. of Transp.*, 205 F.3d 1272, 1277 (11th Cir. 2000)
holding that the Equal Pay Act, 29 U.S.C. § 206(d) (1994), is appropriate legislation for
enforcing the Fourteenth Amendment. In *Hundertmark*, the Court of Appeals ruled that the
Equal Pay Act, as amended, effectively abrogated the states' Eleventh Amendment immunity.

*Id.* at 1274.

187. *See William A. Fletcher, The Eleventh Amendment: Unfinished Business, 75 Notre Dame L. Rev. 843 (2000).* In his article, Judge Fletcher points out that the Supreme
Court has decided more Eleventh Amendment cases in the last 25 years than in all the years
before. *Id.* at 844.

188. *Kimel*, 139 F.3d at 1433 n.15. "I do not say that certain magic words must be used
to abrogate immunity. I accept that Congress could unmistakably signal abrogation of
immunity in a variety of ways, and we write no general rules today." *Id.*

clarity standard in *Florida Prepaid:*

Any State, any instrumentality of a State, and any officer or employee of a State or
instrumentality of a State acting in his official capacity, shall not be immune, under
the eleventh amendment of the Constitution of the United States or under any other
document of sovereign immunity, from suit in Federal Court by any person. 35 U.S.C. §
296(a) (1994).
result of the *Kimel* trilogy might be for Congress to alter its Article I spending legislation by conditioning receipt of federal funding upon a waiver of sovereign immunity. While this avenue is within the authority of Congress, it is, of course, subject to constitutional limitations. Should the financial pressure of Congress become outright compulsion, state sovereignty would again be at issue.

As for *Kimel’s* effect on future Fourteenth Amendment jurisprudence, it probably will not hearken in a new era. Perhaps lurking within the penumbra of the *Kimel* Court’s flavor of the congruence and proportionality test is an attenuated subtlety to be seized upon by a group seeking relief from discriminatory state conduct. On the other hand, *Kimel* may prove to be a solid affirmation of the shifting balance of federalism characterized by *Seminole Tribe* and *City of Boerne*. At the very least, *Kimel* reaffirms the proposition that “[c]ongress does not enforce a constitutional right by changing what the right is.”

The *Kimel* Court has, for the first time, balanced the equal protection enforcement power of Congress with the sovereign police powers of the states. If a state’s age-based classification rationally relates to a legitimate state interest, Congress must overcome a high hurdle to preempt state law. Sufficient fact-finding is necessary if Congress is to prevail, for it is through fact-finding that Congress meets the crucial requirement of targeting unconstitutional conduct. While Congress may restrict a broader

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180. “The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the common Defense and general Welfare of the United States.” U.S. Const. art. I, § 8, cl. 1. In *South Dakota v. Dole*, 483 U.S. 203 (1987), the Supreme Court held that Congress may condition a state’s receipt of highway funding upon its adoption of 21 as the legal drinking age. Id. at 208. The Court has recognized that state waiver of sovereign immunity is a permissible condition to attach to federal funding. *See Alden*, 119 S. Ct. at 2267.


182. *See* Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 Notre Dame L. Rev. 859, 912 & n.193 (2000). “[C]onsider the Court’s failure in *Kimel* to indicate that the obligations imposed by the ADEA remain binding on the states and may be enforced through suits for prospective relief and in actions brought by the federal government.” *Id.* at n.193. *See also* Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. Rev. 653 (2000). “Thus *Kimel* does not support the argument that the Court will offer more deference to Congress when it seeks to enforce the Equal Protection Clause than when it seeks to enforce the Due Process Clause, even if that equal protection interest only garners a low-level rational basis test.” *Id.* at 675-76.

range of conduct than that expressly forbidden by the Fourteenth Amendment, its prophylactic legislation must be congruent with a permissible goal. If it is not, the legislative remedy will be so out of proportion to the supposed harm that it will intrude upon the lawful conduct of states that is protected by the state sovereignty embodied in the Eleventh Amendment. Applying these principles to the Equal Protection Clause, the *Kimel* Court firmly adhered to its long-established doctrine that it is the province of the judiciary, not the Congress, to determine the substantive contours of the rights embodied in the Constitution.

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