To fully appreciate the stakes of the judicial battles over the scope of the § 5 power, it is important to have a basic understanding of state sovereign immunity. The Eleventh Amendment expressly prohibits some suits against states in federal court. The Supreme Court has interpreted the Amendment to reflect a much broader concept of sovereign immunity already implicit in the Constitution that goes well beyond the text of the amendment itself. *Alden v. Maine* (1999) (applying sovereign immunity principle to a claim under federal law brought in state-court lawsuit). State sovereign immunity does not prohibit suits against individual state officers, *Ex Parte Young* (1908), though in some circumstances such "officer suits" are limited by other legal barriers. But where Eleventh Amendment immunity applies, Congress cannot authorize a cause of action against the states unless it is acting pursuant to constitutional authority that specially conveys the power to eliminate—or "abrogate"—that immunity.

The answer to that question depends on which clause Congress is relying on. On one hand, the Court has held that Congress may not abrogate states' sovereign immunity if it is acting under the Commerce Clause. *Seminole Tribe of Florida v. Florida* (1996). On the other hand, Congress may abrogate sovereign immunity if it is acting under § 5 of the Fourteenth Amendment, which "sanctioned intrusions by Congress ... into the ... spheres of autonomy previously reserved to the States..." *Fitzpatrick v. Bitzer* (1976). That means that a federal civil rights statute's validity under the Commerce Clause is not independently sufficient to support a private right of action when the alleged violator is a state. Rather, insofar as the statute is said to authorize judicial action against the states, courts must determine whether it can be justified as an exercise of § 5 authority. The next two cases explore the interaction between these lines of doctrine—and the mechanics of defending a statute as an implementation of § 5—in greater detail.

Kimel v. Florida Board of Regents

Supreme Court of the United States, 2000.
528 U.S. 62.

Justice O'Connor delivered the opinion of the Court.

The Age Discrimination in Employment Act of 1967 (ADEA) .... makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual ... because of such individual's age." The Act also provides several exceptions to this broad prohibition[, and its protections extend only to people who are at least 40 years old.]...

[T]he 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 [of the Fourteenth Amendment]....

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.... Applying the [*City of Boerne v. Flores*] "congruence and proportionality" test in these cases, we conclude that the ADEA is not "appropriate 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. [The Court reviews precedents dealing with constitutional claims of age discrimination and concludes that] States may discriminate on the basis of age ... if the age classification in question is rationally related to a legitimate state interest.... 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....

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*. 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 Court concludes that this is so notwithstanding that the ADEA provides a "bona fide occupational qualification" (BFOQ) defense.] ...

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, 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....

Our examination of the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps

inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation. The evidence compiled by petitioners to demonstrate such attention by Congress to age discrimination by the States falls well short of the mark. That evidence consists almost entirely of isolated sentences clipped from floor debates and legislative reports....

Finally, the United States' argument that Congress found substantial age discrimination in the private sector is beside the point. Congress made no such findings with respect to the States. Although we also have doubts whether the findings Congress did make with respect to the private sector could be extrapolated to support a finding of *unconstitutional* age discrimination in the public sector, it is sufficient for these cases to note that Congress failed to identify a widespread pattern of age discrimination by the States....

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....

WORTH NOTING

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented from most of the Court's opinion. He continued to believe that *Seminole Tribe* had been decided incorrectly, and that the Eleventh Amendment posed no obstacle to the ability of Congress to give federal courts jurisdiction to remedy violations of statutory rights. He did, however, join a portion of the majority opinion not presented here, in which the Court concluded that Congress had intended to abrogate state sovereign immunity. Justice Thomas wrote a separate opinion dissenting from that portion of the majority opinion, but concurring in the rest of it. He was joined by Justice Kennedy.

Nevada Department of Human Resources v. Hibbs

Supreme Court of the United States, 2003.
538 U.S. 721.

Chief Justice Rehnquist delivered the opinion of the Court.

The Family and Medical Leave Act of 1993 (FMLA or Act) entitles eligible employees to take up to 12 work weeks of unpaid leave annually for any of several reasons, including the onset of a "serious health condition" in an employee's spouse, child, or parent. The Act creates a private right of action to seek both equitable relief and money damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction," should that employer "interfere with, restrain, or deny the exercise of" FMLA rights. We hold that employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act....

In enacting the FMLA [remedy against the states], Congress relied on ... its power under § 5 of the Fourteenth Amendment to enforce that Amendment's guarantees.... Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional.... [In particular,] Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.... We distinguish appropriate prophylactic legislation from "substantive redefinition of the Fourteenth Amendment right at issue" by applying the test set forth in *City of Boerne*: Valid § 5 legislation must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,"

The FMLA aims to protect the right to be free from gender-based discrimination in the workplace. We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny. See, *e.g.*, *Craig v. Boren* (1976). For a gender-based classification to withstand such scrutiny, it must "serv[e] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives." *United States v. Virginia* (1996). The State's justification for such a classification "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Ibid.* We now

inquire whether Congress had evidence of a pattern of constitutional violations on the part of the States in this area....

WORTH NOTING

The Court reviewed the long "history of the many state laws limiting women's employment opportunities," and noted that state gender discrimination "did not cease" with the 1964 Civil Rights Act.

According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States' gender discrimination in this area. The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here, ... the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic Section 5 legislation.

As the FMLA's legislative record reflects, a 1990 Bureau of Labor Statistics (BLS) survey stated that 37 percent of surveyed private-sector employees were covered by maternity leave policies, while only 18 percent were covered by paternity leave policies. The corresponding numbers from a similar BLS survey the previous year were 33 percent and 16 percent, respectively. While these data show an increase in the percentage of employees eligible for such leave, they also show a widening of the gender gap during the same period. Thus, stereotype-based beliefs about the allocation of family duties remained firmly rooted, and employers' reliance on them in establishing discriminatory leave policies remained widespread.[1]

Congress also heard testimony that "[p]arental leave for fathers ... is rare. Even ... [w]here child-care leave policies do exist, men, *both in the public and private sectors,* receive notoriously discriminatory treatment in their requests for such leave." Joint Hearing (Washington Council of Lawyers) (emphasis added). Many States offered women extended "maternity" leave that far exceeded the typical 4- to 8-week period of physical disability due to pregnancy and childbirth, but very few States granted men a parallel benefit: Fifteen States provided women up to one year of extended maternity leave, while only four provided men with the same. This

[1] While this and other material described leave policies in the private sector, a 50-state survey also before Congress demonstrated that "[t]he proportion and construction of leave policies available to public sector employees differs little from those offered private sector employees."

and other differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work.

Finally, Congress had evidence that, even where state laws and policies were not facially discriminatory, they were applied in discriminatory ways. It was aware of the "serious problems with the discretionary nature of family leave," because when "the authority to grant leave and to arrange the length of that leave rests with individual supervisors," it leaves "employees open to discretionary and possibly unequal treatment." H. R. Rep. No. 103-8 (1993). Testimony supported that conclusion, explaining that "[t]he lack of uniform parental and medical leave policies in the work place has created an environment where [sex] discrimination is rampant." 1987 Senate Labor Hearings (testimony of Peggy Montes, Mayor's Commission on Women's Affairs, City of Chicago)....

In spite of all of the above evidence, Justice Kennedy argues in dissent that Congress' passage of the FMLA was unnecessary because "the States appear to have been ahead of Congress in providing gender-neutral family leave benefits," and points to Nevada's leave policies in particular. However, it was only "[s]ince Federal family leave legislation was first introduced" that the States had even "begun to consider similar family leave initiatives." S. Rep. No. 103-3. Furthermore, the dissent's statement that some States "had adopted some form of family-care leave" before the FMLA's enactment, glosses over important shortcomings of some state policies. First, seven States had childcare leave provisions that applied to women only....These laws reinforced the very stereotypes that Congress sought to remedy through the FMLA. Second, 12 States provided their employees no family leave, beyond an initial childbirth or adoption, to care for a seriously ill child or family member.... Third, many States provided no statutorily guaranteed right to family leave, offering instead only voluntary or discretionary leave programs. Three States left the amount of leave time primarily in employers' hands.... Congress could reasonably conclude that such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees that Congress sought to eliminate....

Against the above backdrop of limited state leave policies, no matter how generous petitioners' own may have been, Congress was justified in enacting the FMLA as remedial legislation.

In sum, the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic Section 5 legislation.

We reached the opposite conclusion in *Board of Trustees v. Garrett* (2001)

[(holding unconstitutional Title I of the Americans with Disabilities Act, which prohibits discrimination against disabled persons with respect to employment, so far as it authorized private damages actions against states)] and *Kimel*. In those cases, the Section 5 legislation under review responded to a purported tendency of state officials to make age- or disability-based distinctions. Under our equal protection case law, discrimination on the basis of such characteristics is not judged under a heightened review standard, and passes muster if there is "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." *Kimel*. Thus, in order to impugn the constitutionality of state discrimination against the disabled or the elderly, Congress must identify, not just the existence of age- or disability-based state decisions, but a "widespread pattern" of irrational reliance on such criteria. We found no such showing with respect to the ADEA and Title I of the Americans with Disabilities Act of 1990 (ADA).

Here, however, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny. Because the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test—it must "serv[e] important governmental objectives" and be "substantially related to the achievement of those objectives"—it was easier for Congress to show a pattern of state constitutional violations. Congress was similarly successful in *South Carolina v. Katzenbach* (1966), where we upheld the Voting Rights Act of 1965: Because racial classifications are presumptively invalid, most of the States' acts of race discrimination violated the Fourteenth Amendment....

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees. Those perceptions, in turn, Congress reasoned, lead to subtle discrimination that may be difficult to detect on a case-by-case basis.

We believe that Congress' chosen remedy, the family-care leave provision of the FMLA, is "congruent and proportional to the targeted violation." Congress had already tried unsuccessfully to address this problem through Title VII and the amendment of Title VII by the Pregnancy Discrimination Act. Here, as in *Katzenbach, supra,* Congress again confronted a "difficult and intractable

proble[m]," where previous legislative attempts had failed. Such problems may justify added prophylactic measures in response.

By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes....

Unlike the statutes at issue in *City of Boerne, Kimel,* and *Garrett,* which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest—and affects only one aspect of the employment relationship. Compare *City of Boerne* (the "[s]weeping coverage" of the Religious Freedom Restoration Act of 1993); *Kimel* ("the indiscriminate scope of the [ADEA's] substantive requirements"); and *Garrett* (the ADA prohibits disability discrimination "in regard to [any] terms, conditions, and privileges of employment").

We also find significant the many other limitations that Congress placed on the scope of this measure.... The FMLA requires only unpaid leave, and applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months. Employees in high-ranking or sensitive positions are simply ineligible for FMLA leave; of particular importance to the States, the FMLA expressly excludes from coverage state elected officials, their staffs, and appointed policymakers. Employees must give advance notice of foreseeable leave, and employers may require certification by a health care provider of the need for leave. In choosing 12 weeks as the appropriate leave floor, Congress chose "a middle ground, a period long enough to serve 'the needs of families' but not so long that it would upset 'the legitimate interests of employers.'" Moreover, the cause of action under the FMLA is a restricted one: The damages recoverable are strictly defined and measured by actual monetary losses, and the accrual period for backpay is limited by the Act's 2–year statute of limitations (extended to three years only for willful violations).

For the above reasons, we conclude that § 2612(a)(1)(C) is congruent and proportional to its remedial object, and can "be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*.

WORTH NOTING

Justice Souter, joined by Justices Ginsburg and Breyer, wrote a concurring opinion; he joined the majority opinion without conceding the dissenting positions he had taken in prior cases. Justice Stevens, concurring in the judgment, argued that the plain language of the Eleventh Amendment rendered it inapplicable to this case, because the respondents were

Justice Scalia, dissenting.

I join Justice Kennedy's dissent, and add one further observation: The constitutional violation that is a prerequisite to "prophylactic" congressional action to "enforce" the Fourteenth Amendment is a violation *by the State against which the enforcement action is taken*. There is no guilt by association, enabling the sovereignty of one State to be abridged under § 5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States.

Congress has sometimes displayed awareness of this self-evident limitation. That is presumably why the most sweeping provisions of the Voting Rights Act of 1965—which we upheld in *City of Rome v. United States* (1980), as a valid exercise of congressional power under § 2 of the Fifteenth Amendment, which creates congressional enforcement authority analogous to § 5 of the Fourteenth Amendment]—were restricted to States "with a demonstrable history of intentional racial discrimination in voting."

Today's opinion for the Court does not even attempt to demonstrate that each one of the 50 States covered by [the FMLA] was in violation of the Fourteenth Amendment. It treats "the States" as some sort of collective entity which is guilty or innocent as a body.... This will not do. Prophylaxis in the sense of extending the remedy beyond the violation is one thing; prophylaxis in the sense of extending the remedy beyond the violator is something else....

Justice Kennedy, with whom Justice Scalia and Justice Thomas join, dissenting.

... The relevant question, as the Court seems to acknowledge, is whether, notwithstanding the passage of Title VII and similar state legislation, the States continued to engage in widespread discrimination on the basis of gender in the provision of family leave benefits. If such a pattern were shown, the Eleventh

Amendment would not bar Congress from devising a congruent and proportional remedy. The evidence to substantiate this charge must be far more specific, however, than a simple recitation of a general history of employment discrimination against women.... Persisting overall effects of gender-based discrimination at the workplace must not be ignored; but simply noting the problem is not a substitute for evidence which identifies some real discrimination the family leave rules are designed to prevent....

The Court acknowledges that States have adopted family leave programs prior to federal intervention, but argues these policies suffered from serious imperfections. Even if correct, this observation proves, at most, that programs more generous and more effective than those operated by the States were feasible. That the States did not devise the optimal programs is not, however, evidence that the States were perpetuating unconstitutional discrimination. Given that the States assumed a pioneering role in the creation of family leave schemes, it is not surprising these early efforts may have been imperfect. This is altogether different, however, from purposeful discrimination....

Considered in its entirety, the evidence fails to document a pattern of unconstitutional conduct sufficient to justify the [use of § 5 enforcement authority]....
