North Dakota Law Review

Volume 77 | Number 3 Article 5

2001

Constitutional Law - State Sovereign Immunity: Limiting Federal Power to Abrogate State Immunity

Tracy Laaveg

CONSTITUTIONAL LAW—STATE SOVEREIGN IMMUNITY: LIMITING FEDERAL POWER TO ABROGATE STATE IMMUNITY

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000)

I. INTRODUCTION

The Eleventh Amendment guarantees that individual states may not be sued in federal court by "Citizens of another State, or by Citizens or Subjects of any Foreign State."[1] The United States Supreme Court has, through the years, carved out exemptions to this rule, providing that suits may be commenced against states in three instances.[2] The state may be sued in the following situations: if the state consents to the suit,[3] if Congress supersedes or *abrogates* the state's immunity through federal legislation,[4] or if a state official seeks to enforce an unconstitutional state law as a representative of the state.[5] In interpreting these exceptions and applying them to the United States' federalist system of government, the Court has closely scrutinized congressional action that requires states to answer to suit under federal legislation.[6] This case comment will outline the development of these exceptions, focusing on the abrogation exception and its application to the Age Discrimination in Employment Act in *Kimel v. Florida Board of Regents*.[7]

---

1. U.S. CONST. amend. XI.

2. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999) (stating that a state may be sued only if it waives its immunity and consents to suit or if Congress enacts laws under Section 5 of the Fourteenth Amendment that abrogates state immunity); *see also Ex parte* Young, 209 U.S. 123, 167 (1908) (refusing to allow the state to confer immunity on a state official when enforcing an unconstitutional state law).

3. *See* Clark v. Barnard, 108 U.S. 436, 447-48 (1883) (rejecting state's claim of sovereign immunity because it had voluntarily intervened in the suit as a plaintiff, which thereby opened the door to claims against it by interpleaders).

4. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 454-56 (1976) (allowing a suit against the state under Title VII of the Civil Rights Act because the Act was properly enacted under Section 5 of the Fourteenth Amendment, which provided Congress with the power to abrogate state sovereign immunity).

5. *See Young*, 209 U.S. at 159 (refusing to allow the claim of sovereign immunity to bar a suit against a state attorney general who violated a federal court's restraining order in order to enforce a state law).

6. *See* City of Boerne v. Flores, 521 U.S. 507, 516 (1997) (scrutinizing the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000b(b) (1994))); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996) (analyzing the Indian Gaming Regulatory Act, Pub. L. No. 100-497, 102 Stat. 2472 (1988) (codified at 25 U.S.C. § 2710(d) (1994))); *Coll. Sav. Bank*, 527 U.S. at 672-73 (studying the Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567 (1992) (codified as amended at 15 U.S.C. § 1125(a) (1994 & Supp. V 1999))); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 637-38 (1999) (examining the Patent Remedy Act, Pub. L. No. 103-465, 108 Stat. 4988 (1994) (codified at 35 U.S.C. §§ 271(h), 296(a) (1994))).

7. 528 U.S. 62 (2000).

II. FACTS

Kimel v. Florida Board of Regents arose as a culmination of three cases in federal court that involved public employees' claims of illegal discrimination based on age.[8] In December 1994, the first of these cases was filed by university professors Roderick MacPherson and Marvin Narz, who sued the Alabama State University System under the Age Discrimination in Employment Act (ADEA).[9] MacPherson and Narz were the oldest faculty members at the University of Montevallo.[10] The two alleged that the University of Montevallo treated younger professors more favorably by denying older professors "promotions, committee, assignments, sabbaticals, and . . . salaries" and "by using an 'age-based evaluation system'" which disparately impacted older employees.[11] They felt that the treatment they received was partially an act of retaliation for the filing of an earlier ADEA suit which had been settled.[12] At the district court proceeding, the university conceded to the existence of "genuine issues of material fact" under the ADEA regarding promotions, committee appointments, and sabbatical leave.[13] In spite of this, the district court granted the university's motion for dismissal on the ground that suits against the states and state entities were barred by the Eleventh Amendment's guarantee of state sovereign immunity.[14]

In April 1995, the second case arose when thirty-six current and former faculty members of Florida State University and Florida International University, including J. Daniel Kimel, filed claims under the ADEA for improper implementation of salary adjustments with regard to older employees.[15] The salary adjustments were the result of bargaining agreements and lawsuits that began in 1991.[16] In 1991, the State agreed to enter into a collective bargaining agreement with long-term faculty members to remedy the fact that salary adjustments did not accurately reflect the true market value of the employees' services.[17] Following the agreement, the Florida legislature set aside the necessary funds to cover the proposed adjustment, but it later withdrew the money before the

8. *Kimel*, 528 U.S. at 69-71.
9. *Id.* at 69; *see also* Age Discrimination in Employment Act of 1967, Pub. L. No. 9-202, 81 Stat. 602 (codified as amended at 29 U.S.C. § 621 (1994 & Supp. III 1997)).
10. Brief for Petitioners at *7, Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (No. 98-791).
11. *Id.*
12. *Id.*
13. *Id.* (citing Joint Appendix at 113).
14. *Kimel*, 528 U.S. at 69.
15. Petitioners' Brief at *7-*8, *Kimel* (No. 98-791).
16. *Id.* at *8 n.8.
17. *Id.*

adjustments could be implemented.[18] The Florida Supreme Court determined that the withdrawal of the money violated the Florida Constitution's Contracts Clause, and the money was distributed in a lump sum to the employees.[19] The following year the salary levels returned to their preadjusted condition.[20] For the 1993-94 academic year, the legislature appropriated funds to permanently remedy the adjustment situation, but the Florida Board of Regents refused to require that the state universities use the money to actually adjust the salaries of the employees in question.[21]

The Board of Regents moved to dismiss on Eleventh Amendment sovereign immunity grounds, arguing that the State was not subject to suit in federal court for claims associated with the ADEA.[22] The district court denied the university's motion, based on its view that the ADEA was a valid exercise of Congress' Fourteenth Amendment enforcement power and that Congress had clearly expressed its intent to abrogate state sovereign immunity in the language of the statute.[23]

Finally, in May 1996,[24] Wellington Dickson, a corrections officer, brought the last of the three suits against the Florida Department of Corrections, claiming he had been denied promised promotions because of his advanced age.[25] Dickson, who was in his late fifties at the time he was hired, claimed that when he accepted the position, he was told he would be promoted within six months to one year.[26] After working for more than five years, however, he had never been promoted, despite the fact that numerous younger, less qualified employees had been promoted during that time.[27] The Department of Corrections unsuccessfully moved to dismiss the claims based on Eleventh Amendment sovereign immunity.[28] In its reasoning, the district court cited Congress' clear intent to abrogate the states' sovereign immunity, as well as its constitutional power to do so.[29]

---

18. *Id.*

19. *Id.*; *see also* Chiles v. United Faculty of Fla., 615 So. 2d 671, 672-73 (Fla. 1993).

20. Petitioners' Brief at *8 n.8, *Kimel* (No. 98-791).

21. *Id.* This suit was commenced the following April. *Id.* at *8.

22. *Id.* at *9.

23. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 70 (2000) (citing Kimel v. Fla. Bd. of Regents, No. 95-40194, 1966 U.S. Dist. LEXIS 7995, at *7 (N.D. Fla. May 17, 1996), app. to petition for cert. in No. 98-796, pp. 57a-62a).

24. *Id.*

25. Petitioners' Brief at *6, *Kimel* (No. 98-791). Dickson also alleged that he was subjected to retaliatory treatment based on his filing of a complaint with the Florida Commission on Human Relations. *Id.* at *6-*7.

26. *Id.* at *6.

27. *Id.*

28. *Kimel*, 528 U.S. at 71.

29. *Id.*

All three cases were appealed to the Eleventh Circuit Court of Appeals, which consolidated the claims.[30] A divided panel of the Eleventh Circuit found that the ADEA did not validly abrogate the states' Eleventh Amendment sovereign immunity.[31] Judge Edmondson stated that the ADEA was improper because it lacked a clear statement of intent to abrogate state sovereign immunity.[32] Judge Cox concurred with Judge Edmondson but did not address "the thorny issue of Congress' intent."[33] Judge Cox instead based his opinion on the fact that Congress did not seem to enact the ADEA pursuant to any clear Fourteenth Amendment violation.[34] Chief Judge Hatchett did not agree with either judge's reasoning, finding instead that the ADEA contained a clear statement of Congress' intent to abrogate state immunity and represented a valid exercise of congressional power to abrogate those state rights.[35]

The United States Supreme Court granted certiorari to settle the issue of whether the ADEA was a valid exercise of congressional abrogation of state sovereign immunity among the divided circuit courts.[36] In affirming the decision of the Eleventh Circuit Court of Appeals, the Supreme Court *held* that although Congress did intend to abrogate state sovereign immunity in the enactment of the ADEA,[37] it was not a valid exercise of Congress' remedial powers under the Fourteenth Amendment.[38]

III. LEGAL BACKGROUND

Because the defendants in *Kimel* are state university and corrections systems, they are considered an arm of the state government and

30. *Id.*; *see also* Kimel v. Fla. Bd. of Regents, 139 F.3d 1426, 1428 (11th Cir. 1998). The United States intervened in all three cases to defend the ADEA. *Kimel*, 528 U.S. at 71.

31. *Kimel*, 528 U.S. at 71; *see also Kimel*, 139 F.3d at 1449.

32. *Kimel*, 528 U.S. at 71; *see also Kimel*, 139 F.3d at 1430-31.

33. *Kimel*, 528 U.S. at 71; *see also Kimel*, 139 F.3d at 1445 (Cox, J., concurring in part and dissenting in part).

34. *Kimel*, 528 U.S. at 72; *see also Kimel*, 139 F.3d at 1446-47.

35. Petitioner's Brief at *10, *Kimel* (No. 98-791); *see also Kimel*, 139 F.3d at 1434 (Hatchett, C.J., concurring in part and dissenting in part).

36. *Kimel*, 528 U.S. at 72, *cert. granted*, 511 U.S. 1121 (1999). In the eight circuits that had addressed the issue, six held that the ADEA was a valid exercise of congressional power. *See* Cooper v. N.Y. State Office of Mental Health, 162 F.3d 770, 777 (2d Cir. 1998); Migneault v. Peck, 158 F.3d 1131, 1140 (10th Cir. 1998); Coger v. Bd. of Regents of the State of Tenn., 154 F.3d 296, 307 (6th Cir. 1998); Keeton v. Univ. of Nev. Sys., 150 F.3d 1055, 1058 (9th Cir. 1998); Scott v. Univ. of Miss., 148 F.3d 493, 503 (5th Cir. 1998); Goshtasby v. Bd. of Trs. of the Univ. of Ill., 141 F.3d 761, 772 (7th Cir. 1998). The other two circuits held that the abrogation was invalid. *See* Humenansky v. Regents of Univ. of Minn., 152 F.3d 822, 825-28 (8th Cir. 1998); *Kimel*, 139 F.3d 1426, 1433 (11th Cir. 1998).

37. *Kimel*, 528 U.S. at 73.

38. *Id.* at 91.

therefore appropriately raised the issue of sovereign immunity as a bar to being sued in federal court.[39]

The issue of individual state power in our federalist system has been contested for years; therefore a brief recapitulation of the cases leading to the current status of state sovereign immunity in the Supreme Court is in order.[40]

A. STATE SOVEREIGN IMMUNITY

The doctrine of sovereign immunity dates back to England's policy of the king being exempt from suits unless he consented to being sued.[41] The Framers of the Constitution, however elected not to adopt this principle that "the king can do no wrong" in the original United States Constitution.[42] Sovereign immunity for the individual states was not explicitly incorporated into the Federal Constitution until after the decision in *Chisholm v. Georgia.*[43]

1. *The Supreme Court Recognizes the Need for Explicit Sovereign Immunity for the States*

Chisholm involved an individual's suit in assumpsit against the state of Georgia to collect a debt related to the Revolutionary War.[44] The

---

39. *Id.* at 66.

40. The limits of state power in a federalist system of government are inherently ambiguous because the governmental authority is split between the central federal government and the states. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543-44 (1954). The true power lies with the people, not the legislatures, and therefore changes in public opinion will affect the position of the states in the federal power structure to some degree. *Id.* at 544. "The actual extent of central intervention in the governance of our affairs [by the states] is determined far less by the formal power distribution than by the sheer existence of the states and their political power to influence the action of the national authority." *Id.*

41. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 457 (1793) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES * 241).

42. *Chisholm*, 2 U.S. at 437-38; *see also* Forde O. Fairchild, Case Note, *United States Supreme Court Refuses to Strip States of Their Sovereign Immunity in State Court*, Alden v. Maine, 76 N.D. L. REV. 659, 661 (2000) (summarizing arguments concerning state sovereign immunity made at the time of the Constitution's ratification).

43. 2 U.S. (2 Dall.) 419 (1793); *see also* Vicki Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 8 (1988); *see also Chisholm*, 2 U.S. at 452, 454, 471 (discussing the separate opinions of Justices Blair and Wilson, and Chief Justice Jay).

44. *Chisholm*, 2 U.S. at 444. Assumpsit is a common law action for breach of contract. *See* BLACK'S LAW DICTIONARY 120 (7th ed., 1999). In 1779, Robert Farquhar, a Charleston, South Carolina merchant, sold goods to the Georgia army for use in the Revolutionary War. *See* Doyle Mathis, Chisholm v. Georgia: *Background Settlement, in* THE JOURNAL OF AMERICAN HISTORY 19-21 (June 1967). The goods were not paid for at Farquhar's death in 1784. *Id.* In 1791, his executor, Alexander Chisholm, unsuccessfully brought suit in the United States Circuit Court for the District of Georgia. *Id.* at 21-22. Plaintiffs sought 100,000 pounds in sterling silver for payment of the debt plus consequential damages. *Id.* at 22. Notably, Justice James Iredell, who later filed the famous dissenting opinion in the Supreme Court's decision, heard the arguments at the district court level as a traveling circuit judge. *Id.* at 23.

United States Supreme Court decided that the State's claim of sovereign immunity from suit was not supported by the Constitution.[45] In separate opinions, a majority of the justices declared that the states had given up their sovereignty when they adopted the Constitution and created a new central government.[46] The majority also noted that the implied power of the judiciary to decide suits against the states was broad enough to allow the suit in question.[47]

This decision included a noteworthy dissent by Justice Iredell, who felt that sovereign immunity was a principle that was meant to be inherently incorporated into the Constitution by the Framers due to their reliance on the common law of England.[48] Justice Iredell was of the opinion that the purpose of the judiciary was to interpret *existing* law.[49] He explained that the legislature was the branch of government that should be making new law and policy, not the judiciary.[50] Because he was unable to find any specific instance in the Constitution or other State or federal law wherein the states had given up their immunity from suits in federal courts, he was unwilling to agree that the State of Georgia should be required to defend itself in court, even for the recovery of a debt owed by a state.[51]

2. *The Eleventh Amendment is Officially Recognized and Interpreted*

The reaction to the *Chisholm* decision was "swift and hostile."[52] Within days of the announcement of the decision, Congress began drafting the Eleventh Amendment.[53] The Amendment was almost unanimously adopted at the next congressional assembly.[54]

Following this adoption the Court entertained virtually no challenges under the new amendment until 1890, when the Court was faced

---

45. William P. Marshall, *Commentary: The Diversity Theory of the Eleventh Amendment: A Critical Evaluation*, 102 HARV. L. REV. 1372, 1376 (1989). Interestingly, although Chishom did obtain a judgment against Georgia in 1793, the claim was not settled until 1847. *See* Mathis, *supra* note 44, at 29.

46. *Chisholm*, 2 U.S. at 450 (citing opinion of Blair, J.); *Id.* at 457 (citing opinion of Wilson, J.); *Id.* at 468 (citing opinion of Cushing, J.); *Id.* at 471 (citing opinion of Jay, C.J.).

47. *Id.* at 451 (citing opinion of Iredell, J.); *Id.* at 464 (citing opinion of Wilson, J.); *Id.* at 467 (citing opinion of Cushing, J.); *Id.* at 465 (citing opinion of Jay, C.J.). All of the four majority opinions focused on the fact that if the state could be a plaintiff in a suit in federal court, it was only fair that it could also be a defendant in similar suits. *Id.* at 451, 464-65, 467.

48. *Id.* at 419, 429-50 (Iredell, J., dissenting).

49. *Id.* at 433.

50. *Id.*

51. *Id.* at 434-35.

52. *See* Marshall, *supra* note 45, at 1377.

53. *Id.*; *see also* U.S. CONST. amend. XI.

54. Hans v. Louisiana, 134 U.S. 1, 11 (1890); *see also* U.S. CONST. amend. XI.

with *Hans v. Louisiana*.[55] *Hans* involved a Louisiana citizen suing the State of Louisiana for defaulting on bonds issued after the Civil War.[56] Because this case arose under the Court's federal question jurisdiction,[57] it was a case of first impression.[58]

The State of Louisiana ultimately prevailed in the suit, based on the newly drafted Eleventh Amendment.[59] The Amendment granted states immunity from civil suits brought by foreign citizens if the state had not consented.[60] The *Hans* decision expanded this idea to include resident as well as foreign citizens and rested, not on the majority opinion in *Chisholm*, but on Justice Iredell's dissent.[61] The Court declared that the states could be sued for debts by individuals only if they consented to being sued.[62] However, the Court also noted that this was a fine line and that the states would be held accountable if they attempted to invade individual property rights that arose as a result of contracting with the state.[63]

3. *Modifications to the Doctrine of State Sovereign Immunity*

Following *Hans*, the Court in 1908 modified the rule regarding state immunity from suit in *Ex parte Young*.[64] Minnesota Attorney General Edward T. Young claimed that he was exempt from suit under the Eleventh Amendment because he was acting in his official capacity as a state official when he sought to enforce a state law that was later declared unconstitutional.[65] The Court disagreed and stated that when Young attempted to enforce an unconstitutional law he had acted beyond the scope of his official duties.[66] Thus, the *Young* exception was born, declaring that a state official seeking to enforce a state law, which does not

---

55. 134 U.S. 1 (1890).

56. *Hans*, 134 U.S. at 1.

57. Hans's suit was based on a violation of Article III of United States Constitution. *Hans*, 134 U.S. at 9; *see also* U.S. CONST. art. III., § 2, cl. 1.

58. *Hans*, 134 U.S. at 9. Note that Chisholm was based on the common law claim of assumpsit. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 444 (1793) (Iredell, J., dissenting).

59. *Hans*, 134 U.S. at 20-21.

60. U.S. CONST. amend. XI.

61. *Hans*, 134 U.S. at 12.

62. *Id.* at 20.

63. *Id.* at 20-21.

64. 209 U.S. 123 (1908).

65. *Young*, 209 U.S. at 134. *Young* arose when the Minnesota legislature passed rate changes on railroads traveling in the state. *Id.* at 127-29. The railroads challenged the rate changes as unconstitutional and brought suit in the federal circuit court. *Id.* at 129. The circuit court then issued an injunction, prohibiting the publication of rate changes as well as attempting to enforce the law in any way. *Id.* at 132. When Attorney General Young filed a writ of mandamus to overturn the circuit court decision, in direct violation of a restraining order against the state, he was charged with contempt. *Id.* at 133-34.

66. *Id.* at 159-60.

comport with the Federal Constitution, is not protected by Eleventh Amendment immunity.[67]

In *Ex Parte Young*, the relief requested and granted was injunctive relief.[68] In *Edelman v. Jordan*,[69] the Court expanded the doctrine of sovereign immunity exceptions to encompass cases also involving a limited amount of monetary relief when the money damages are a direct result of injunctive relief.[70] The Court refused to allow the payment of all monetary damages in general because the funds would have to be paid from general state revenues, which would violate the Eleventh Amendment.[71] The Court noted that although the payment of money damages would have an ancillary effect on state revenues when connected with an injunctive award, this result was allowable whereas a direct judgment against state revenues was not.[72]

Shortly after *Edelman,* the Court took a different approach to state sovereign immunity challenges, by analyzing the basis for Congress' power to abrogate rather than the available relief, when it decided *Fitzpatrick v. Bitzer.*[73] In *Fitzpatrick*, a case involving a sex discrimination claim under The Civil Rights Act of 1966, the Court expanded Congress' basis for usurping state sovereign immunity to include the Civil War Amendments.[74] The Supreme Court looked closely at the Fourteenth Amendment, which was undisputed as the source of congressional power to abrogate state immunity under Title VII.[75] Justice Rehnquist's opinion noted that the Civil War Amendments were

---

67. *Id.* at 167-68.

68. *Id.* at 132.

69. 415 U.S. 651 (1974).

70. *Edelman*, 415 U.S. at 667-68. *Edelman* was a class action brought by state welfare recipient John Jordan and others, who sued former employees of the Public Aid Department of the State of Illinois for improper disbursement of federal-state aid programs for the aged, blind and disabled. *Id.* at 653. Jordan requested retroactive benefits for the four-month period that the state wrongfully withheld his benefits due to the state's improperly implementing the program in accordance with state, rather than federal guidelines. *Id.* at 655-56.

71. *Id.* at 664-65.

72. *Id.* at 668. The distinction drawn here is the difference between actually removing existing funds from the state treasury compared to preventing future monies from being collected by the state. *Id.* at 665.

73. 427 U.S. 445 (1976).

74. *Fitzpatrick*, 427 U.S. at 447-48; *see also* U.S. CONST. amends. XIII-XV. In *Fitzpatrick*, a group of retired male employees of the State of Connecticut brought suit for sex-based discrimination in violation of Title VII of the Civil Rights Act of 1966. *Fitzpatrick*, 427 U.S. at 448-49. Justices Brennan and Stevens filed concurring opinions. *Id.* at 457-58. Justice Brennan's opinion was based on the belief that the states had surrendered their immunity when they adopted the Constitution. *Id.* (Brennan, J. concurring). Justice Stevens also agreed in the outcome, but opined that congressional commerce power was broad enough to abrogate state immunity in this case, and therefore the Fourteenth Amendment was needlessly cited as the source of the congressional power to act. *Id.* at 458-60 (Stevens, J. concurring).

75. *Fitzpatrick*, 427 U.S. at 452-53.

adopted specifically to limit state power.[76] Therefore, in adopting the Civil War Amendments, the states had given up their Eleventh Amendment right to sovereign immunity with respect to suits based on federal laws that Congress passed pursuant to Section 5 of the Fourteenth Amendment.[77]

In *Pennsylvania v. Union Gas Co.*,[78] a divided Court considered both the remedy and basis for congressional action and determined that imposing money damages for violation of federal environmental laws by the states was an appropriate exercise of congressional power under the Commerce Clause.[79] The Court looked to the legislative history and plain language of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)[80] and its amendment the Superfund Amendments and Reauthorization Act of 1986 (SARA)[81] to first determine if the intent to abrogate state sovereign immunity under these acts was clear.[82]

Finding that the intention to abrogate state immunity was clear, the Court discussed whether Congress had the power to do so when it enacted CERCLA under the Commerce Clause.[83] The Court noted a list

---

76. *Id.* at 453-54.

77. *Id.* at 456.

78. 491 U.S. 1 (1989).

79. *Union Gas*, 491 U.S. at 23 (plurality opinion). *Union Gas* arose when the State of Pennsylvania undertook a major flood control program and unleashed a deposit of coal tar into Broadhead Creek. *Id.* at 5-6. The State was ordered to clean up the site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). 42 U.S.C. § 9601 (1994 & Supp. V 1999); *see also Union Gas*, 491 U.S. at 5-6. The federal government had reimbursed the State $720,000 for costs associated with cleaning up the site. *Union Gas*, 491 U.S. at 6. The United States sued Union Gas in order to recoup the amounts reimbursed to the State for clean up costs because Union Gas was the prior owner of the property. *Id.* Union Gas then filed a third-party complaint against the State, declaring that the State was negligent in the construction of its flood control project. *Id.* Union Gas appealed when both the district court and court of appeals dismissed the case, claiming that the State was immune and that there was no clear congressional intent to hold the states liable for money damages under CERCLA. *Id.* Meanwhile, Congress amended CERLCA by passing the Superfund Amendments and Reauthorization Act of 1986 (SARA). *Id.* As a result of the amendment, the Supreme Court vacated and remanded the case to the Court of Appeals for the Third Circuit, which held that CERCLA, as amended by SARA, did clearly intend to subject the states to suit through the power granted to Congress through the Commerce Clause. *Id; see also* United States v. Union Gas Co., 832 F.2d 1343, 1345 (3d Cir. 1987).

80. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. 96-510, 94 Stat. 2767 (codified at 42 U.S.C. §§ 9601-9675 (1994 & Supp. V 1999)).

81. Superfund Amendments and Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. § 9601 (1994 & Supp. V 1999)).

82. *Union Gas,* 491 U.S. at 9-10. The statute specifically notes that the states shall not be subject to suit for damages that arise out of an emergency situation involving the release or potential release of hazardous substances, but that this "shall not preclude liability for costs or damages as a result of gross negligence or intentional misconduct by the State or local government." *Id.* (citing 42 U.S.C. § 9607(d)(2) (1982 & Supp. IV 1998)). The Court rejected the argument that the plain language of the statute did not provide for private entities' suits against the states, noting that this interpretation would render another section of the Act as meaningless. *Id.* at 11 (referring to § 101(20)(D), concerning the states' liability to "any nongovernmental entity").

83. *Id.* at 13.

of prior cases where congressional power to abrogate Eleventh Amendment state sovereign immunity was found in the Commerce Clause.[84] It then likened the case at hand to *Fitzpatrick*, wherein congressional abrogation power was found in the Fourteenth Amendment.[85] The Court then compared the Commerce Clause with Section 5 of the Fourteenth Amendment because both clauses grant power to Congress and take power from the states.[86] Because the two clauses were so similar, the Court determined that both gave Congress the power to abrogate the states' Eleventh Amendment immunity from suit.[87] Therefore, CERCLA was a valid exercise of this congressional power under the Commerce Clause.[88]

This reasoning was rejected seven years later in *Seminole Tribe of Florida v. Florida*.[89] In *Seminole Tribe*, the Court adopted a two-step inquiry to determine whether state sovereign immunity had been validly abrogated.[90] The first step required an "unequivocally" clear statement of intent to revoke the state right.[91] The second step demanded that Congress had acted within a bona fide power to abrogate the right under a specific provision in the United States Constitution.[92] The Court then determined that Florida was immune from the suit, because although Congress did "unequivocally express" its intention to abrogate the states' immunity,[93] there was no power to do so within the Indian Commerce Clause.[94]

---

84. *Id.* at 14-15 (citing Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184, 191 (1964); Employees v. Mo. Dep't of Pub. Health & Welfare, 411 U.S. 279, 286 (1973); Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 475-76 (1987); County of Oneida v. Oneida Indian Nation of N.Y., 470 U.S. 226, 252 (1985)).

85. *Union Gas*, 491 U.S. at 15-16; *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, 456-57 (1976).

86. *Union Gas*, 491 U.S. at 16-17.

87. *Id.*

88. *Id.* at 19.

89. 517 U.S. 44 (1996).

90. *Seminole Tribe*, 517 U.S. at 55. *Seminole Tribe* involved The Indian Gaming Regulatory Act, 25 U.S.C. § 2710 (1988), which required the tribes to contact and enter into an agreement with the states in which the gaming would take place. *Id.* at 47. Under the Act, certain elements of the gaming would be controlled by a compact between the state and the tribe. *Id.* at 48-49. The Act required the states to negotiate the compact in good faith and gave the tribes the ability to bring claims in federal court for a violation of this good faith requirement. *Id.* at 50. The Seminole Tribe took advantage of that opportunity, bringing suit against the State of Florida, alleging that the State refused to negotiate with regard to "inclusion of certain gaming activities" in its suit against the State. *Id.* at 51-52. The State of Florida moved to dismiss because of Eleventh Amendment immunity. *Id.* at 52. The district court denied the motion to dismiss, but the court of appeals reversed, stating that the source of the congressional action at issue here was the Indian Commerce Clause, which does not give Congress the power to abrogate state immunity. *Id.* at 52-53.

91. *Id.* (citing Green v. Mansour, 474 U.S. 64, 68 (1985)).

92. *Id.* (citing *Green*, 474 U.S. at 68).

93. *Id.*

94. *Id.* at 47.

In determining that there was no valid grant of power within the Indian Commerce Clause, the Court noted that only in *Union Gas* had the Court upheld congressional abrogation of the states' Eleventh Amendment immunity under this clause and that was a plurality opinion.[95] The Court then agreed that the Tribe's analogy between the Interstate Commerce Clause and the Indian Commerce Clause was fitting, and overruled *Union Gas* to protect states' rights.[96] This effectively meant that the Article I "Commerce Power" was invalid as a source for congressional abrogation of state sovereign immunity in federal court.[97]

On June 23, 1999, this rationale was extended to prevent the abrogation of state sovereign immunity in state courts in *Alden v. Maine.*[98] The *Alden* Court addressed a challenge to the Fair Labor Standards Act (FLSA)[99] arising out of a suit against the State of Maine by a group of state corrections employees.[100]

The provision of specific importance in *Alden* was the FLSA's provision that authorized suits against the states in their own courts without regard to whether the state had consented to the suit.[101] The authority cited in the FLSA was Article I, which had not previously been identified as a source of congressional authority for the abrogation of state sovereign immunity in the state courts.[102] Following an analysis of constitutional "[h]istory, practice, precedent, and . . . structure,"[103] the Court determined that Article I power did not grant Congress the right to abrogate state sovereign immunity in the state's own courts unless the state first agreed to be subject to suit in state court.[104] Since Maine did not consent to the suit, the FLSA challenge was sustained.[105] This left

---

95. *Id.* at 59; *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 18-19 (1989).

96. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 60-62 (1996).

97. *Id.* at 72.

> Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.

Id. at 72-73.

98. 527 U.S. 706 (1999).

99. Fair Labor Standards Act of 1938, ch. 676, § 1, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201-219 (1994 & Supp. V 1999)).

100. Alden v. Maine, 527 U.S. 706, 711-12 (1999). The workers claimed that the State had violated the overtime provisions in the FLSA. *Id.* at 711.

101. *Id.* at 712; *see also* 29 U.S.C. §§ 216(b), 203(x) (1994 & Supp. IV 1998).

102. *Alden*, 527 U.S. at 741.

103. *Id.*

104. *Id.* at 754, 759.

105. *Id.* at 759-60.

only Section 5 of the Fourteenth Amendment as a valid source available for congressional abrogation of state immunity.[106]

B. THE FOURTEENTH AMENDMENT'S SECTION 5 ENFORCEMENT CLAUSE

The Fourteenth Amendment provides in part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.[107]

Thus, if Congress finds that the states have violated the basic civil rights mentioned in the Fourteenth Amendment by enacting state law, Congress has the power to abrogate state sovereign immunity and overturn the state law under the enforcement power in Section 5.[108] When challenges are made to the exercise of this power, the Court will look to equal protection jurisprudence to determine the appropriate tests to apply to the state laws based on the rights being considered.[109] If the rights at issue are not "fundamental rights" or if the people treated unfairly are not in a "suspect class," the state must only show that the means used are "rationally related" to a "legitimate end" of government to demonstrate that the state laws are appropriate under the Fourteenth Amendment.[110]

---

106. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 65 (1996). "Never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress operating pursuant to any constitutional provision other than the Fourteenth Amendment." *Id.*

107. U.S. CONST. amend. XIV §§ 1, 5.

108. *See generally* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (ordering states to comply with federal desegregation law); Graham v. Richardson, 403 U.S. 365 (1971) (overturning state law denying welfare benefits to illegal aliens); Hunter v. Underwood, 471 U.S. 222 (1985) (striking down a state law denying voting rights to defendants convicted of "crimes of moral turpitude").

109. *See, e.g.*, Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312-13 (1976) (recognizing that the strict scrutiny test is not applicable if the state law does not infringe upon a fundamental right or impact a suspect class of persons).

110. *See generally* Dandrige v. Williams, 397 U.S. 471 (1970) (upholding state Aid to Families With Dependent Children implementation scheme despite disparate impact on large families because the state's rationale in capping benefits at $250 per month per family was reasonable); Vacco v. Quill, 521 U.S. 793 (1997) (affirming a state law prohibiting assisted suicide while permitting the refusal of lifesaving medical treatment because the goal of protecting lives was rationally related to the means of refusing to allow affirmative actions resulting in murder).

"Fundamental" or "natural" rights are those rights that the Court has determined that all people inherently possess and shall enjoy without the interference of government.[111] Some of the fundamental rights which the Supreme Court has recognized are the right to vote,[112] the right to interstate travel,[113] and various privacy rights, such as marriage and the right to use contraception.[114] If state action threatens a fundamental right, the Court applies "strict scrutiny," its most stringent test, to determine if the state law comports with the Constitution.[115]

Likewise, "strict scrutiny" is applied to those cases which target individuals who are members of recognized "suspect classes."[116] Suspect classes include race,[117] alienage,[118] and national origin.[119] When the Court applies strict scrutiny, it will strike down the challenged law unless it is "necessary" to promote a "compelling" state interest, and all other less intrusive means are ineffective.[120]

Quasi-suspect classes are gender[121] and illegitimacy,[122] and challenged laws based on these classifications face a mid-level review by the Supreme Court.[123] When reviewing claims based on quasi-suspect classifications, the Court requires that the law be "substantially related" to

---

111. *Murgia*, 427 U.S. at 312, n.3 (citing the right to vote, right of interstate travel, rights guaranteed by the First Amendment, and the right to procreate as fundamental rights).

112. Harper v. V.I. State Bd. of Elections, 383 U.S. 663, 669-70 (1966) (disallowing poll tax as a bar to fundamental right of voting).

113. Shapiro v. Thompson, 394 U.S. 618, 643-44 (1969) (finding unconstitutional, state laws that denied welfare assistance to residents who had resided in the state for less than one year as it was a penalty to the fundamental right of interstate travel).

114. *See generally* Zablocki v. Redhail, 434 U.S. 374 (1978) (declaring marriage as a fundamental right); Roe v. Wade, 410 U.S. 113 (1973) (holding that abortions are protected under a woman's fundamental right to privacy); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding that the right to use contraception is protected under the fundamental right to privacy).

115. Skinner v. Oklahoma, 316 U.S. 535, 544-45 (1942) (holding that strict scrutiny was warranted for state law requiring sterilization of some repeat criminal offenders).

116. Korematsu v. United States, 323 U.S. 214, 217-18 (1944) (holding that race-based classification triggered strict scrutiny because race is a suspect classification).

117. Loving v. Virginia, 388 U.S. 1, 8 (1967) (holding as suspect, racial classifications that require strict scrutiny).

118. Plyler v. Doe, 457 U.S. 202, 230 (1982) (using strict scrutiny to invalidate state law banning children of illegal aliens from attending public school).

119. *Korematsu*, 323 U.S. at 217-18 (subjecting state law targeting persons of Japanese ancestry to strict scrutiny).

120. Shapiro v. Thompson, 394 U.S. 618, 643-44 (1969) (invalidating state laws requiring one-year residency requirement before welfare benefits could be received partly due to the fact that the waiting period was more restrictive than a proposed individualized case-by-case analysis of new residents' need for welfare benefits).

121. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 729-30 (1982) (sustaining challenge to women-only admissions policy under intermediate scrutiny review).

122. Clark v. Jeter, 486 U.S. 456, 465 (1988) (using intermediate scrutiny to overturn six-year statute of limitations for support of illegitimate children).

123. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985) (explaining the tests used for various equal protection classes and why the district court's classifying the characteristic of mental retardation as quasi-suspect was in error).

an "important government interest" in order to pass Constitutional muster.[124]

Cases which do not involve suspect or quasi-suspect classes or fundamental rights undergo rational basis review.[125] Rational basis scrutiny requires that the state law in question be "rationally related" to some legitimate state goal.[126] In many of the early equal protection cases applying rational review, the Court gave deference to the legislature, assuming that its goals were legitimate.[127]

One of these cases wherein the Court applied rational review was *Massachusetts Board of Retirement v. Murgia*.[128] Robert Murgia was a police officer who waged an equal protection challenge on a state law mandating retirement for police officers after age fifty.[129] In a per curiam decision, the Court refused to find that age discrimination claims should be subjected to anything more than rational basis scrutiny.[130] The Massachusetts statute was upheld because "where rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'"[131]

In 1979, the Court again gave deference to Congress in *Vance v. Bradley*,[132] another age discrimination case involving a mandatory retirement provision for foreign service personnel under the Federal Foreign Service Act.[133] The Court stated that the classification here was presumably reasonable because it was not unreasonable to set higher standards for people in positions "critical to the conduct of our foreign relations."[134]

---

124. *Id.*

125. *Id.* at 441.

126. *Id.* (describing the general rule for equal protection claims and the exception to the rule when the cases deal with classifications based on race, alienage or national origin).

127. *See generally* Ry. Express Agency v. New York, 336 U.S. 106, 110 (1949) (upholding a state law banning solicited advertising on delivery trucks yet allowing advertising of company-owned products and services on company-owned trucks because the "local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use"); Williamson v. Lee Optical Co., 348 U.S. 483, 490-91 (1955) (upholding different treatment of opticians based on public health concerns); Fullilove v. Klutznick, 448 U.S. 448, 478 (1980) (upholding congressional spending program which required minority contractors because Congress had enough historical basis to conclude that minority contractors needed protection from discrimination).

128. 427 U.S. 307 (1976).

129. *Murgia*, 427 U.S at 309.

130. *Id.* at 314. The district court considered strict scrutiny the appropriate test because the compulsory retirement at age fifty was considered irrational. *Id.* "[E]ven old age does not define a 'discrete and insular' group, in need of 'extraordinary protection from the majoritarian political processes.' Instead, it marks a stage that each of us will reach if we live out our normal span." *Id.* at 313-14 (citing United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938)).

131. *Id.* at 316 (citing Dandridge v. Williams, 397 U.S. 471, 485 (1970)).

132. 440 U.S. 93 (1979).

133. *Vance*, 440 U.S. at 94-95; *see also* 22 U.S.C. § 1002 (1976) (repealed 1980).

134. *Vance*, 440 U.S. at 101.

This "blind deference" to Congress would not last, however, as was noted most clearly in *Cleburne v. Cleburne Living Center*.[135] *Cleburne* involved a challenge to a city zoning ordinance which prohibited the establishment of group homes for the mentally retarded in certain residential zones.[136] The Court noted that rational review was the appropriate standard of scrutiny in affirming the court of appeals' invalidation of the ordinance.[137] Rational review was appropriate because the characteristic of mental retardation was not the basis for a suspect or quasi-suspect classification warranting heightened scrutiny.[138] Instead of deferring to the legislature's decision, however, the Court took the lead of the district court in examining the unstated reasons behind the ordinance.[139] In looking at the language of the law itself, specifically what was contained and what was absent, the Court determined that the rationale supporting the ordinance was not reasonable in light of the other factors present in the case.[140]

In sum, the Court will scrutinize Fourteenth Amendment claims under rational review scrutiny unless the classifications are considered suspect or involve a fundamental right.[141] As a result of *Cleburne*, however, the Court has looked more closely at legislative intent even in cases where rational review scrutiny is warranted.[142] This closer inspection of legislative history has become even more central to the Court's analysis when the party being sued is a state or state entity claiming protection under the Eleventh Amendment.[143]

---

135. 473 U.S. 432 (1985).

136. *Cleburne*, 473 U.S. at 442.

137. *Id.* at 435. The court of appeals determined that mental retardation was a quasi-suspect class, and therefore the law at issue should be subjected to a heightened standard of review. *Id.* at 437-38. Had mental retardation been classified as a quasi-suspect class, the Court would have had to examine the law to determine if it was substantially related to an important government interest. *Id.*

138. *Id.* at 442-43. In concluding that mental retardation was not a quasi-suspect class, the Court noted four reasons for its decision. *Id.* at 442-46. First, the condition of mental retardation is a complex one, which is best dealt with by those state legislators and other qualified professionals who are familiar with its issues. *Id.* at 442-43. Second, "the Federal Government has not only outlawed discrimination against the mentally retarded in federally funded programs, but it has also provided the retarded with the right to receive 'appropriate treatment, services, and habilitation' in a setting that is 'least restrictive of [their] personal liberty.'" *Id.* at 443 (citing the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6010(1), (2) (1984)). Third, the mentally retarded are not powerless in government; they have much public support in the legislature. *Id.* at 445. Finally, the Court did not want to expand the classes already established because it would be nearly impossible to ascertain if the mentally retarded were more qualified for heightened judicial scrutiny than other classes similarly situated, such as the aged, mentally infirm, etc. *Id.* at 445-46.

139. *Id.* at 448-50.

140. *Id.* The facts show that the zoning ordinance for that section did allow for boarding houses, hospitals, and other multiple dwelling structures, and the city failed to show how the residents of a group home facility would pose any greater threat "to the city's legitimate interests" than the residents of a group home for the mentally retarded. *Id.* at 449.

141. *Id.* at 440.

142. *Id.* at 448-50; *see also* City of Boerne v. Flores, 521 U.S. 507, 530-32 (1997).

143. Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996) (stating that whether a state has

C. CASES INVOLVING BOTH THE FOURTEENTH AMENDMENT AND SOVEREIGN IMMUNITY

In *City of Boerne v. Flores*,[144] the Court not only refused to give blind deference to Congress, but it set a precedent of looking more closely at the aims behind the legislation before deciding the fate of federal laws under a Fourteenth Amendment challenge.[145] After the Supreme Court's decision in Employment Division v. Smith,[146] Congress reacted by passing the Religious Freedom Restoration Act (RFRA).[147] The city of Boerne, Texas, was later sued by a local church under RFRA for its decision not to grant the church a requested building permit.[148]

The Court reviewed Congress' stated Fourteenth Amendment authority for enacting RFRA.[149] It determined that the Fourteenth Amendment power was intended to remedy specific acts of past injury and was limited to only "enforcing" the provisions of the amendment.[150] The Court then considered the contention that RFRA did not remedy an unconstitutional action but instead altered the meaning of what established a constitutional violation.[151] In determining whether RFRA did cross the fine line between enforcement and alteration of the Constitution, the Court stated, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[152] This "congruence and proportionality test" was then applied to the city's actions.[153]

---

constructively abrogated its sovereign immunity must be obvious in the legislative history of the law being considered); *see also* Green v. Mansour, 474 U.S. 64, 68 (1985) (noting that Congress must have passed the legislation at issue under a valid grant of power).

144. 521 U.S. 507 (1997).

145. *City of Boerne*, 521 U.S. at 534-35.

146. 494 U.S. 872 (1990).

147. Religious Freedom Restoration Act of 1993, Pub. L. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1994)). The Court in *Employment Div. v. Smith* held that the states could regulate religious practices which are protected by the First Amendment if the laws are neutral and generally applied. *Smith*, 494 U.S. at 890. The religious practice being regulated in *Smith* was the use of peyote, a psychedelic drug. *Id.* at 874. RFRA prevented the states from enacting such laws unless they could pass the heightened scrutiny tests under equal protection jurisprudence, despite the fact that the right to religious practice was not a recognized fundamental right. *City of Boerne*, 521 U.S. at 534-35.

148. *City of Boerne*, 521 U.S. at 512. The city denied the request because the church was located in a newly designated historic landmark district. *Id.*

149. *Id.* at 516-17.

150. *Id.* at 519. (citing South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).

151. *Id.*

152. *Id.* at 520.

153. *Id.* at 529. This test became a pivotal test in later cases involving Congress' enactment of legislation pursuant to its Section 5 Fourteenth Amendment power. *See e.g.*, United States v. Morrison, 529 U.S. 598, 625-26 (2000) (subjecting the Violence Against Women Act to the test); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639-40 (1999) (considering the Patent Remedy Act under this test); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-86 (1999) (applying

In concluding that RFRA was not an appropriate exercise of Congress' remedial Fourteenth Amendment enforcement power, the Court compared RFRA to the Voting Rights Act.[154] The Court looked to the legislative history of the two acts to determine what circumstances prompted the two laws.[155] It found that there was ample evidence of violations of the fundamental right to vote by the states before the enactment of the Voting Rights Act; however, evidence of the states' violating individuals' religious freedom rights was not so clear in enacting RFRA.[156] Therefore, the Court determined that RFRA was not a proper remedial exercise under the Fourteenth Amendment's enforcement clause.[157]

The Court again affirmed states' rights under a Section 5 Fourteenth Amendment challenge in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank.*[158] The *Florida Prepaid* decision addressed a sovereign immunity challenge brought under the Patent Remedy Act.[159] When it was conceded that the Act was enacted pursuant to congressional Fourteenth Amendment enforcement power, the Court considered whether the Act was a valid exercise of that

---

the test to the Age Discrimination in Employment Act); Bd. of Trs. of the Univ. of Ala. v. Garrett, 121 S. Ct. 955, 962-63 (2001) (using the test on the Americans with Disabilities Act).

154. City of Boerne v. Flores, 521 U.S. 507, 530 (1997); *see also Katzenbach*, 383 U.S. at 308-15.

155. *City of Boerne*, 521 U.S. at 530-31; *see also Katzenbach*, 383 U.S. at 308-15.

156. *City of Boerne*, 521 U.S. at 530-32.

157. *Id.* at 536.

158. 527 U.S. 627 (1999).

159. *Fla. Prepaid*, 527 U.S. at 630; *see also* 35 U.S.C. §§ 271(h), 296(a) (1994). College Savings Bank, a New Jersey chartered bank, held a patent on a financing scheme for funding college education. *Fla. Prepaid*, 527 U.S. at 630-31. The scheme involved annuity contracts that were purchased to fund future education costs for college students. *Id.* at 630. The State of Florida created the Florida Prepaid Postsecondary Education Expense Board (Florida Prepaid), a state agency which provided tuition prepayment contracts for state residents similar to those provided by College Savings Bank. *Id.* at 631. College Savings Bank brought a patent infringement suit against Florida Prepaid in the Federal District Court of New Jersey under the newly enacted Patent and Plant Variety Protection Remedy Clarification Act (Plant Remedy Act). *Id.*; *see also* Patent and Plant Variety Protection Remedy Clarification Act, Pub. L. 102-560, 106 Stat. 4230 (1992) (codified at 7 U.S.C. §§ 2321-2582 (1994 & Supp. V 1999)). College Savings Bank also brought a claim under the Trademark Act of 1946 (Lanham Act), alleging that Florida Prepaid had violated this act by making false claims about its own product. *Fla. Prepaid*, 527 U.S. at 633, n.1; *see also* Trademark Act of 1946, ch. 540, 60 Stat. 427 (codified as amended at 15 U.S.C. §§ 1051-1127 (1994 & Supp. V 1999)). The district court dismissed the Lanham Act claim, but sustained the Plant Remedy Act claim, which formed the basis for *Florida Prepaid. Fla. Prepaid*, 527 U.S. at 633. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* was a companion case to *Florida Prepaid* arising out of the same set of operative facts under the Lanham Act. 527 U.S. 666, 670-72 (1999). College Savings Bank appealed the district court's dismissal of the Lanham Act claim. *Coll. Sav. Bank*, 527 U.S. at 671. Although the Lanham Act was enacted pursuant to Congress' Article I powers, the Fourteenth Amendment was considered as a possible alternate source of power because the rights at issue were arguably property rights. *Id.* at 672-73. The Court found neither the freedom from false advertising about one's product by a competitor, nor the right to be secure in one's business qualified as a Fourteenth Amendment property right. *Id.* at 672. Therefore the Fourteenth Amendment was rejected as a valid source for the congressional action at issue. *Id.* at 675.

power.[160] After recognizing that patents were property within the meaning of the Due Process Clause, the Court considered whether the means used to protect this property were "congruent and proportional" to remedy past constitutional violations.[161] In examining the legislative history of the Act, the Court found no widespread violation of patents by states that would require complete abrogation of state sovereign immunity under the Patent Remedy Act.[162] Consequently, because the law was not an appropriate remedial act under the Fourteenth Amendment, the abrogation of state sovereign immunity under the Patent Remedy Act was held invalid.[163]

As a result of the foregoing, it was clear that the Supreme Court would view subsequent congressional attempts to abrogate state immunity with suspicion.[164] Congressional power to abrogate state immunity must come only from the powers granted in Section 5 of the Fourteenth Amendment and nowhere else in the Constitution,[165] it must be exercised to remedy a specific past Fourteenth Amendment violation,[166] and the means used must be congruent and proportional to the injury to be remedied.[167] Therefore, in future cases, the Court's inquiry into the state sovereign immunity challenge would center on the "history, practice, precedent and . . . structure"[168] of the legislation and the Constitution.

IV. ANALYSIS

In *Kimel v. Florida Board of Regents*, Justice O'Connor authored the majority opinion, which held that the Age Discrimination in Employment Act (ADEA) was not a proper exercise of Congressional remedial

160. *Fla. Prepaid*, 527 U.S. at 635-37. Congress also cited the Patent Clause and Commerce Clause which are both found in Article I as sources of power with which to abrogate state immunity. *Id.*

161. *Id.* at 637-40.

162. *Id.* at 642-43. In fact, the record indicated only two instances where a state had infringed upon a private patent and had resulted in claims being filed in court. *Id.* at 640 (citing H.R. REP. No. 101-960, pt. 1, at 38 (1990)).

163. *Id.* at 647-48.

164. *Id.*

165. Seminole Tribe v. Florida, 517 U.S. 44, 65 (1996).

166. City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (citing South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).

167. *Id.* at 520.

168. Alden v. Maine, 527 U.S. 706, 741 (1999).

Fourteenth Amendment power to abrogate state sovereign immunity.[169] Justice Stevens wrote an opinion concurring in part and dissenting in part, stating that the power given to Congress was not so limited as the Court suggested and calling for a repeal of the overruling of *Union Gas*.[170] Justice Thomas also concurred in part and dissented in part, stating that the ADEA did not validly abrogate state immunity because Congress did not make its intention to do so unmistakably clear in the language of the statute.[171]

A. MAJORITY OPINION

The Court began its analysis with an examination of various sections of the ADEA and the Fair Labor Standards Act (FLSA), to determine the exact changes made when Congress extended the application of the law to state and local government employers through the ADEA's 1974 amendments.[172] It then looked to the history of the case at hand[173] and addressed two issues: whether Congress clearly intended to abrogate state sovereign immunity, and, if so, whether this abrogation was a proper exercise of Congress' power under the Constitution.[174]

1. *Congressional Intent*

With respect to the intent of Congress, the Court noted the requirement that Congress must make its intent to abrogate state sovereign immunity with an unmistakably clear statement.[175] Kimel and the other

---

169. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 66 (2000). The majority opinion was split into four parts. *Id.* at 65. Parts I, II, and IV were joined by Chief Justice Rehnquist and Justices Scalia, Thomas and Kennedy. *Id.* Part III was joined by Chief Justice Rehnquist and Justices Stevens, Scalia, Souter, Ginsberg and Breyer. *Id.* Justice Stevens wrote an opinion dissenting in part and concurring in part, which Justices Souter, Ginsberg, and Breyer joined. *See id.* at 92 (Stevens, J., concurring in part and dissenting in part). Justice Thomas also filed a separate opinion concurring in part and dissenting in part, which Justice Kennedy joined. *See id.* at 99 (Thomas, J., concurring in part and dissenting in part).

170. *Id.* at 92-97.

171. *Id.* at 99.

172. *Kimel*, 528 U.S. at 67-69. Two of the changes the Court recognized in the ADEA and incorporated sections of the FLSA applied to the extension of covered employees. *Id.* at 67. Originally, the ADEA applied to workers aged forty to sixty-five. *Id.* Following the 1974 amendment, all employees aged forty and older were covered by the Act. *Id.* Additionally, the original statute specifically exempted public employees. *Id.* at 68. After the 1974 Amendments, both state and federal government employees were granted protection under the Act. *Id.* However, exceptions were made to exempt a few selected groups. *Id.* State and local elected officials and appointed policymakers are not covered as they are exempted from the definition of employees within the Act. *Id; see also* 29 U.S.C. § 630(f) (1994). Mandatory age limits for federal, state and local law enforcement officials and firefighters are also exempted under the Act. *Kimel*, 528 U.S. at 68; *see also* 5 U.S.C. § 3307(d), (e) (1994); 29 U.S. C. § 623(j) (Supp. V 1999).

173. *Kimel*, 528 U.S. at 69-72.

174. *Id.* at 73.

175. *Id.* (citing Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).

petitioners contended that this intent was found in the provisions regarding the enforcement clauses, as well as the definition and extension of the law to public agencies.[176]

The State argued that the ADEA failed to clearly state its intention to abrogate state immunity for two reasons.[177] The first reason centered on the enforcement provisions found in the ADEA and FLSA.[178] The FLSA, which had its own enforcement provision, and the ADEA were both amended by the Fair Labor Standards Amendments of 1974 (1974 Amendments).[179] While the provision in the FLSA clearly showed Congress' intent to abrogate state sovereign immunity, the ADEA provision did not, so it was therefore argued that Congress did not intend to abrogate state immunity in the ADEA provision.[180] The Court rejected this argument, stating that because the ADEA provision specifically stated

---

176. *Id.* at 74. Section 626(b) provides that the provisions of the ADEA are to be enforced in conjunction with the FLSA provisions at §§ 211(b), 216 (except for subsections (a) thereof), and 217. 29 U.S.C. § 626(b) (1994). Section 216(b) explicitly allows private individuals to sue the states under this Act. *Id.* § 216(b) (1994 & Supp. III 1997).

Section 211(b) provides that the United States Secretary of Labor may use the state labor agencies to help the federal authorities carry out their duties. *Id.* § 211(b) (1994). The state agencies may not be utilized without the consent of the individual states, and the state agencies and employees should be compensated adequately for their services. *Id.* This provision, requiring that state labor agencies may be called by the federal labor department for assistance in the enforcement of the ADEA, shows that Congress intended that the states should be aware of all of the provisions provided therein, including § 216 which specifically provides for suits against public agencies. *Id.*

Section 216 states that the damages for violations of §§ 206 or 207 of this title shall include back pay or other legal or equitable relief that may be appropriate. *Id.* § 216(b). The statute specifies that the employers who are required to adhere to this law include public agencies and that suits alleging violations of this title shall be maintained "in any Federal or State court of competent jurisdiction." *Id.* The language of congressional intent to abrogate state immunity is clear here, when the law specifically provides for suits against public agencies, which have been defined as "the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Rate Commission), a State, or a political subdivision of a State; or any interstate governmental agency." *Id.* § 203(x) (1994 & Supp. V 1999).

Section 217 provides that the United States district courts shall have jurisdiction with regard to injunctions associated with claims arising under this Title. *Id.* § 217 (1994). This provision clearly shows congressional intent to abrogate state immunity when viewed in connection with § 216's clear statement of a right to bring suit against public agencies. *Id.* § 216(b).

177. *Kimel*, 528 U.S. at 74.

178. *Id.* The enforcement provision in the ADEA is found at 29 U.S.C. § 626(b). The FLSA's enforcement provision is found at 29 U.S.C. § 216(b). *Kimel*, 528 U.S. at 74.

179. *Id.* at 68; *see also* Fair Labor Standard Amendments of 1974, Pub. L. 93-259, 88 Stat. 55 (codified at 29 U.S.C. §§ 201-219 (1994 & Supp. V 1999)).

180. *Kimel*, 528 U.S. at 74. Originally, the ADEA provided that suits for back pay could be maintained by employees "against any employer (including a public agency)" in any court of competent jurisdiction. *Id.* (citing 29 U.S. C. § 626(b)). This provision did not specify that these suits could be maintained if the states did not consent to being sued. *Id.* at 74. When the Act was amended in 1974, it incorporated § 216(b) from the FLSA, which specifically provided for suits against the unconsenting states, as well as § 203(x) which defines "public agency" to include state and local government officials. *Id.* at 73-74. (citing 29 U.S.C. §§ 216(b), 203(x) (1994)).

that the FLSA provision would be incorporated into the ADEA, all of the attributes of the FLSA provision were present in the ADEA provision.[181]

Second, the State contended that the phrase "court of competent jurisdiction" was ambiguous.[182] It argued that this phrase could be construed to only provide for suits against those states that had consented to being sued, not all states.[183] This argument relied on the *Kennecott Copper Corp. v. State Tax Commissioner*[184] decision.[185]

The Court determined that the phrase in *Kimel* was distinguishable from the exact same one in *Kennecott Copper* based on the accompanying language of the statute.[186] The Utah statute in *Kennecott Copper* did not refer to federal courts anywhere in the Act.[187] Conversely, § 216(b), which was clearly incorporated into the ADEA provisions, clearly stated that individuals could sustain ADEA claims against the states in federal or state courts; therefore, there was no ambiguity as to what courts were appropriate in *Kimel*.[188]

The Court then addressed Justice Thomas' dissent and refused to find the phrase "court of competent jurisdiction" ambiguous, based on the time delays involved in the enactment of the ADEA, the incorporated references to the FLSA, and the subsequent amendments to both Acts.[189] The Court noted that what was important was "what" was enacted, not "when" the changes were made.[190] It also noted that Congress must have been aware of the consequences of incorporating the FLSA provisions into the ADEA because both acts were amended as a result of the same act in 1976.[191]

---

181. *Id.* at 75.

182. *Id.* The basis for this argument is summarized in the Court's statement, "for over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States." *Id.* at 73. Presumably then, a court in which the defendant state has not surrendered its sovereign immunity is not "competent" to hear the case. *Id.* at 75.

183. *Id.*

184. 327 U.S. 573 (1946).

185. *Kennecott Copper*, 327 U.S. at 579-80. *Kennecott Copper* involved a citizen suing the State of Utah in federal court under state law for recovery of a mining tax that was paid under protest by the citizen. *Id.* at 574-75. The state law provided that citizens could bring suit for the refund of taxes paid under protest "in any court of competent jurisdiction." *Id.* at 578 (citing UTAH CODE ANN. § 80-11-11 (1933), *amended by* § 59-2-1411 (repealed 1988)). The Court in *Kennecott Copper* noted that only state courts were to be included under this phrase because the states have no power to affect the procedures of federal court. *Id.*

186. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 75 (2000).

187. *Id.*

188. *Id.* at 75-76.

189. *Id.* at 77-78. The specific arguments made by Justice Thomas are discussed in Part IV.C. *See* discussion *infra* Part IV.C.

190. *Kimel*, 528 U.S. at 76.

191. *Id.* Justice Thomas' argument relied on a clause in § 216(b), which excepted § 216(c) as a source of enforcement procedure for the ADEA. *Id.* at 99 (Thomas, J., dissenting).

2. *Congressional Authority*

Next, the Court turned to the question of whether the 1974 extension of the ADEA to state and local employers was a valid exercise of constitutional congressional power.[192] The Court noted that it had considered this question in *Equal Employment Opportunity Commission (EEOC) v. Wyoming*,[193] wherein the ADEA was adjudged a valid exercise of constitutional Commerce Clause power.[194] Since the decision in *Seminole Tribe* and the subsequent decisions in *Alden, Florida Prepaid,* and *College Savings Bank,* the Court has rejected Article I of the Federal Constitution as a source for congressional power to abrogate state immunity.[195] The Court adhered to this precedent, despite Justice Stevens' contention that the cases since *Hans* have been decided wrongly because Congress inherently has the power to abrogate state immunity through the fundamental aspects of federalism and that citing a specific Constitutional enforcement provision granting such power is unnecessary.[196] Consequently, the Court stated that the ADEA would be considered invalid if it is not appropriate legislation under Section 5 of the Fourteenth Amendment.[197]

Discussing Fourteenth Amendment jurisprudence, specifically the decision and circumstances surrounding *City of Boerne* and its congruence and proportionality test," was the Court's next step.[198] It then

---

192. *Id.* at 76.

193. 460 U.S. 226 (1983).

194. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 76 (2000) (citing *EEOC*, 460 U.S. at 243); *see also* U.S. CONST. art. I, § 8, cl. 3.

195. *Kimel*, 528 U.S. at 78; *see also* Alden v. Maine, 527 U.S. 706, 731 (1999) (rejecting the argument that Article I gives Congress the right to abrogate state sovereign immunity even when read in conjunction with the Supremacy Clause, U.S. CONST. art. IV); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999) (Patent Clause, U.S. CONST. art. I, § 8, cl. 8); Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672 (1999) (U.S. Const. art. I). The Court briefly mentioned its decision in *College Savings Bank* to overrule the constructive waiver rule. *Kimel*, 528 U.S. at 79 (citing *Coll. Sav. Bank*, 527 U.S. at 683). The constructive waiver rule allowed Congress to enact laws based on its Article I commerce power, and successfully argue that the states had "constructively waived" their sovereign immunity when they complied with these laws, despite the fact that they had made no specific statement of their intention to surrender their sovereign immunity. *Id.* (citing Parden v. Terminal Ry. Co. of Ala. Docks Dep't, 377 U.S. 184, 192 (1964)). The continuation of the constructive waiver doctrine was prohibited in *College Savings Bank* because it would allow Congress to circumvent *Seminole Tribe's* holding that Congress cannot abrogate state sovereign immunity using its Article I Commerce Clause power. *Id.* (citing *Coll. Sav. Bank*, 527 U.S. at 683).

196. *Kimel*, 528 U.S. at 79-80. *See also id.* at 92-99 (Stevens, J. dissenting). Justice Stevens noted, "In my opinion, Congress' power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations on the States in the first place. Neither the Eleventh Amendment nor the doctrine of sovereign immunity places any limit on that power." *Id.* at 93.

197. *Id.* at 80.

198. *Id. City of Boerne* identified that "fine line" between enacting remedial legislation under the

applied the congruence and proportionality test to the ADEA and determined that the ADEA was inappropriate because the Act's substantive requirements were disproportionate to any identified unconstitutional conduct by the states.[199] Most of the time, age discrimination by state and local employers is not unconstitutional because the classification will usually withstand lower scrutiny than is required by the ADEA.[200]

The Court relied on *Massachusetts Board of Retirement v. Murgia*,[201] *Vance v. Bradley*,[202] and *Gregory v. Ashcroft*,[203] which all held that age was not a suspect class in terms of Fourteenth Amendment discrimination.[204] Those cases refused to find that generalized classifications based on age were unconstitutional.[205] Based on this precedent, the Court again affirmed its holding that age is not a suspect or quasi-suspect class in terms of equal protection under the Constitution.[206]

The Court determined that the ADEA was out of proportion with equal protection jurisprudence because its prohibitions were overbroad.[207] Petitioners unsuccessfully argued that with the two specified exceptions included in the ADEA, it was not overbroad.[208] The first of these exceptions allowed employers to depend on age classifications only when age is "a bona fide occupational qualification" which is vital to the standard operation of the employer's business.[209]

Fourteenth Amendment and actually expanding the meaning of the amendment. *Id.* at 81 (citing City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997)). The congruence and proportionality test was adopted because the Court recognized that "the same language that serves as the basis for the affirmative grant of congressional power [to abrogate state sovereign immunity under the Fourteenth Amendment] also serves to limit that power." *Id.* The Court then noted *Florida Prepaid,* wherein the "congruence and proportionality" test was again implemented to invalidate state sovereign immunity under the Patent Remedy Act. *Id.* at 82 (citing *Fla. Prepaid*, 527 U.S. at 635-36).

199. *Id.* at 83.

200. *Id.* "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'" *Id.* (citing Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).

201. 427 U.S. 307 (1976).

202. 440 U.S. 93 (1979).

203. 501 U.S. 452 (1991).

204. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000).

205. *Id.* The Court noted that equal protection challenges based on age discrimination are particularly difficult because the challengers bear the burden of showing that the state's classification based on age is irrational. *Id.* at 84 (citing Vance v. Bradley, 440 U.S. 93, 111 (1979); Gregory v. Ashcroft, 501 U.S. 452, 473 (1991)). Rational basis review does not require perfection, thus this burden is particularly substantial and challenges usually do not prevail. *Id.*

206. *Id.* at 83.

207. *Id.* at 86. "Judged against the backdrop of our equal protection jurisprudence, it is clear 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.'" *Id.* (citing City of Boerne v. Flores, 521 U.S. 507, 532 (1997)).

208. *Id.* at 86-87. The exceptions cited for this argument are located at 29 U.S.C. § 623(f)(1) (1994). The statute states in part that it is lawful for an employer to take action which would otherwise be prohibited "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).

209. *Kimel*, 528 U.S. at 67. (citing 29 U.S.C. § 623(f)(1)).

Western Air Lines Inc. v. Criswell[210] was decided by the Court using the bona fide occupational qualification (BFOQ) exception.[211] The Court noted that the BFOQ exception can only succeed if the employer can demonstrate that there is a "substantial basis for believing that *all or nearly all employees* above an age lack the qualifications required for the position" or that it is nearly impossible to determine which employees are not qualified without using the classification.[212] This "reasonable necessity" standard adopted by the ADEA is more akin to heightened scrutiny under equal protection jurisprudence than the rational basis scrutiny required in cases where classifications are based on age.[213] Because age is not a classification warranting heightened scrutiny, the BFOQ provision is unconstitutionally overbroad.[214]

The second exception listed under § 623(f)(1) is the reasonableness exception.[215] Under this provision, employers are allowed to act in a manner which would otherwise violate the ADEA when the "differentiation is based on reasonable factors other than age."[216] This was in direct opposition to holdings in *Bradley*, *Gregory*, and *Murgia*, which expressly allowed the states to make generalizations based on age.[217] The language of the ADEA thus raised age discrimination to a heightened level of scrutiny under equal protection, which is an exercise the Supreme Court has repeatedly rejected.[218]

---

210. 472 U.S. 400 (1985).

211. *Western Air Lines*, 472 U.S. at 423. *Western Air Lines* ultimately determined that a mandatory retirement provision at age sixty for flight engineers was not covered under the BFOQ defense because individualized determinations of health could less restrictively help Western Air Lines attain its goal of safely transporting its passengers than a generalized retirement age policy. *Id.*

212. *Kimel*, 528 U.S. at 87 (quoting *Western Air Lines*, 472 U.S. at 422-23). The Court noted that the BFOQ defense was intended as a very narrow exception within the ADEA. *Id.* (citing *Western Air Lines*, 472 U.S. at 412). To successfully use the BFOQ defense, the employer must show that it is highly impractical to assess each employee individually or that there is a substantial basis for the belief that "all or nearly all employees" over a certain age are unable to perform the required work tasks satisfactorily. *Id.* (citing *Western Air Lines*, 472 U.S. at 422-23).

213. *Id.* at 86-87 (citing *Western Air Lines*, 472 U.S. at 419). The Court noted that the ADEA makes the State's use of age classifications prima facie unlawful, because it requires employers to evaluate on the basis of employee performance, not age, even though it is constitutionally permissible to evaluate employees based on age if the classification is rationally related to an important state interest. *Id.* (citing 29 U.S.C. § 623(a)(1) (1994) and *Western Air Lines*, 472 U.S. at 422); *see also* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985).

214. *Kimel*, 528 U.S. at 87-88.

215. *Id.* at 88.

216. *Id.* (quoting 29 U.S.C. § 623(f)(1) (1994)). The Court here noted that this provision prohibited the use of age as a proxy for other characteristics of the employee, such as using age as a reason for dismissal when the employee's dismissal is actually based on productivity. *Id.* at 88 (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993)). However, the Constitution allows the states to use age as a "proxy" for an employee's other undesirable characteristics. *Id.* (citing Gregory v. Ashcroft, 501 U.S. 452, 473 (1991), Vance v. Bradley, 440 U.S. 93, 108-09 (1979), and Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314-17 (1976)).

217. *Id.*

218. *Id.*; *see also* City of Boerne v. Flores, 521 U.S. 507, 519 (1997) (holding that the

The Court then moved to the next phase of the congruence and proportionality test: whether the ADEA was appropriate remedial legislation.[219] When previously faced with this question, the Court has often looked to the congressional record.[220] In examining the legislative history of the ADEA, the Court found no pattern of age discrimination by the states, nor did it find that there was any pattern of unconstitutional age discrimination in the general public.[221]

The Court also found that the evidence provided by Petitioners consisted of isolated sentences clipped from reports and debates, rather than a more comprehensive and complete record.[222] The main report Petitioners relied on was a 1966 California report that found no unconstitutional age discrimination violations in that state.[223] Those violations mentioned in the report were mostly found in police and fire departments, and those areas have traditionally been found to be places where age discrimination is allowed even on the state level.[224] The Court also noted that the California report defined a state problem, not a national problem that would require a federal remedy.[225] Furthermore, the report concentrated on age discrimination in the private sector, but the Court considered this inadequate to support the legislation regulating the states.[226] Based on this information gathered from the private sector, the Court said that Congress had no reason to believe that state and local governments were discriminating on the basis of age.[227]

The Court concluded by stating that the fact that state employees were no longer able to sue their employers in federal court did not mean that the "courthouse door was completely barred" to those employees.[228] In fact, all the states have enacted age discrimination statutes, most of which allow for suit against public entities.[229]

---

classification based on religious practices to the scrutiny level of a suspect class was invalid).

219. *Id.* at 88-89.

220. *Id.* at 89; *see also* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640-45 (1999); *City of Boerne*, 521 U.S. at 530-31. "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." *City of Boerne*, 521 U.S. at 530; *see also* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

221. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 90 (2000).

222. *Id.* The Court noted that although there had been several instances of age discrimination noted in "a decade's worth of congressional reports and floor debates," those reports simply did not point to violations by the state that rose to the level of constitutional violation. *Id.*

223. *Id.* at 90; *see also Hearings on H.R. 3651 Before the Subcomm. on Labor of the House Comm. on Education and Labor*, 90th Cong. 161-201 (1967).

224. *Kimel*, 528 U.S. at 90. Specifically, age discrimination in the areas of law enforcement and fire fighting was allowed not only by California state law, but also by the ADEA. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* at 90-91.

228. *Id.* at 91-92.

229. *Id.*

B. JUSTICE STEVENS' CONCURRENCE AND DISSENT

Justice Stevens' dissent began by stating that congressional commerce power includes the regulation of labor in the private and public sectors.[230] Justice Stevens found no limits on federal power to regulate labor by either the Eleventh Amendment or the "judge-made" doctrine of state sovereign immunity.[231] He stated that the judiciary is not the guardian of state sovereign immunity, but rather our system of checks and balances, through state representation in federal government, guarantees the rights of the states.[232]

Justice Stevens suggested that congressional acts are enacted against a backdrop of state law, similar to the enactment of state law against the backdrop of common law.[233] Congress is comprised of representatives elected by the states, who bring public opinion from the states to the floor of the legislature when enacting federal laws.[234] Thus, in our federalist system of government, any action taken by Congress can only be completed with the cooperation of representatives of the people from the various states.[235]

Through the state representatives, the people have given the federal legislature all the power it possesses.[236] This includes the power to enact legislation that will seem adverse to some states because the enacting of federal law is the end result of balancing the interests of the several states.[237] Under Justice Stevens' view, if Congress has the power to create a federal right against the states, it must also have the power to provide a remedy in federal courts, "even if it is necessary to 'abrogate'

---

230. *Id.* at 92-93 (Stevens, J., concurring in part and dissenting in part). Justice Stevens stated that because Congress had the power to enact legislation regulating labor issues such as health and safety standards, minimum hours and wages, and age discrimination, it must also have the power to provide a forum to decide disputes based on these laws in federal courts. *Id.*

231. *Id.* at 93.

232. *Id.*; *see also* Wechsler, *supra* note 40, at 558-60. Justice Stevens also noted that the doctrine of state sovereign immunity is not a part of the Constitution but that it is "judge-made" law. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 93 (2000); *see also* Alden v. Maine, 527 U.S. 706, 761-814 (1999) (Souter, J., dissenting).

233. *Kimel*, 528 U.S. at 94 (Stevens, J., dissenting). Thus, when Congress makes a federal law, it is often codifying several state laws on a national level. *Id.* at 93-94; *see also* Wechsler, *supra* note 40, at 546.

234. *Kimel*, 528 U.S. at 93-94 (citing THE FEDERALIST No. 45, at 291 (James Madison) (C. Rossiter ed., 1961)); *see also* Wechsler, *supra* note 40, at 546.

235. *Kimel*, 528 U.S. at 94 n.1.

236. *Id.*

237. *Id.* at 94. Justice Stevens noted that when Congress enacts laws regulating state action it is safe to assume that the implications on the states have been weighed heavily in the deliberations leading to the statute's passage. *Id.* at 96. The burdens imposed on the states necessarily include the costs of resolving disputes based on the enforcement of the laws. *Id.*

the Court's 'Eleventh Amendment' version of the common-law defense of sovereign immunity to do so."[238]

Justice Stevens concluded by asserting that *Union Gas* was decided correctly, and that *Seminole Tribe* was not controlling law.[239] This assertion was based on the fact that *stare decisis* means less in constitutional law when there is a single controlling document to guide judicial decisions, rather than just a series of past decisions.[240] He also asserted that those cases following *Seminole Tribe*, specifically the trio of cases decided on June 23, 1999, *Alden, Florida Prepaid,* and *College Savings Bank,* should not be followed.[241]

C. JUSTICE THOMAS' CONCURRENCE AND DISSENT

In his partial concurrence and partial dissent, Justice Thomas stated that the ADEA showed no "unmistakably clear statement" of congressional intent to abrogate state immunity.[242] First, Justice Thomas looked at the "person aggrieved" phrase, and determined that it must extend to state employees, because it extended to any employee, and a state employee would certainly be considered "any employee."[243] However, there was no such clear statement of a right against a state incorporated in the Act.[244]

---

238. *Id.* at 97. "[O]nce Congress has made its policy choice, [to supplant state law with a federal law] the sovereignty concerns of the several States are satisfied, and the federal interest in evenhanded enforcement of federal law, explicitly endorsed in Article VI of the Constitution, does not countenance further limitations." *Id.* at 96.

239. *Id.* at 97. Justice Stevens stated that *Seminole Tribe* was misguided in several respects, specifically in that the decision prevented private suits against state entities under federal law, but left open the ability for federal entities to sue the states for the same violations. *Id.* at 98.

240. *Id.* at 97-98; *see also* BLACK'S LAW DICTIONARY 1414 (7th ed. 1999) (defining *stare decisis* as "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation"). Justice Stevens did not reject the doctrine, but instead contended that constitutional interpretation should be based more on the original intent of the Framers than on "novel" judicial interpretations of doctrines such as sovereign immunity. *Kimel,* 528 U.S. at 97-98. He also noted that the majority discounted the doctrine of *stare decisis* in its repeated overruling of earlier precedent in cases similar to *Kimel. Id.* at 98 n.7 (citing Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 660, 675-83 (1999) (overruling Parden v. Terminal Ry. Co. of Ala. Docks Dep't, 377 U.S. 184 (1964)); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63-73 (1996) (overruling Pennsylvania v. Union Gas Co., 401 U.S. 1 (1989)); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984) (Stevens, J. dissenting)).

241. *Kimel,* 528 U.S. at 98-99 (citing Alden v. Maine, 527 U.S. 706 (1999), Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999), and Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999)).

242. *Id.* at 99 (Thomas, J., concurring in part and dissenting in part) (citing the rule from Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)). Justice Thomas stated that compliance with this rule was especially important in wide-reaching statutes such as the ADEA. *Id.*

243. *Id.* at 100; *see also* 29 U.S.C. § 626 (c)(1) (1994) (stating in part: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act").

244. *Kimel,* 528 U.S. at 100. Specifically, Justice Thomas found the lack of a clear intent to abrogate state immunity in § 255(d) because that section only applies to the FLSA, and was not mentioned

He looked to *Employees of Department of Public Health and Welfare of Missouri v. Department of Public Health and Welfare of Missouri*,[245] specifically at its holding that there was no intent to abrogate state immunity with the language used in that case.[246] Justice Thomas noted that *Employees* centered on the idea that "the history and tradition of the Eleventh Amendment indicate that by reason of that barrier, a federal court is not *competent* to render judgment against a *nonconsenting* State."[247] Thus, he argued that it should not be assumed that all federal courts were competent to hear suits against those states that had not waived their Eleventh Amendment immunity because Congress had not clearly stated its intention to abrogate state immunity in § 626.[248] In Justice Thomas' opinion, it was important to consider that the phrase "court of competent jurisdiction" used in *Employees* was no different from that used in the ADEA.[249]

Second, Justice Thomas looked to § 216(b) of the ADEA and § 6(d)(1) of the 1974 amendments to the FLSA that altered it.[250] He argued that Congress was unaware of the impact of the 1974 Amendments on the different enforcement provisions of §§ 216(b) and 626(b), because it would have included a clear statement of abrogation of state sovereign immunity into § 626(b) if it had intended to do so.[251] He noted his skepticism that Congress deliberated on the consequences of amending an existing act with provisions from another existing act, when the former act is not mentioned in the amending act.[252] Justice Thomas

---

in the amendment to the ADEA. *Id.* at 108-09.

245. 411 U.S. 279 (1973).

246. *Employees*, 411 U.S. at 285. *Employees* concerned public health employees suing for lost overtime wages under the federal Fair Labor Standards Act (FLSA). *Id.* at 281. In *Employees*, the Court determined that when Congress enacted the FLSA, it did not intend to abrogate state immunity with respect to employees of state nonprofit institutions because they have little impact on interstate commerce. *Id.* at 284-85; *see also Kimel*, 528 U.S. at 100.

247. *Kimel*, 528 U.S. at 108 (quoting *Employees*, 411 U.S. at 284).

248. *Id.* (citing Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 579 (1946)) (holding that federal court was not a court of competent jurisdiction for a Utah state tax law that did not specify an intent to abrogate state immunity in federal court in the language of the statute).

249. *Id.* at 101.

250. *Id.* at 102; *see also supra* note 206 and accompanying text; 29 U.S.C. §§ 216(b), 626(b) (1994); *Id.* § 255(d)(1994) (1974 Amendments) (suspending the statute of limitations on cases based on § 216 so that those plaintiffs could avail themselves of the newly-enacted § 216 which clearly abrogated state sovereign immunity). Justice Thomas stated that the language regarding the statute of limitations was a reaction to *Employees*, which was a decision based on the FLSA, not the ADEA. *Kimel*, 528 U.S. at 103. He thus asserted that § 6(d)(1) was considered only as an amendment to the FLSA, and its impact on the ADEA was not fully explored. *Id.*

Justice Thomas also noted the Court's determination that the ADEA was referenced in the 1974 amendments through § 28. *Id.* at 104. However, Justice Thomas asserted that section 6(d)(2)(A) was more persuasive authority than § 28 of the amendment because it was closer in "space and purpose" to § 6(d)(1). *Id.* Therefore the inference in § 6(d)(1) that the amendment was targeted only at the FLSA should be more controlling than the inference in § 28 that the ADEA was incorporated. *Id.*

251. *Kimel*, 528 U.S. at 102. In fact, Justice Thomas noted that the act which amended § 216(b) did not even mention § 626(b). *Id.*

252. *Id.* at 102. "Congress, acting responsibly, would not be presumed to take such action [increasing state liability and decreasing state sovereign immunity] silently." *Id.* at 101 (quoting

stated that the impact of § 6(d)(2)(A) on the ADEA made no sense, because it showed a lack of thoughtfulness regarding the impact of the two provisions on each other.[253] He asserted that this raised a shadow of a doubt, which did not comport with an unequivocal declaration of intent to abrogate state sovereign immunity.[254] He stated that *Union Gas* was different, because that case involved an amendment of an act, not an amendment of an amendment to an act, as was the case in *Kimel*.[255]

Finally, Justice Thomas stated that § 626(b) did not incorporate a private right of action into § 216(b).[256] He argued that § 626(c) already had its own private right of action provision and incorporating the one contained in § 216(b) would be superfluous.[257] He argued for an interpretation wherein § 626(c)(1) would be an exclusive right of action, which could be added to the provisions in §§ 626(c)(2) and 216(b), rather than the interpretation wherein § 626(c)(1) was incorporated into § 216(b).[258]

V. IMPACT

A. NATIONAL IMPACT

In *Kimel*, the Court affirmed the idea that the Court's blind deference to Congress is dead.[259] The detailed analysis present in *Kimel* has prompted review of other congressional acts.[260] Recently, in *University*

Employees, 411 U.S. at 284-85). He noted that the interaction of the provisions raised a "permissible inference" rather than the "unequivocal declaration" required to abrogate state sovereign immunity. *Id.* at 104.

253. *Id.* at 103-04.

254. *Id.* at 104.

255. *Id.* at 105; *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 7-13 (1989). Justice Thomas presumably would require that amendments that affect more than one legislative act require a clear statement of impact on all prior legislation affected by the amendment. *Kimel*, 528 U.S. at 102. Justice Thomas was also concerned that § 626(e) was amended in 1991 by the Civil Rights Act which removed the incorporating reference at § 255(d). *Id.* at 103, n.3. (citing Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §§ 1981-2000h-6 (1994 & Supp. V 1999))).

256. *Kimel*, 528 U.S. at 105.

257. *Id.* at 106.

258. *Id.* The additions contained in § 216(b) include collective actions, attorneys fees and liquidated damages. 29 U.S.C. § 216(b) (1994). Section 626(c)(2) provides for the right to trial by jury. 29 U.S.C. § 626(c)(2) (1994). Justice Thomas noted that the majority's interpretation was a "permissive inference," rather than the required "unequivocal declaration" which precedent requires. *Kimel*, 528 U.S. at 106 (citing Dellmuth v. Muth, 491 U.S. 223, 232 (1989)).

259. City of Boerne v. Florida, 521 U.S. 507, 531-32 (1997) (defining and questioning the concept of judicial deference to congressional acts); *see also Kimel*, 528 U.S. at 74 (introducing a two-step inquiry to determine if Congress did indeed clearly intend and have the power to abrogate state immunity when it enacted the ADEA).

260. Kimel *Changes Everything*, *in* 18 DISABILITY COMPLIANCE BULLETIN 6 (LRP Publications Aug. 25, 2000).

of Alabama Board of Trustees v. Garrett,[261] the Americans with Disabilities Act (ADA) was subjected to *Kimel*-type scrutiny.[262]

Garrett involved state employees who sued Alabama state agencies under three federal statutes, the ADA, the Rehabilitation Act of 1973 (Rehabilitation Act), and the Family Medical Leave Act of 1993 (FMLA).[263] The Eleventh Circuit found that Alabama was immune from suit only under the specific provision of the FMLA which was addressed in the case.[264] Relying on their prior decision in *Kimel*, wherein the ADA was found to be a valid exercise of Congress' Fourteenth Amendment enforcement power, the Eleventh Circuit reversed the decision upholding sovereign immunity.[265] The Supreme Court granted certiorari

---

261. 193 F.3d 1214 (11th Cir. 1999), *cert. granted*, 529 U.S. 1065 (2000), *reversed by* 531 U.S. 356 (2001).

262. *Garrett*, 193 F.3d at 1218-21; *see also* Mary Bomgren, *The Eleventh Amendment and the Threat to the Americans with Disabilities Act*, 79 MICH. B.J. 1670, 1672 (2000) (stating that there are over fifty-four million disabled people currently living in the United States who could be affected if the ADA is found unconstitutional). Coincidentally, the ADA was addressed by the Eleventh Circuit Court of Appeals in *Kimel*, but the Supreme Court did not grant certiorari with respect to the validity of that Act. Kimel v. Fla. Bd. of Regents, 139 F. 3d 1426, 1433 (1998).

263. *Garrett*, 193 F.3d at 1216; *see also* Americans With Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 328 (codified at 42 U.S.C. §§ 12101-12213 (1994 & Supp. V 1999)); Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1973, Pub. L. 93-112, 87 Stat. 394 (codified as amended at 29 U.S.C. § 794 (1994 & Supp. V 1999)); Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (1994 & Supp. V 1999)). Patricia Garrett sued her employer, the University of Alabama Hospital, for reassigning her to a lower-paying position upon her return to work due to a leave of absence to battle breast cancer. Brief for Respondent at *2, Garrett v. Univ. of Ala. Bd. of Trs., 531 U.S. 356 (2001) (No. 99-1240). She sued for compensatory and punitive damages under the ADA, but the district court dismissed the action based on the University's claim of sovereign immunity and Garrett appealed. *Id.* at *3; *see also* Garrett v. Bd. of Trs., 989 F. Supp. 1409, 1412 (N.D. Ala. 1998).

Garrett also contained the case of Milton Ash, an employee of the Alabama Department of Youth Services. Respondent's Brief at *3-*5, *Garrett* (No. 99-1240). Ash claimed that he was discriminated against because the department did not take efforts with regard to his work conditions or schedule in order to accommodate the severe asthma, sleep apnea, diabetes, and obstructive pulmonary disease which limited his ability to breathe, sleep, work, and care for himself. *Id.* at *3-*4. The district court also dismissed his claims for compensatory and punitive damages based on the state's claim of sovereign immunity and Ash appealed. *Id.* at *5; *see also Garrett*, 989 F. Supp. at 1412.

264. *Garrett*, 193 F.3d at 1216.

265. *Id.* at 1218. The Supreme Court in *Kimel* invalidated the defense of sovereign immunity with respect to the Age Discrimination in Employment Act (ADEA), not the Americans with Disabilities Act (ADA) which was at issue in *Garrett*. *Kimel*, 528 U.S. at 66-67; *Garrett*, 193 F.3d at 1216. *Kimel* did involve a challenge to the ADA at the Eleventh Circuit level but that Act was not addressed by the Supreme Court. *Kimel*, 139 F.3d at 1428 n.2. However, many courts have used the abbreviation ADA to describe the Age Discrimination Act, 42 U.S.C. § 6101 (1994) rather than the Americans with Disabilities Act. *See* Adams v. Lewis Univ., No. 97-C7636, 1999 U.S. Dist. LEXIS 3413 at *12 (N.D. Ill. Mar. 12, 1999); Heckman v. Univ. of N.C. at Chapel Hill, 19 F. Supp. 2d 468, 469 (M.D. N.C. 1998); Action Alliance of Senior Citizens of Greater Philadelphia v. Bowen, 846 F.2d 1449, 1458 (D. D.C. 1998); Simmons v. Middle Tenn. State Univ., No. 95-6111, 1997 U.S. App. LEXIS 17751 at *2 (6th Cir. July 11, 1997); Parker v. Wakelin, 887 F. Supp. 14, 15 (D. Me. 1995); Hilow v. Rome City Sch. Dist., No. 91-CV 567, 1994 U.S. Dist. LEXIS 8953 at *9 (N.D. N.Y. June 6, 1994); Gettle v. Amcel Corp., No. C-92-0503-DLJ, 1992 U.S. Dist. LEXIS at *2 (N.D. Ca. May 18, 1992); Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan, 930 F.2d 77, 82 (D. D.C. 1991); Rannels v. Hargrove, 731 F. Supp. 1214, 1216 (E.D. Pa. 1990); Stephanidis v. Yale Univ., 652 F. Supp.

to determine if the ADA is indeed a valid exercise of Congress' Fourteenth Amendment enforcement power.[266]

As in *Kimel,* the Court upheld state sovereign immunity at the expense of the federal law in *Garrett.*[267] The Court held the ADA was improperly applied to state governmental employers under Congress' Fourteenth Amendment remedial power.[268] In limiting the reaches of the ADA, the Court looked at the legislative history behind the Act to determine if it clearly showed a pattern of unconstitutional conduct by the states that warranted remedial action by Congress.[269] It used the Voting Rights Act of 1965 as an example of proper congressional abrogation of state sovereign immunity under the Fourteenth Amendment.[270] It then compared the enactment of the ADA to the enactment of the Voting Rights Act and noted that the evidence supporting the passage of the ADA did not sufficiently show unconstitutional discrimination against disabled persons by the states.[271]

The Court did note that there was substantial evidence of discrimination by the public at large, but the small number of those cases which were actually attributed to state governmental actors did not warrant the abrogation of state sovereign immunity under Fourteenth Amendment power.[272] Justice Breyer dissented, attaching congressional hearing evidence to support his view that the evidence Congress considered was sufficient to show that the ADA did address a constitutional violation requiring a national remedy.[273] However, the Court again reminded potential plaintiffs that state remedies were available for disability discrimination claims.[274]

In addition to its impact on subsequent cases before the Supreme Court, *Kimel* has sparked responses in Congress.[275] Despite the Court's assurance that there was still an adequate forum for the rights of aggrieved older workers in the state courts, a bill was introduced into the United States Senate on September 6, 2000, which would "close the loop-

---

110, 112 (D. Conn. 1986); Action Alliance of Senior Citizens of Greater Philadelphia v. Heckler, 789 F.2d 931, 934 (D. D.C. 1986).

266. Bd. of Trs. v. Garrett, 121 S. Ct. 955 (2001).

267. *Id.* at 967-68.

268. *Id.* at 966-67.

269. *Id.* at 964-65.

270. *Id.* at 967; *see also* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (citing Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971-1974e (1994 & Supp. V 1999))).

271. *Garrett,* 121 S. Ct. at 967-68.

272. *Id.* at 965.

273. *Id.* at 969-93 (listing congressional hearings on the ADA, federal anti-disability discrimination laws enacted prior to the ADA, and submissions of disability discrimination incidents within each state).

274. *Id.* at 968 n.9; *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91-92 (2000).

275. Jennifer Sergent, *Federal Law Might Aid Age Bias Lawsuits*, THE STUART NEWS/PORT ST. LUCIE NEWS (Stuart, FL), Sept. 7, 2000, at C7.

hole in the ADEA" exemplified by the *Kimel* decision.[276] This bill would require states to surrender their immunity from suit for ADEA claims by withholding federal dollars for other programs to those states which did not comply.[277] Another bill was introduced into the United States House of Representatives on June 7, 2000, which would require the Equal Employment Opportunity Commission to mediate employee claims under certain federal laws.[278] The acts affected by this bill would include not only the ADEA and the ADA, but also the Civil Rights Act of 1964, the Vocational Rehabilitation Act of 1973, and the Civil Rights Act of 1991.[279]

B. NORTH DAKOTA IMPACT

The closing paragraphs of *Kimel* reminded all state employees that they still have a right of action for age discrimination in state courts.[280] North Dakota state employees are no exception.[281] North Dakota Century Code section 34-01-17 provides a specific statutory provision prohibiting discrimination in employment based solely on age.[282] The statute specifically exempts mandatory retirement provisions that are not tailored to evade compliance with section 34-01-17.[283]

In *Selland v. Fargo School District,*[284] the North Dakota Supreme Court examined one such mandatory retirement policy in a manner similar to that used in *Kimel.*[285] Cynthia Selland sued the Fargo School district when it refused to allow her an exception to the school's manda-

---

276. Older Workers Rights Restoration Act of 2000, S. 3008, 106th Cong. § 2 (2000), *reintroduced as* Older Workers Rights Restoration Act of 2001, S. 928, 107th Cong. § 1 (2001), 147 CONG. REC. 5438 (2001).

277. Older Workers Rights Restoration Act, *supra* note 276; *see also* Congressional Press Release, Jim Jeffords, Senator, Loophole to be Introduced, (Sept. 5, 2000) (on file with author). This bill was referred to the Senate Committee on Health, Education, Labor and Pensions on September 6, 2000. *See* 146 CONG. REC. 8105 (2000). The 2001 version of this bill was referred to the Committee on Health, Education, Labor and Pensions on May 22, 2001. *See* 147 CONG. REC. 5438 (2001). The bill was ordered to be reported without amendment favorably on Sept. 13, 2001. *See* 147 CONG. REC. 893 (2001).

278. National Employment Dispute Resolution Act of 2000 (NEDRA), H.R. 4593, 106th Cong. § 2 (2000). The bill was reintroduced on Mar. 1, 2001 as H.R. 820, 107th Cong. § 1 (2001).

279. Nat'l Employment Dispute Resolution Act, *supra* note 278. This bill was referred to the House Committee on Education and the Workforce on June 7, 2000. *See* 146 CONG. REC. 4035 (2000). The bill was reintroduced and referred to the House Comm. on Educ. and the Workforce on Mar. 1, 2001. It was sent to the Subcomm. on Employer Relations on April 30, 2001. 147 CONG. REC. 621 (2001).

280. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91-92 (2000).

281. N.D. CENT. CODE § 34-01-17 (1987).

282. *Id.*

283. *Id.*

284. 285 N.W.2d 567 (N.D. 1979).

285. *Selland*, 285 N.W. 2d at 574-75.

tory retirement policy when she reached age sixty-five.[286] The school claimed that its policy was compliant with the state's statutes governing teachers' contracts.[287] The North Dakota Supreme Court rejected the school's rationale, however, basing its decision on the principles of statutory construction and equal protection.[288] First, it noted that there are specific statutes applicable to school boards that do not specifically give the power to establish mandatory retirement policies.[289] It also noted that a more specific statute provides that retirement should not be mandatory for teachers who reach age sixty-five.[290] Because "the specific controls the general" in terms of statutory construction, the school board did not have the power to create the mandatory retirement policy at issue.[291]

The court also noted that attainment of age sixty-five does not provide a valid reason for nonrenewal of a teaching contract based on lack of competency, ability, or qualifications as is required by state law.[292] This rationale mirrors the language of section 34-01-17, prohibiting dismissal of employment based solely on age.[293] The North Dakota statute goes beyond the requirements of federal equal protection cases based on age, which allow age-based classifications if they are reasonably related to a legitimate state interest.[294] Therefore, for North Dakota and other state employees, *Kimel* is actually a good reminder that there may be more protection under the state age discrimination statutes than under the ADEA.

However, it is beneficial to note that in practice, an age discrimination suit is not easily won, even in the state court.[295] In *Anderson v.*

---

286. *Id.* at 570.

287. *Id.* The two provisions at issue were N.D. CENT. CODE §§ 15-47-27 and 15-47-38 (1993 & Supp. 1999). Section 27 requires that the school district give written notification to any teacher whose contract will not be renewed, stating the reasons for the nonrenewal of the contract. N.D. CENT. CODE § 15-47-27. If no notice is given, the statute provides that it will be constructively assumed that the teacher's contract will be renewed. *Id.*

Section 38 provides that teachers who are being considered for nonrenewal of contracts must be given written notice of the reasons for action, and a meeting must be held between the teacher and the school board to discuss the reasons for the contemplated nonrenewal. N.D. CENT. CODE § 15-47-38. The statute further requires that the reasons for the nonrenewal of the contract must be based on nonarbitrary reasons, such as lack of funding for teaching staff, inability or incompetence, or lack of the necessary qualifications for teaching. *Id.*

288. *Selland*, 285 N.W.2d at 575.

289. *See* N.D. CENT. CODE § 15-29-08 (1979) (repealed 1999) (setting forth general powers and duties of school boards); N.D. CENT. CODE § 15-51-17 (1979) (repealed 1999) (specifically addressing the Fargo Board of Education).

290. N.D. CENT. CODE § 15-39.1-14 (1993 & Supp. 1999).

291. *Selland*, 285 N.W.2d at 574; *see also* N.D. CENT. CODE § 1-02-07 (1987) (stating that general statutes are to be controlled by those which are more specific on a particular issue).

292. *Selland*, 285 N.W.2d at 574-75; *see also* N.D. CENT. CODE § 15-47-38.

293. N.D. CENT. CODE § 34-01-17 (1987).

294. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000).

295. *See* Anderson v. Meyer Broadcasting Co., 2001 ND 125, ¶ 16, 630 N.W.2d 46, 51.

Meyer Broadcasting Co.,[296] the North Dakota Supreme Court commented on an age discrimination claim brought under the state human rights act in the context of a summary judgment affirmation.[297] The court noted that in order to prevail, the employee must establish a prima facie case with four elements.[298] Those elements are (1) that he or she was a member of a protected class,[299] (2) that the reason for the dismissal was not based on unsatisfactory performance of duties, (3) that the dismissal was adverse, and (4) that persons not in the protected class were treated better than those in the class.[300] This last element is becoming more and more difficult to prove as the overall workforce in the United States grows older and those workers in the "protected" class are beginning to outnumber those who are not.[301]

VI. CONCLUSION

Kimel is ultimately an exercise in limiting the powers of Congress to abrogate state sovereign immunity. When Congress enacted the ADEA, it inadvertently directed the courts to use a heightened level of scrutiny when assessing age discrimination claims.[302] It also assumed that it had the power to subject the states to suit under the ADEA if they failed to meet the heightened level of scrutiny.[303] However, because the sovereign immunity of the states is a fundamental principle embodied in the Constitution, the Court in *Kimel* showed that Congress must act carefully when seeking to abrogate that immunity, even when attempting to remedy unconstitutional conduct throughout the country.[304]

Tracy Laaveg

---

296. 2001 ND 125, 630 N.W.2d 46.

297. *Id.* ¶ 16, 630 N.W.2d at 51.

298. *Id.* ¶ 18.

299. *Id.* ¶ 17 (citing N.D. CENT. CODE § 14-02.4-02(1), which defines the limits for age discrimination as age forty and above).

300. *Id.* ¶ 18.

301. Howard N. Fullerton, Jr., *Labor Force Projections to 2008: Steady Growth and Changing Composition*, MONTHLY LABOR REVIEW, Nov. 1999, at 31 tbl. 8. This article, provided by the U.S. Bureau of Labor Statistics, shows that in 1998, 46.5% of the working population was aged forty and older. *Id.* The report projects that by 2008, the percentage will increase to 51.7%. *Id.*

302. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000).

303. *Id.* at 89.

304. *Id.* at 90-91.