Age Discrimination

J. DANIEL KIMEL, JR., ET AL. v. FLORIDA BOARD OF REGENTS, ET AL.

Nos. 98-791 and 98-796

SUPREME COURT OF THE UNITED STATES

528 U.S. 62; 120 S. Ct. 631; 145 L. Ed. 2d 522; 2000 U.S. LEXIS 498; 81 Fair Empl. Prac. Cas. (BNA) 970; 76 Empl. Prac. Dec. (CCH) P46,190; 78 Empl. Prac. Dec. (CCH) P46,190; 187 A.L.R. Fed. 543; 2000 Cal. Daily Op. Service 229; 2000 Daily Journal DAR 293; 1999 Colo. J. C.A.R. 190; 13 Fla. L. Weekly Fed. S 25; 23 Employee Benefits Cas. (BNA) 2945

October 13, 1999, Argued
January 11, 2000, Decided *

*** Together with No. 98-796, United States v. Florida Board of Regents et al., also on certiorari to the same court.**

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PRIOR HISTORY: ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

DISPOSITION: *139 F.3d 1426,* affirmed.

PROCEDURAL POSTURE: Regarding petitioner employees' actions alleging that respondent state employers discriminated against petitioners on the basis of age, petitioners filed petitions for writs of certiorari to the United States Court of Appeals for the 11th Circuit, which determined that the Age Discrimination in Employment Act of 1967, *29 U.S.C.S. § 621* et seq., did not abrogate the States' U.S. Const. amend. XI immunity.

OVERVIEW: Petitioner employees filed separate suits under the Age Discrimination in Employment Act of 1967 (ADEA), *29 U.S.C.S. § 621* et seq., alleging that respondent state employers discriminated against petitioners on the basis of age. Federal district courts made determinations as to respondents' motions to dismiss on the basis of U.S. Const. amend. XI immunity. The federal appellate court consolidated the appeals from the district courts and ruled in favor of respondents. The court affirmed the judgment. The court determined that the ADEA contained a clear statement of Congress' intent to abrogate the States' immunity. However, in light of the indiscriminate scope of the ADEA's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, the ADEA was not a valid exercise of Congress' power under U.S. Const. amend. XIV, § 5. The ADEA's purported abrogation of the States' sovereign immunity was accordingly invalid.

OUTCOME: Judgment was affirmed because federal age discrimination statute did not validly abrogate the States' immunity.

COUNSEL:

Jeremiah A. Collins argued the cause for petitioners in No. 98-791, and respondents under this Court's Rule § 12.6 in support of petitioner in No. 98-796. With him on the brief were Robert H. Chanin, Laurence Gold, David Arendall, Thomas W. Brooks, and Gerald J. Houlihan.

Barbara D. Underwood argued the cause for the United States, as petitioner in No. 98-796, and respondent under this Court's Rule § 12.6 in support of petitioners in No. 98-791. With her on the briefs were Solicitor General Waxman, Acting Assistant Attorney General Lee, Patricia A. Millett, Jessica Dunsay Silver, and Seth M. Galanter.

Jeffrey S. Sutton argued the cause for state respondents in both cases. With him on the brief were Gregory G. Katsas, Robert A. Butterworth, Attorney General of Florida, Louis F. Hubener and Amelia Beisner, Assistant Attorneys General, Bill Pryor, Attorney General of Alabama, and Alice Ann Byrne and Jack Park, Assistant Attorneys General. *

* Laurie A. McCann and Melvin Radowitz filed a brief for the American Association of Retired Persons et al. as amici curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the State of Ohio et al. by Betty D. Montgomery, Attorney General of Ohio, Edward B. Foley, State Solicitor, Stephen P. Carney, Associate Solicitor, and Matthew J. Lampke, Assistant Solicitor, Paul G. Summers, Attorney General of Tennessee, and Michael E. Moore, Solicitor General, and by the Attorneys General for their respective States as follows: Richard Blumenthal of Connecticut, M. Jane Brady of Delaware, Thurbert E. Baker of Georgia, Earl I. Anzai of Hawaii, Alan G. Lance of Idaho, Carla J. Stoval of Kansas, Richard P. Ieyoub of Louisiana, Andrew Ketterer of Maine, Jennifer M. Granholm of Michigan, Mike Moore of Mississippi, Joseph P. Mazurek of Montana, Don Stenberg of Nebraska, Frankie Sue Del Papa of Nevada, John J. Farmer, Jr., of New Jersey, W. A. Drew Edmondson of Oklahoma, Hardy Myers of Oregon, D. Michael Fisher of Pennsylvania, Sheldon Whitehouse of Rhode Island, Jan Graham of Utah, William H. Sorrell of Vermont, and Mark L. Earley of Virginia; for the Pennsylvania House of Represenetatives, Republican Caucus, by David R. Fine and John P. Krill, Jr.; and for the Pacific Legal Foundation by Robin L. Rivett and Frank A. Shepherd.

Briefs of amici curiae were filed for the Coalition for Local Sovereignty by Kenneth B. Clark; and for the English Language Advocates by Barnaby W. Zall.

JUDGES: O'CONNOR, J., delivered the opinion of the Court, Parts I, II, and IV of which were joined by REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., and Part III of which was joined by REHNQUIST, C. J., and STEVENS, SCALIA, SOUTER, GINSBURG, and BREYER, JJ. STEVENS, J., filed an opinion dissenting in part and concurring in part, in which SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which KENNEDY, J., joined.

OPINION BY: O'CONNOR

OPINION: [*66] [***531] [**636] *JUSTICE O'CONNOR* delivered the opinion of the Court.

The Age Discrimination in Employment Act of 1967 (ADEA or Act), 81 Stat. 602, as amended, *29 U.S.C. § 621 et seq.* (1994 ed. and Supp. III), makes it unlawful for an employer, including a State, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." *29 U.S.C. § 623*(a)(1). In these cases, three sets of plaintiffs filed suit under the Act, seeking money damages for their state employers' alleged discrimination [**637] on the basis of age. In each case, the state employer moved to dismiss the suit on the basis of its Eleventh Amendment immunity. The District Court in one case granted the motion to dismiss, while in each of the remaining cases the District Court denied the motion. Appeals in the three cases were consolidated before the Court of Appeals for the Eleventh Circuit, which held that the ADEA does not validly abrogate the States' Eleventh Amendment immunity. In these cases, we are asked to consider whether the ADEA contains a clear [*67] statement of Congress' intent to abrogate the States' Eleventh Amendment immunity and, if so, whether the ADEA is a proper exercise of Congress' constitutional authority.

We conclude that the ADEA does contain a clear statement of Congress' intent to abrogate the States' immunity, but that the abrogation exceeded Congress' authority under § 5 of the Fourteenth Amendment.

I

A

The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *29 U.S.C. § 623*(a)(1). The Act also provides several exceptions to this broad prohibition. For example, an employer may rely on age where it "is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." § 623(f)(1). The Act also permits an employer to engage [***532] in conduct otherwise prohibited by § 623(a)(1) if the employer's action "is based on reasonable factors other than age," § 623(f)(1), or if the employer "discharges or otherwise disciplines an individual for good cause," § 623(f)(3). Although the Act's prohibitions originally applied only to individuals "at least forty years of age but less than sixty-five years of age," 81 Stat. 607, *29 U.S.C. § 631* (1964 ed., Supp. III), Congress subsequently removed the upper age limit, and the Act now covers individuals age 40 and over, *29 U.S.C. § 631*(a). Any person aggrieved by an employer's violation of the Act "may bring a civil action in any court of competent jurisdiction" for legal or equitable relief. § 626(c)(1). Section 626(b)

also permits aggrieved employees to enforce the Act through certain provisions of the Fair Labor Standards Act of 1938 (FLSA), and the ADEA [*68] specifically incorporates § 16(b) of the FLSA, *29 U.S.C. § 216*(b).

Since its enactment, the ADEA's scope of coverage has been expanded by amendment. Of particular importance to these cases is the Act's treatment of state employers and employees. When first passed in 1967, the ADEA applied only to private employers. See *29 U.S.C. § 630*(b) (1964 ed., Supp. III) (defining term "employer" to exclude "the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof "). In 1974, in a statute consisting primarily of amendments to the FLSA, Congress extended application of the ADEA's substantive requirements to the States. Fair Labor Standards Amendments of 1974 (1974 Act), § 28, 88 Stat. 74. Congress accomplished that expansion in scope by a simple amendment to the definition of "employer" contained in *29 U.S.C. § 630*(b): "The term [employer] also means . . . a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State . . . ." Congress also amended the ADEA's definition of "employee," still defining the term to mean "an individual employed by any employer," but excluding elected officials and appointed policymakers at the state and local levels. § 630(f). In the same 1974 Act, Congress amended *29 U.S.C. § 216*(b), the FLSA enforcement provision incorporated by reference into the ADEA. 88 Stat. 61. Section 216(b) now permits an individual to bring a civil [**638] action "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." Section 203(x) defines "public agency" to include "the Government of a State or political subdivision thereof," and "any agency of . . . a State, or a political subdivision of a State." Finally, in the 1974 Act, Congress added a provision prohibiting age discrimination generally in employment at the Federal Government. 88 Stat. 74, *29 U.S.C. § 633a* (1994 ed. and Supp. III). Under the current ADEA, [*69] mandatory age limits for law enforcement officers and firefighters -- at federal, state, and local levels -- are exempted from the statute's coverage. *5 U.S.C. §§ 3307*(d), (e); *29 U.S.C. § 623*(j) (1994 ed., Supp. III).

B

In December 1994, Roderick [***533] MacPherson and Marvin Narz, ages 57 and 58 at the time, filed suit under the ADEA against their employer, the University of Montevallo, in the United States District Court for the Northern District of Alabama. In their complaint, they alleged that the university had discriminated against them on the basis of their age, that it had retaliated against them for filing discrimination charges with the Equal Employment Opportunity Commission (EEOC), and that its College of Business, at which they were associate professors, employed an evaluation system that had a disparate impact on older faculty members. MacPherson and Narz sought declaratory and injunctive relief, backpay, promotions to full professor, and compensatory and punitive damages. App. 21-25. The University of Montevallo moved to dismiss the suit for lack of subject matter jurisdiction, contending it was barred by the Eleventh Amendment. No party disputes the District Court's holding that the University is an instrumentality of the State of Alabama. On September 9, 1996, the District Court granted the University's motion. *MacPherson v. University of Montevallo, 938 F. Supp. 785, 1996 U.S. Dist. LEXIS 13357* (ND Ala., Sept. 9, 1996), App. to Pet. for Cert. in No. 98-796, pp. 63a-71a. The court determined that, although the ADEA contains a clear statement of Congress' intent to abrogate the States' Eleventh Amendment immunity, Congress did not enact or extend the ADEA under its Fourteenth Amendment § 5 enforcement power. *Id.*, at 67a, 69a-70a. The District Court therefore held that the ADEA did not abrogate the States' Eleventh Amendment immunity. *Id.*, at 71a. [*70]

In April 1995, a group of current and former faculty and librarians of Florida State University, including J. Daniel Kimel, Jr., the named petitioner in one of today's cases, filed suit against the Florida Board of Regents in the United States District Court for the Northern District of Florida. Complaint and Demand for Jury Trial in No. 95-CV-40194, 1 Record, Doc. No. 2. The complaint was subsequently amended to add as plaintiffs current and former faculty and librarians of Florida International University. App. 41. The plaintiffs, all over age 40, alleged that the Florida Board of Regents refused to require the two state universities to allocate funds to provide previously agreed upon market adjustments to the salaries of eligible university employees. The plaintiffs contended that the failure to allocate the funds violated both the ADEA and the Florida Civil Rights Act of 1992, *Fla. Stat. § 760.01 et seq.* (1997 and Supp. 1998), because it had a disparate impact on the base pay of employees with a longer record of service, most of whom were older employees. App. 42-45. The plaintiffs sought backpay, liquidated damages, and permanent salary adjustments as relief. *Id.*, at 46. The Florida Board of Regents moved to dismiss the suit on the grounds of Eleventh Amendment immunity. On May 17, 1996, the District Court denied the motion, holding that Congress expressed its intent to abrogate the States' Eleventh Amendment immunity in the ADEA, and that the ADEA is a proper exercise of congressional authority under the Fourteenth Amendment. [**639] No. TCA 95-40194-MMP (ND Fla., May 17, 1996), App. to Pet. for Cert. in No. 98-796, pp. 57a-62a.

In May 1996, Wellington Dickson [***534] filed suit against his employer, the Florida Department of

Corrections, in the United States District Court for the Northern District of Florida. Dickson alleged that the state employer failed to promote him because of his age and because he had filed grievances with respect to the alleged acts of age discrimination. Dickson sought injunctive relief, backpay, and compensatory [*71] and punitive damages. App. 83-109. The Florida Department of Corrections moved to dismiss the suit on the grounds that it was barred by the Eleventh Amendment. The District Court denied that motion on November 5, 1996, holding that Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity in the ADEA, and that Congress had authority to do so under § 5 of the Fourteenth Amendment. *Dickson* v. *Florida Dept. of Corrections*, No. 5:9cv207-RH (ND Fla., Nov. 5, 1996), App. to Pet. for Cert. in No. 98-796, pp. 72a-76a.

The plaintiffs in the *MacPherson* case, and the state defendants in the *Kimel* and *Dickson* cases, appealed to the Court of Appeals for the Eleventh Circuit. The United States also intervened in all three cases to defend the ADEA's abrogation of the States' Eleventh Amendment immunity. The Court of Appeals consolidated the appeals and, in a divided panel opinion, held that the ADEA does not abrogate the States' Eleventh Amendment immunity. *139 F.3d 1426, 1433 (1998).*

* * *

We granted certiorari, *525 U.S. 1121 (1999),* to resolve a conflict among the Federal Courts of Appeals on the question whether the ADEA validly abrogates the States' Eleventh Amendment immunity.

* * *

II

The Eleventh Amendment states:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Although today's cases concern suits brought by citizens against their own States, this Court has long "'understood the Eleventh Amendment to stand not so much for what it [*73] says, but for the presupposition . . . which it confirms.'" *Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996)* (quoting *Blatchford v. Native Village of Noatak, 501 U.S. 775, 779, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991)).* Accordingly, for over a century now, we have made clear that the Constitution does not provide for federal jurisdiction over suits against nonconsenting States. *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 669-670, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999)* (slip op., at 2-3); *Seminole Tribe, supra, at 54;* see *Hans v. Louisiana, 134 U.S. 1, 15, 33 L. Ed. 842, 10 S. Ct. 504 (1890).* Petitioners nevertheless contend that the States of Alabama and Florida must defend the present suits on the merits because Congress abrogated their Eleventh Amendment immunity in the ADEA. To determine whether petitioners are correct, we must resolve two predicate questions: first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority. *Seminole Tribe, supra, at 55.*

III

To determine whether a federal statute properly subjects States to suits by individuals, we apply a "simple but stringent test: 'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'" *Dellmuth v. Muth, 491 U.S. 223, 228, 105 L. Ed. 2d 181, 109 S. Ct. 2397 (1989)* (quoting *Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)).* We agree with petitioners that the ADEA satisfies that test. The ADEA states that its provisions "shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section." *29 U.S.C. § 626*(b). Section 216(b), in turn, clearly provides for suits by individuals against States. That provision authorizes employees to maintain actions for backpay "against any employer (including a [***536] public agency) [*74] in any Federal or State court of competent jurisdiction . . . ." Any doubt concerning the identity of the "public agency" defendant named in § 216(b) is dispelled by looking to § 203(x), which defines the term to include "the government of a State or political subdivision thereof," and "any agency of . . . a State, or a political subdivision of a State." Read as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees.

* * * *

IV

A

This is not the first time we have considered the constitutional validity of the 1974 [**643] extension of the ADEA to state and local governments. In *EEOC v. Wyoming, 460 U.S. 226, 243, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983),* we held that the ADEA constitutes a valid

exercise of Congress' power "to regulate Commerce . . . among the several States," Art. I, § 8, cl. 3, and that the Act did not transgress any external restraints imposed on the commerce power by the Tenth Amendment. Because we found the ADEA valid under Congress' Commerce Clause power, we concluded that it was unnecessary to determine whether the Act also could be supported by Congress' power under § 5 of the Fourteenth Amendment. *Wyoming, 460 U.S. at 243.* But see *id., at 259-263* [***539] (Burger, C. J., dissenting). Resolution of today's cases requires us to decide that question.

In *Seminole Tribe*, we held that Congress lacks power under Article I to abrogate the States' sovereign immunity. *517 U.S. at 72-73.* "Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." *517 U.S. at 72.* Last Term, in a series of three decisions, we reaffirmed that central holding of *Seminole Tribe*. See *College Savings Bank, 527 U.S. at 672; Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank,* [*79] *527 U.S. 627, 636, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999)* (slip op., at 6-7); *Alden v. Maine, 527 U.S. 706, 712, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999)* (slip op., at 1-2). . . . Under our firmly established precedent then, if the ADEA rests solely on Congress' Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers.

JUSTICE STEVENS disputes that well-established precedent again. . . . In *Alden*, we explained that, "although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design." *527 U.S. at 733* (slip op., at 23-24). For purposes of today's decision, it is sufficient to note that we have on more than one occasion explained the substantial reasons for adhering to that constitutional design. See *id., at 712-754* (slip op., at 2-45); *College Savings Bank*, *supra*, at 669-670, 687-691; *Seminole Tribe*, *supra*, at 54-55, 59-73; *Pennsylvania v. Union Gas Co., 491 U.S. 1, 30-42, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989)* (SCALIA, J., concurring in part and dissenting in part). Indeed, the present dissenters' refusal to accept the validity and natural import of decisions like *Hans*, rendered over a full century ago by this Court, makes it [*80] difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution. Compare *Hans, 134 U.S. at* [***540] *10, 14-16,* with *post*, at 5-6. Today we adhere to our holding in *Seminole Tribe:* [**644] Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hands of private individuals.

Section 5 of the Fourteenth Amendment, however, does grant Congress the authority to abrogate the States' sovereign immunity. In *Fitzpatrick v. Bitzer, 427 U.S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976),* we recognized that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." *Id., at 456* (citation omitted). Since our decision in *Fitzpatrick*, we have reaffirmed the validity of that congressional power on numerous occasions. See, *e.g.*, *College Savings Bank, supra, at 670; Florida Prepaid, supra, at 636-637; Alden, supra, at 756* (slip op., at 46-48); *Seminole Tribe, supra, at 59.* Accordingly, the private petitioners in these cases may maintain their ADEA suits against the States of Alabama and Florida if, and only if, the ADEA is appropriate legislation under § 5.

B

The Fourteenth Amendment provides, in relevant 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."

As we recognized most recently in *City of Boerne v. Flores, 521 U.S. 507, 517, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997),* § 5 is an affirmative grant of power to Congress. "It is for Congress in the first instance to [*81] 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." *Id., at 536* (quoting *Katzenbach v. Morgan, 384 U.S. 641, 651, 16 L. Ed. 2d 828, 86 S. Ct. 1717 (1966)).* Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress' power "to enforce" the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which

is not itself forbidden by the *Amendment's text. 521 U.S. at 518.*

Nevertheless, we have also recognized that the same language that serves as the basis for the affirmative grant of congressional power also serves to limit that power. For example, Congress cannot "decree the *substance* of the Fourteenth Amendment's restrictions on the States. . . . It has been given the power 'to enforce,' not the power to [***541] determine *what constitutes* a constitutional violation." *521 U.S. at 519* (emphases added). The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch. *Id., at 536.* In *City of Boerne*, we noted that the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult. *521 U.S. at 519-520.* The line between the two is a fine one. Accordingly, recognizing that "Congress must have wide latitude in determining where [that line] lies," we held that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *521 U.S. at 520.*

In *City of Boerne*, we applied that "congruence and proportionality" test and held that the Religious Freedom Restoration [**645] Act of 1993 (RFRA) was not appropriate legislation under § 5. We first noted that the legislative record contained very little evidence of the unconstitutional conduct [*82] purportedly targeted by RFRA's substantive provisions. Rather, Congress had uncovered only "anecdotal evidence" that, standing alone, did not reveal a "widespread pattern of religious discrimination in this country." *521 U.S. at 531.* Second, we found that RFRA 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." *521 U.S. at 532.*

Last Term, we again had occasion to apply the "congruence and proportionality" test. In *Florida Prepaid*, we considered the validity of the Eleventh Amendment abrogation provision in the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act). We held that the statute, which subjected States to patent infringement suits, was not appropriate legislation under § 5 of the Fourteenth Amendment. The Patent Remedy Act failed to meet our congruence and proportionality test first because "Congress identified no pattern of patent infringement *by the States*, let alone a pattern of constitutional violations." *527 U.S. at 640* (emphasis added). Moreover, because it was unlikely that many of the acts of patent infringement affected by the statute had any likelihood of being unconstitutional, we concluded that the scope of the Act was out of proportion to its supposed remedial or preventive objectives. *Id., at 647.* Instead, "the statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime." *Id., at 647-648.* While we acknowledged that such aims may be proper congressional concerns under Article I, we found them insufficient to support an abrogation of the States' Eleventh Amendment immunity after *Seminole Tribe*. *Florida Prepaid, supra, at 648.* [***542]

C

Applying the same "congruence and proportionality" test in these cases, we conclude that the ADEA is not "appropriate [*83] legislation" under § 5 of the Fourteenth Amendment. Initially, the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act. We have considered claims of unconstitutional age discrimination under the Equal Protection Clause three times. See *Gregory v. Ashcroft, 501 U.S. 452, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991); Vance v. Bradley, 440 U.S. 93, 59 L. Ed. 2d 171, 99 S. Ct. 939 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976) (per curiam).* In all three cases, we held that the age classifications at issue did not violate the Equal Protection Clause. See *Gregory, supra, at 473; Bradley, 440 U.S. at 102-103, n. 20, 108-112; Murgia, supra, at 317.* 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." *Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985).* Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a '"history of purposeful unequal treatment.'" *Murgia*, *supra*, at 313 (quoting *San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973)).* Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it. *427 U.S. at 313-314.* Accordingly, as we recognized in *Murgia*, *Bradley*, [**646] and *Gregory*, age is not a suspect classification under the Equal Protection Clause. See, *e.g.*, *Gregory, 501 U.S. at 470; Bradley, 440 U.S. at 97; Murgia, 427 U.S. at 313-314.*

States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to

match age distinctions and the legitimate interests they serve with razorlike precision. As [*84] we have explained, when conducting rational basis review "we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational." *Bradley, 440 U.S. at 97.* In contrast, when a State discriminates on the basis of race or gender, we require a tighter fit between the discriminatory means and the legitimate ends they serve. See, *e.g.*, *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995)* ("[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests"); *Mississippi* [***543] *Univ. for Women v. Hogan, 458 U.S. 718, 724, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982)* (holding that gender classifications are constitutional only if they serve "'important governmental objectives and . . . the discriminatory means employed' are 'substantially related to the achievement of those objectives'" (citation omitted)). Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant. Where rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" *Murgia, supra, at 316* (quoting *Dandridge v. Williams, 397 U.S. 471, 485, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970)).* Finally, because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the "facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Bradley, 440 U.S. at 111;* see *Gregory, supra, at 473.*

Our decisions in *Murgia*, *Bradley*, and *Gregory* illustrate these principles. In all three cases, we held that the States' reliance on broad generalizations with respect to age did [*85] not violate the Equal Protection Clause. In *Murgia*, we upheld against an equal protection challenge a Massachusetts statute requiring state police officers to retire at age 50. The State justified the provision on the ground that the age classification assured the State of the physical preparedness of its officers. *427 U.S. at 314-315.* Although we acknowledged that Officer Murgia himself was in excellent physical health and could still perform the duties of a state police officer, we found that the statute clearly met the requirements of the *Equal Protection Clause. 427 U.S. at 311, 314-317.* "That the State chooses not to determine fitness more precisely through individualized testing after age 50 [does not prove] that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation." *427 U.S. at 316.* In *Bradley*, we considered an equal protection challenge to a federal statute requiring Foreign Service officers to retire at age 60. We explained: "If increasing age brings with it increasing susceptibility to physical difficulties, . . . the fact that individual Foreign Service employees may be able to perform past age 60 does not invalidate [the statute] any more than did the [**647] similar truth undercut compulsory retirement at age 50 for uniformed state police in *Murgia*." *440 U.S. at 108.* Finally, in *Gregory*, we upheld a provision of the Missouri Constitution that required judges to retire at age 70. Noting that the Missouri provision was based on a generalization about the effect of old age on the ability of individuals to serve as judges, we acknowledged that "it is far from true that all judges suffer significant deterioration in performance at age 70," "it is probably not true that most do," and "it may not be true at all." *501 U.S. at 473.* [***544] Nevertheless, because Missouri's age classification was subject only to rational basis review, we held that the State's reliance on such imperfect generalizations was entirely proper under the Equal Protection Clause. *Ibid.* These decisions thus demonstrate that the constitutionality of state classifications on the basis of age cannot be determined [*86] on a person-by-person basis. Our Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it "is probably not true" that those reasons are valid in the majority of cases.

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." *City of Boerne, 521 U.S. at 532.* The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard. The ADEA makes unlawful, in the employment context, all "discrimination against any individual . . . because of such individual's age." *29 U.S.C. § 623*(a)(1). Petitioners, relying on the Act's exceptions, dispute the extent to which the ADEA erects protections beyond the Constitution's requirements. They contend that the Act's prohibition, considered together with its exceptions, applies only to arbitrary age discrimination, which in the majority of cases corresponds to conduct that violates the Equal Protection Clause. We disagree.

Petitioners stake their claim on § 623(f)(1). That section permits employers to rely on age when it "is a

bona fide occupational qualification reasonably necessary to the normal operation of the particular business." Petitioners' reliance on the "bona fide occupational qualification" (BFOQ) defense is misplaced. Our interpretation of § 623(f)(1) in *Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 86 L. Ed. 2d 321, 105 S. Ct. 2743 (1985),* conclusively demonstrates that the defense is a far cry from the rational basis standard we apply to age discrimination under the Equal Protection Clause. The petitioner in that case maintained that, pursuant to the BFOQ defense, employers must be permitted to rely on age when such reliance [*87] has a "rational basis in fact." *Id., at 417.* We rejected that argument, explaining that "the BFOQ standard adopted in the statute is one of 'reasonable necessity,' not reasonableness," *id., at 419,* and that the ADEA standard and the rational basis test are "significantly different," *id., at 421.*

* * *

Petitioners also place some reliance on the next clause in § 623(f)(1), which permits employers to engage in conduct otherwise prohibited by the Act "where the differentiation is based on reasonable factors other than age." This exception confirms, however, rather than disproves, the conclusion that the ADEA's protection extends beyond the requirements of the Equal Protection Clause. The exception simply makes clear that "the employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly." . . .

That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. Our task is to determine whether the ADEA is in fact just such an appropriate remedy or, instead, [***546] merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination. One means by which we have made such a determination in the past is by examining the legislative record containing the reasons for Congress' action. See, *e.g.*, *Florida* [*89] *Prepaid, 527 U.S. at 640-647* (slip op., at 11-18); *City of Boerne, 521 U.S. at 530-531.* "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." *521 U.S. at 530* (citing *South Carolina v. Katzenbach, 383 U.S. 301, 308, 15 L. Ed. 2d 769, 86 S. Ct. 803 (1966)).*

Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential [**649] problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports. . . .

[*90]

Petitioners place additional reliance on Congress' consideration of a 1966 report prepared by the State of California on age discrimination in its public agencies. . . . Like the assorted sentences petitioners cobble together from a decade's worth of congressional reports and floor debates, the California study does not indicate that the State had engaged in any *unconstitutional* age discrimination. In fact, the report stated that the majority of the age limits uncovered in the state survey applied in the law enforcement and firefighting occupations. [***547] Hearings 168. Those age limits were not only permitted under California law at the time, see *ibid.*, but are also currently permitted under the ADEA. See *5 U.S.C. § § 3307*(d), (e); *29 U.S.C. § 623* (j) (1994 ed., Supp. III). Even if the California report had uncovered a pattern of unconstitutional age discrimination in the State's public agencies at the time, it nevertheless would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union. The report simply does not constitute "evidence that [unconstitutional age discrimination] had become a problem of national import." *Florida Prepaid*, *supra*, at 641.

Finally, the United States' argument that Congress found substantial age discrimination in the private sector, see Brief for United States 38, is beside the point. Congress made no such findings with respect to the States. . . .

A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age. Although that lack of support is not determinative of the § 5 inquiry, *id., at 646; City of Boerne, 521 U.S. at 531-532,* [**650] Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field. In light of the indiscriminate scope of the Act's substantive requirements, and the lack of evidence of widespread and unconstitutional age discrimination by the States, we hold that the ADEA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment. The ADEA's purported

abrogation of the States' sovereign immunity is accordingly invalid.

D

Our decision today does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. n1 [***548] Those avenues [*92] of relief remain available today, just as they were before this decision.

Because the ADEA does not validly abrogate the States' sovereign immunity, however, the present suits must be dismissed. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

CONCUR BY: STEVENS (In Part); THOMAS (In Part)

DISSENT BY: STEVENS (In Part); THOMAS (In Part)

DISSENT:

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting in part and concurring in part.

Congress' power to regulate the American economy includes the power to regulate both the public and the private [*93] sectors of the labor market. Federal rules outlawing discrimination in the workplace, like the regulation of wages and hours or health and safety standards, may be enforced against public as well as private [**651] employers. 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. See *Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 165-168, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996)* (SOUTER, J., dissenting); *EEOC v. Wyoming, 460 U.S. 226, 247-248, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983)* (STEVENS, J., concurring).

The application of the ancient judge-made doctrine of sovereign immunity in cases like these is supposedly justified as a freestanding limit on congressional authority, a limit necessary to protect States'"dignity and respect" from impairment by the National Government. The Framers did not, however, select the Judicial Branch as the constitutional guardian of those state interests. Rather, the Framers designed important structural safeguards to ensure that when the National Government enacted substantive law (and provided for its enforcement), the normal operation of the legislative process [***549] itself would adequately defend state interests from undue infringement. See generally 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 (1954).*

It is the Framers' compromise giving each State equal representation in the Senate that provides the principal structural protection for the sovereignty of the several States. The composition of the Senate was originally determined by the legislatures of the States, which would guarantee that their interests could not be ignored by Congress. n1 [*94] The Framers also directed that the House be composed of Representatives selected by voters in the several States, the consequence of which is that "the states are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, the separate geographical determinants of national as well as local politics." *Id., at 546.*

n1 The Federalist No. 45, p. 291 (C. Rossiter ed. 1961 (J. Madison)) ("The State governments may be regarded as constituent and essential parts of the federal government . . . . The Senate will be elected absolutely and exclusively by the State legislatures . . . . Thus, [it] will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them").

Whenever Congress passes a statute, it does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of the existing state norms that Congress seeks to supplement or supplant. n2 The persuasiveness of any justification for overcoming legislative inertia and taking national action, either creating new federal obligations or providing for their enforcement, must necessarily be judged in reference to state interests, as expressed in existing state laws. The precise scope of federal laws, of course, can be shaped with nuanced attention to state interests. The Congress also has the authority to grant or withhold jurisdiction in lower federal courts. The burden of being haled into a federal forum for the enforcement of federal law, thus, can be expanded or contracted as Congress deems proper, which decision, like all other legislative acts, necessarily contemplates state interests.

Thus, Congress can use its broad range of flexible legislative tools to approach the delicate issue of how to balance local and national interests in the [*95] most responsive and careful manner. n3 It is [**652] quite evident, therefore, that the Framers did not view [***550] this Court as the ultimate guardian of the States' interest in protecting their own sovereignty from impairment by "burdensome" federal laws. n4

n2 When Congress expanded the ADEA in 1974 to apply to public employers, all 50 States had some form of age discrimination law, but 24 of them did not extend their own laws to public employers. See App. to Brief for Respondents 1a-25a.

[*96]

Federalism concerns do make it appropriate for Congress to speak clearly when it regulates state action. But when it does so, as it has in these cases, n5 we can safely presume that the burdens the statute imposes on the sovereignty of the several States were taken into account during the deliberative process leading to the enactment of the measure. Those burdens necessarily include the cost of defending against enforcement proceedings and paying whatever penalties might be incurred for violating the statute. In my judgment, the question whether those enforcement proceedings should be conducted exclusively by federal agencies, or may be brought by private parties as well, is a matter of policy for Congress to decide. In either event, once Congress has made its policy choice, 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. There is not a word in the text of the Constitution supporting the Court's conclusion that the judge-made doctrine of sovereign immunity limits Congress' power to authorize private parties, as well as federal agencies, to enforce federal law against the States. The importance of respecting the Framers' decision to assign the business of lawmaking to the Congress dictates firm resistance to the present majority's repeated substitution of its own views of federalism for those expressed in statutes enacted by the Congress and signed by the President.

n5 Because Congress has clearly expressed its intention to subject States to suits by private parties under the ADEA, I join Part III of the Opinion of the Court.

[*97]

The Eleventh Amendment simply does not support the Court's view. As has been stated before, the Amendment only places [**653] a textual limitation on the diversity jurisdiction of the federal courts. See *Atascadero State Hospital v. Scanlon, 473 U.S. 234, 286-289, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985)* (Brennan, J., dissenting). [***551] Because the Amendment is a part of the Constitution, I have never understood how its limitation on the diversity jurisdiction of federal courts defined in Article III could be "abrogated" by an Act of Congress. *Seminole Tribe, 517 U.S. at 93* (STEVENS, J., dissenting). Here, however, private petitioners did not invoke the federal courts' diversity jurisdiction; they are citizens of the same State as the defendants and they are asserting claims that arise under federal law. Thus, today's decision (relying as it does on *Seminole Tribe*) rests entirely on a novel judicial interpretation of the doctrine of sovereign immunity, n6 which the Court treats as though it were a constitutional precept. It is nevertheless clear to me that if Congress has the power to create the federal rights that these petitioners are asserting, it must also have the power to give the federal courts jurisdiction to remedy violations of those rights, even if it is necessary to "abrogate" the Court's "Eleventh Amendment" version of the common-law defense of sovereign immunity to do so. That is the essence of the Court's holding in *Pennsylvania v. Union Gas Co., 491 U.S. 1, 13-23, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989).*

I remain convinced that *Union Gas* was correctly decided and that the decision of five Justices in *Seminole Tribe* to overrule that case was profoundly misguided. Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so [*98] fundamentally inconsistent with the Framers' conception of the constitutional order that it has forsaken any claim to the usual deference or respect owed to decisions of this Court. *Stare decisis*, furthermore, has less force in the area of constitutional law. See, *e.g., Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-410, 76 L. Ed. 815, 52 S. Ct. 443 (1932)* (Brandeis, J., dissenting). And in this instance, it is but a hollow pretense for any State to seek refuge in *stare decisis*' protection of reliance interests. It cannot be credibly maintained that a State's ordering of its affairs with respect to potential liability under federal law requires adherence to *Seminole Tribe*, as that decision leaves open a State's liability upon enforcement of federal law by federal agencies. Nor can a State find solace in the *stare decisis* interest of promoting "the evenhanded . . . and consistent development of legal principles." *Payne v. Tennessee, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991).* That principle is perverted when invoked to rely on sovereign immunity as a defense to deliberate violations of settled federal law. Further, *Seminole Tribe*

is a case that will unquestionably have serious ramifications in future cases; indeed, it has already had such an effect, as in the Court's decision today and in the equally misguided opinion of *Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999).* Further still, the *Seminole Tribe* decision unnecessarily forces the Court [***552] to resolve vexing questions of constitutional law respecting Congress' § 5 authority. Finally, by its own repeated overruling of earlier precedent, the majority has itself discounted the importance of *stare decisis* in this area of the law. n7 The kind of judicial activism manifested in cases like *Seminole Tribe*, [**654] [*99] *Alden v. Maine, Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999),* and *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999),* represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.

Accordingly, I respectfully dissent.