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Mandatory Retirement of Appointed State Judges: Balancing State and Federal Interests

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MANDATORY RETIREMENT OF APPOINTED STATE JUDGES: BALANCING STATE AND FEDERAL INTERESTS

In 1967 Congress enacted the Age Discrimination in Employment Act ("ADEA" or "Act"),[1] and in the process established a national policy of eradicating arbitrary age discrimination in the workplace. The ADEA is intended "to promote employment of older persons based on their ability rather than age."[2] The Act prohibits all employers from discharging employees because of their age, or from classifying employees in a way that would affect their status as employees because of their age.[3] As originally enacted, the ADEA neither applied to the federal government nor to the states or their political subdivisions. To close this gap in coverage, in 1974 Congress extended the substantive prohibitions of the Act to the federal and state governments by amending the definition of "employer."[4]

The 1986 amendments to the Act, which effectively barred mandatory retirement of protected employees, coupled with Congress' decision in 1974 to bring state government workers within the protection of the Act, have combined to prompt appointed state court judges to question the validity of their state's mandatory retirement provisions.[5] State judges assert that because they are

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1. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1988).

2. 29 U.S.C. §§ 621(b), 2(b) (1988). ("It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.").

For an excellent discussion of the legislative history of the ADEA, see Note, *The Age Discrimination in Employment Act of 1967,* 90 HARV. L. REV. 380 (1976).

3. 29 U.S.C. § 623(a) (1988). As originally enacted, the protection of the Act was limited to workers between the ages of 40 and 65. Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967), (codified at 29 U.S.C. §§ 621-631)). Congress amended the Act in 1978, raising the age limit to 70 (Pub. L. No. 95-256, Section 3(a), 92 Stat. 189 (1978)), and again in 1986, removing any upper age limit. Pub. L. No. 99-592, Sections 2(c) and 6(a), 100 Stat. 3342, 3344 (1986), (amending 29 U.S.C. § 623(f)(1)). As a result, the ADEA now protects any worker over 39 years of age and bars mandatory retirement.

4. Pub. L. No. 93-259, Section 28(a)(1)-(4), 88 Stat. 55 (1974), (amending 29 U.S.C. § 630(b)). 29 U.S.C. § 630(b), now provides in relevant part: "The term [employer] also means ... (2) a State or political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State, and any interstate agency,...."

5. *See, e.g.*, VT. CONST. ch. II § 35, which provides: "All justices of the Supreme Court and judges of all subordinate courts shall be retired at the end of the calendar year in which they attain seventy years of age or at the end of the term of election during which they attain seventy years of age,...."

Presently, thirty-five states have mandatory retirement provisions for at least some members of their judiciary. *See* AMERICAN BAR ASS'N, A SURVEY OF JUDICIAL FRINGE BENEFITS, Table I

employees protected by the Act, their state mandatory retirement provisions violate the ADEA, and that by virtue of the Supremacy Clause,[6] the ADEA takes precedence over conflicting state laws mandating retirement even if the laws are contained in state constitutional provisions.[7]

An analysis of the application of the ADEA to appointed state judges raises two interrelated issues. First, did Congress intend to include appointed judges among the "employees" protected by the Act, or did Congress intend appointed state court judges to fall within one of the exceptions to the Act's definition of "employees?"[8] Second, may Congress constitutionally protect appointed judges from mandatory retirement?[9] Congress' decision to enact legislation that will regulate a state's conduct, although a power indisputably reserved to Congress,[10] raises classic federalism concerns. For example, Congress may have a concern in eradicating age-based discrimination in the workplace, including such discrimination practiced by a state, while a state may assert an interest in determining the characteristics of its work force, including its judiciary. When those interests conflict -- where a state seeks to use age-related criteria such as mandatory retirement to determine who may serve as a judge -- it is necessary to determine whether the federal interest takes precedence. In so doing, one must evaluate Congress' intent on the question of whether state judges are protected against age discrimination.

The Second Circuit Court of Appeals[11] and federal district courts in Vermont[12] and Virginia[13] have concluded that appointed state judges are protected by the ADEA, and accordingly, have enjoined the application of state

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(1988). In seventeen of these states (Alabama, Connecticut, Illinois, Indiana, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Vermont, and Wyoming), judges are appointed on at least one level. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES, Table 4.4 (1988-89) [hereinafter COUNCIL OF STATE GOVERNMENTS]. In addition, in eleven of the thirty-five states with mandatory retirement provisions, judges are appointed for a term and are then subject to a retention election. These states include Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Utah, and Wyoming. *Id.*

6. U.S. CONST. art. VI, cl. 2.

7. The Equal Employment Opportunity Commission ("EEOC") has litigated several of these recent cases involving mandatory retirement after receiving charges from appointed state judges. The EEOC is the agency charged by Congress with the interpretation, administration, and enforcement of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-631 (1988), and other federal statutes prohibiting employment discrimination.

8. *See infra* notes 27-111 and accompanying text.

9. *See infra* notes 117-63 and accompanying text.

10. *See infra* notes 117-46 and accompanying text.

11. EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990).

12. EEOC v. Vermont, 717 F. Supp. 261 (D. Vt. 1989).

13. Schlitz v. Virginia, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988).

mandatory retirement provisions. However, the First[14] and Eighth Circuit Courts of Appeal,[15] two federal district courts,[16] as well as two state supreme courts,[17] have held that the ADEA does not protect state judges from mandatory retirement. To resolve this split in the circuits, the United States Supreme Court recently granted *certiorari* in the case decided by the Eighth Circuit Court of Appeals, *Gregory v. Ashcroft*.[18]

This note will examine whether the ADEA protects appointed[19] state court judges from mandatory retirement. In the "Statutory Analysis" section, the Note examines the text of the ADEA and its legislative history to determine whether Congress intended to protect appointed state judges from mandatory retirement.[20] The Note proposes that those courts finding that appointed judges are not protected by the ADEA have misinterpreted the plain meaning of the employee exceptions to the ADEA and the legislative debate that preceded enactment of the ADEA and its subsequent amendments.[21]

In the "Constitutional Analysis" section, the Note analyzes the application of the ADEA to state judges as a proper exercise of Congress' Commerce Clause power under Article I of the United States Constitution.[22] This section also examines the standard that courts apply in seeking to discern Congress' intent when it enacts laws that regulate state conduct.[23] An analysis of relevant case law compels the conclusion that Congress has the authority to regulate state functions through the Commerce Clause, and that Congress clearly expressed its intent to extend ADEA protection to state and local governments. This statutory and constitutional analysis will demonstrate that the ADEA protects appointed state judges from mandatory retirement.

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14. EEOC v. Massachusetts, 858 F.2d 52 (1st Cir.), *aff'g*, 680 F. Supp. 455 (D. Mass. 1988).

15. Gregory v. Ashcroft, 898 F.2d 598 (8th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3391 (U.S. Nov. 27, 1990) (No. 90-50).

16. EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989), *appeal pending*, No. 89-3421 (7th Cir.); Gregory v. Ashcroft, No. 88-0221C(3) (E.D. Mo. July 14, 1989).

17. *In re* Stout, 521 Pa. 570, 559 A.2d 489 (1989); Apkin v. Treasurer and Receiver Gen'l, 401 Mass. 427, 517 N.E.2d 141 (1988).

18. 898 F.2d 598 (8th Cir. 1990), *cert. granted* 59 U.S.L.W. 3391 (U.S. Nov. 27, 1990) (No. 90-50).

19. Elected judges are clearly exempted from ADEA coverage. *See* 29 U.S.C. § 630(f) (1988). ("The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office....").

20. *Infra* notes 24-111 and accompanying text.

21. *Infra* notes 42-65 and accompanying text.

22. *See infra* notes 112-63 and accompanying text.

23. *See infra* notes 164-200 and accompanying text.

I. STATUTORY ANALYSIS

The ADEA broadly protects employees from arbitrary age discrimination in the workplace with narrowly defined exemptions for elected officials and certain policymaking appointees.[24] The determination of whether appointed judges are protected by the ADEA is a fairly straightforward inquiry: Did Congress intend to include appointed state judges within the "appointee on the policymaking level" exemption to ADEA coverage?[25] Properly understood in light of the legislative history, this provision only exempts appointees in the legislative and executive branches of government, and even if Congress meant to exempt appointees in all three branches of government, appointed judges are not exempt from coverage because they are not primarily policymakers. Since this interpretation results in an exemption for elected, but not appointed judges, it is also necessary to analyze the rationality of a distinction between elected and appointed state judges for ADEA protection.[26]

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24. 29 U.S.C. § 630(f) (1988), provides:

> The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

25. Several Supreme Court opinions state that original legislative intent, as reflected either in the language of the statute or the relevant legislative history, is the touchstone for statutory interpretation. *See, e.g.*, Blanchard v. Bergeron, 489 U.S. 87, 95 (1989) (lower court counsel fee cases binding on Supreme Court because mentioned in committee report and apparently approved by Congress); Public Citizen v. United States Dep't of Justice, ___ U.S. ___, 109 S. Ct. 2558, 2566 (1989) (clear and unambiguous language can be trumped by "other evidence of congressional intent"); Commissioner v. Engle, 464 U.S. 206, 214 (1984) ("sole task" of Court in statutory interpretation is to determine congressional intent).

26. Determining congressional intent, at least when that intent is not obvious from the language of the statute, is particularly difficult because the courts must ascribe an intention not only to individuals, but to a sizeable group of individuals--actually, to two different groups of people (the House and the Senate)--whose views are known only from the historical record. For an analysis of collective intent, see Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 348-49 (1985); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930). *See also* DWORKIN, *How to Read the Civil Rights Act*, in A MATTER OF PRINCIPLE 316 (1985).

Historical records rarely disclose the reasons why each legislator voted for or against a proposed law. In fact, legislators vote for bills out of many unknowable motives, such as loyalty or deference to party and committee, a desire not to alienate blocks of voters, and pure matters of conscience. *See, e.g.*, R. DAVIDSON & W. OLESZEK, CONGRESS AND ITS MEMBERS 388, 401 (2d ed. 1985); M. COLLIE, *Voting Behavior in Legislatures*, in HANDBOOK OF LEGISLATIVE RESEARCH 471-518 (Lowenberg, Patterson & Jewell eds. 1985).

A. Congress Intended Appointed State Court Judges to be Employees Protected by the ADEA

The various states in the recent cases involving ADEA protection of appointed state judges are without question "employers" covered by the ADEA.[27] Congress extended ADEA coverage to state and local governments in 1974 when it amended the definition of employer to include the states.[28] Thus, the states are employers of appointed judges. The ADEA defines "employee" broadly as an individual employed by an employer and exempts from that definition certain elected and appointed officials.[29] Several courts have agreed that appointed judges are employees according to the broad language of the ADEA.[30] As one court noted, judges show traditional employee characteristics, such as working under the direction and control of the state, drawing salaries, and performing other employee duties.[31] Although the legislative history of the ADEA lacks any discussion of the definition of "employee,"[32] an analysis of the legislative history of Title VII indicates by analogy that judges are "employees" within the generic sense of that term.[33]

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27. *See* EEOC v. Vermont, 904 F.2d 794, 797 (2d Cir. 1990) ("There is no question that the State is an employer to which the Act applies and that Vermont's judges are employed by the State.").

28. *See supra* note 4 and accompanying text.

29. *See supra* note 24.

30. *See* EEOC v. Illinois, 721 F. Supp. 156, 159 (N.D. Ill. 1989); Schlitz v. Virginia, 681 F. Supp. 330, 333 (E.D. Va. 1988).

31. Schlitz v. Virginia, 681 F. Supp. 330, 333 (E.D. Va. 1988) (Virginia judges are paid a salary and receive other benefits from Virginia, are hired through gubernatorial appointment with confirmation by the state senate, are subject to terms and conditions prescribed by Virginia, and exercise the judicial and equitable powers of Virginia.). *See also* EEOC v. First Catholic Slovak Ladies Assoc., 694 F.2d 1068, 1070 (6th Cir. 1982), *cert. denied*, 464 U.S. 819 (1983) (held that where salaried officers performed traditional employee duties and drew salaries as employees, they were covered by the ADEA).

32. *See* Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 698-99 (1st Cir. 1983) ("The legislative history behind the 1974 amendment is less than abundant, as this revision was included in a much broader package of amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.*").

33. The legislative history of Title VII is instructive because its definition of the term "employee," including the exemptions, is identical to the ADEA definition and exemptions. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(f) (1988). The courts have found the legislative history and the judicial interpretation for Title VII to be controlling for identical ADEA provisions. *See, e.g.*, Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) (adopting construction of Title VII section 706(c) for interpretation of ADEA section 14(b), "since the legislative history of Section 14(b) [of the ADEA] indicates that its source was Section 706(c) [of Title VII]"); Lorillard v. Pons, 434 U.S. 575, 584 (1978) (recognizing that ADEA prohibitions "were derived *in haec verba* from Title VII").

The legislative history from Title VII supports the conclusion that judges are employees in the general sense indicated by the ADEA. Senator Ervin noted during Senate debates on amendments to the definition of "employee" that the coverage of the "employed by an employer" language was

The more troubling analysis is whether appointed state court judges are "employees" in the technical way that term is defined by the ADEA.[34]

The definition of "employee" excepts two broad groups from the protection of the Act.[35] In the first group are elected officials of a state or its political divisions.[36] The second group includes some of the officials appointed by those elected officials.[37] Specifically, the second group includes three categories of appointees: (1) "person[s] chosen by such officer to be on such officer's personal staff," (2) "appointee[s] on the policymaking level," and (3) "immediate adviser[s] with respect to the exercise of the constitutional or legal powers of the office." The only exemption to the term "employee" that can possibly include appointed judges is the "appointee on the policymaking level exemption."[38] The first exemption excluding elected officials is clearly not applicable.[39] The second exemption, excluding those on the elected officer's personal staff, is also distinguished by virtue of the separation of powers; a judge is, of course, independent of elected officials.[40] And the final exemption excluding an immediate adviser with respect to the exercise of the constitutional

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broad:

> The bill defines a State and political subdivision of a State as employers.... It defines an employee as one who is employed by an employer. The dictionary states that any person or concern which employe another, usually for wages or a salary, is an employer. Under these provisions, no one is excepted. In other words, the bill is broad enough in its present form to cover Governors of States, State supreme court justices, State legislators, and so forth.

118 CONG. REC. 4096 (1972) (Remarks of Senator Ervin). The only exception taken to Senator Ervin's characterization of the employee language was by Senators Javits and Taft, who believed that elected officials would not be covered by the definition. 118 CONG. REC. 4097 (1972) (Remarks of Senator Javits); 118 CONG. REC. 1838 (1972) (Remarks of Senator Taft).

34. *See supra* note 24.

35. 29 U.S.C. § 630(f) (1988). *See supra* note 24 for text of definition.

36. 29 U.S.C. § 630(f) (1988).

37. *Id.*

38. *See* EEOC v. Massachusetts, 858 F.2d 52, 54 (1st Cir. 1988).

39. The effect of this exemption for those appointed judges who are subject to a retention election is not so clear. *See* EEOC v. Vermont, 717 F. Supp. 261, 264 n.3 (D. Vt. 1989) ("A retention vote by the state assembly does not constitute an election by the qualified voters of a state."); Gregory v. Ashcroft, No. 88-0221C(3), at 4 n.3 (E.D. Mo. July 14, 1989) (appointed judges subject to retention vote by electorate do not fall within the ADEA's exception for "any person elected *to* public office." (emphasis in original)). *But cf. Gregory v. Ashcroft,* 898 F.2d 598, 600 (8th Cir. 1990) ("we are inclined to disagree with this aspect [that appointed Missouri judges are not elected within the meaning of the ADEA] of the District Court's decision, [but] the Governor did not cross-appeal this issue, it was not briefed by either side, and it is not properly before us."); EEOC Opinion Letter to Rep. Claude Pepper, April 7, 1987, *reprinted in* EEOC Compliance Man. (BNA), at N:1001 n.2 (a state judge "who is appointed by the Governor or the legislature but must appear on a ballot before the general electorate for either retention or rejection would be excepted from the term 'employee' under the ADEA as a 'person elected to public office.'").

40. *See infra* note 63 and accompanying text.

or legal powers of the elected official's office also does not cover judges.[41]

The applicability of the "policymaker" exemption requires a two-part analysis. First, which appointees on the policymaking level did Congress intend to exempt? The most reasoned answer to this question is that Congress intended to limit the policymaker exemption to the close advisers of the elected official, thus not reaching members of the judiciary. However, assuming that Congress intended the policymaker exemption to have a broad reach, the second part of the analysis examines whether judges are on a policymaking level.

1. Only Appointees who Directly Advise an Elected Official are Exempt from ADEA Coverage

An analysis of the contents and structure of the language of the exemption suggests that Congress intended to exempt only those policymaking officials who work for the elected official.[42] Both the first and last clause, i.e., the elected official's personal staff and his immediate advisors, refer to persons who work for the elected official. The most logical inference is that the middle category, appointees on the policymaking level, shares basic characteristics of the categories that surround it.[43] In order to exempt judges, one would have to conclude that Congress chose first to list elected officials, then to list a group of persons who work for the elected officials, then to move outside the elected officials' realm and list a group of persons who are independent of them, and then to return again to list another group of persons who work for the elected officials.[44] The more reasonable interpretation is that the entire exemption relates to elected officials and those persons who are in a close working relationship with the elected official--his or her close advisers, personal staff, and cabinet-style officials.[45]

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41. *See* EEOC v. Massachusetts, 858 F.2d 52, 54 (1st Cir. 1988).

42. The EEOC has characterized Congress' intent in exempting policymaking appointees as follows:

> Congress realized the necessity of allowing elected officials complete freedom in appointing those who would direct state and local departments and agencies. These individuals must work closely with elected officials and their advisors in developing policies that will implement the overall goals of the elected officials. In order to achieve these goals, an elected official is likely to prefer individuals with similar political and ideological outlooks. Congress intended to allow elected officials the freedom to appoint those with whom they feel they can work best.

EEOC Decision No. 78-42, Empl. Prac. EEOC Dec. (CCH) P6725 (Sept. 29, 1978).

43. *See* EEOC v. Vermont, 904 F.2d 794, 798 (2d Cir. 1989).

44. Brief for EEOC as Appellant at 10, EEOC v. Illinois, No. 89-3421 (7th Cir.).

45. The EEOC has taken the position that judges are covered by the ADEA in an opinion letter from its legal counsel to Senator Claude Pepper. EEOC Opinion Letter to Rep. Claude Pepper, reprinted in EEOC Compliance Man. (BNA) at N:1001 n.2 (Apr. 7, 1987). When the language of a statute is vague and the intent of Congress indiscernible, courts should defer to the EEOC's

Interpreting the exemption to reach only appointees who work for the elected official is supported by the relevant Title VII legislative history regarding an identical provision that was created in 1972 when Congress amended Title VII to include the states as employers.[46] The legislative history of Title VII is particularly appropriate because Congress viewed arbitrary discrimination based on age as comparable to the race, sex, religious, and national origin discrimination prohibited by Title VII.[47] Senator Ervin introduced the exemption for elected officials so that the democratic process would be protected.[48] Senator Ervin advocated the exemption for elected officials to prevent the Act from allowing federal courts to question whether the electorate was motivated by discrimination in the election of a public official.[49] Senator Ervin argued that the protection for elected officials should be augmented by

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construction of the ADEA. Chemical Mfrs. Ass'n v. Natural Resource Defense Council, 470 U.S. 116, 126 (1984).

Additionally, attorneys general from three states have issued official opinions stating that judges are "employees" covered by the ADEA because they do not fit within any of the exemptions contained in section 11(f). *See* 71 Op. Md. Att'y Gen. 68 (Dec. 29, 1986); 87-5 Op. S.C. Att'y Gen. 23 (Jan. 1987); 87-8 Op. Vt. Att'y Gen. (Aug. 7, 1987). The EEOC has observed that the fact that three state attorneys general have found that appointed state judges are covered by the ADEA is especially persuasive considering "the natural proclivity of state officials to protect state prerogatives and 'resist all changes which may hazard a diminution of power, emolument and consequences of the offices they hold under the State establishments.'" Brief for EEOC as Appellant at 8 n.9, EEOC v. Illinois, No. 89-3421 (7th Cir.) (citing THE FEDERALIST, No. 1, at 4 (A. Hamilton) (Wesleyan Univ. Press ed. 1961)).

46. *See supra* note 24. Section 701(f) of Title VII, as amended, states:

> The term 'employee' means an individual employed by an employer, except that the term 'employee:' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

42 U.S.C. § 2000e(f) (1988).

47. *See* 118 CONG. REC. 15895 (1972) (Remarks of Senator Bentsen regarding the 1972 amendments to Title VII: "I believe that the principles underlying these provisions in the EEOC bill are directly applicable to the Age Discrimination in Employment Act."). The frequent comparison in the legislative history of the Act between discrimination based on age and discrimination based on race, sex, religion, and national origin confirm this view. *See, e.g.*, 110 CONG. REC. 2597 (1964) (remarks of Rep. Pucinski); 113 CONG. REC. 31256-31257 (1967) (remarks of Sen. Young); 118 CONG. REC. 15895 (1972) (remarks of Sen. Bentsen); 123 CONG. REC. 30563 (1977) (remarks of Rep. Pepper).

48. 118 CONG. REC. 4096 (1972) (without the exemption, the Act would "give the Federal courts jurisdiction to inquire as to ... [whether] the people were actuated in any extent [by discrimination] in the election of a public official, so that [the EEOC] could come in and remove that public official from office or that adviser from office and dictate who should be employed in his place.").

49. *Id.*

exempting their advisers.[50] The plain language used by Senator Ervin indicates that Congress intended to exempt only elected officials and their personal advisers.[51] The senators also debated the reach of the exemption to persons who did not work directly for the elected official. Senator Ervin agreed with Senator Williams that the purpose of the amendment was to exempt from coverage those appointees who are in a close personal and immediate relationship with the elected official.[52]

Moreover, the conference committee reports submitted following the debates support this interpretation of the exemption.[53] The conference managers' report states: "It is the intention of the conferees to exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisers or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level."[54] The report concluded that it was the conferees' intent that the exemption should be construed narrowly.[55] Courts that have interpreted the ADEA's "appointee on the policymaking level" exemption, although not necessarily in the context of mandatory retirement of appointed state court judges, support the conclusion that Congress intended to exempt only those appointed officials who work directly

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50. 118 CONG. REC. 4485 (1972).

51. *See also* 118 CONG. REC. at 4485 (Title VII exemption introduced so that "Federal judges cannot remove elected state and county officials from office or tell them whom they have to have as their selections to advise them with respect to their constitutional and legal responsibilities.").

52. 118 CONG. REC. 4492-93 (1972). *See also* EEOC v. Vermont, 904 F.2d 794, 798-800 (2d Cir. 1990).

53. Courts have found conference committee reports to be reliable indicators of legislative intent. *See* Gemsco v. Walling, 324 U.S. 244, 264-65 (1945); United States v. Pfitsch, 256 U.S. 547, 551 (1921).

54. An argument can be made that Congress did not intend to include the judiciary within the policymaker exemption since a state's judiciary is not comparable to state departments and agencies, e.g., the Department of Revenue, nor to cabinet officers or similar persons at the local government level. *See* EEOC v. Vermont, 717 F. Supp. 261, 266 (D. Vt. 1989) ("The language 'departments or agencies of State or local governments' further suggests that Congress did not intend the exemptions to extend to members of a separate branch of state government such as the judiciary. Departments and agencies are part of the executive branch of government."). *See also* Brief for Appellants at 11-13, Gregory v. Ashcroft, 898 F.2d 598 (8th Cir. 1990) (No. 89-2360).

At first blush, the argument that the judiciary is not a department or agency of a state has some appeal. However, as the Eighth Circuit correctly held in *Gregory v. Ashcroft*, 898 F.2d 598, 602 (8th Cir. 1990), it is more realistic to view the state judiciary as one of the more powerful "agencies" of state government.

55. Joint Explanatory Statement of Managers at the Conference on H.R. 1746, 92d Cong., 1st Sess., *reprinted in part in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2137, 2179, 2180 (1972).

for the elected official.[56]

The First Circuit refused to limit the policymaker exemption to advisers of elected officials, holding that Congress intended to exempt two categories: "policymakers, who need not be advisers; and advisers, who need not be policymakers."[57] However, the legislative history of the ADEA belies this interpretation. According to the legislative history, "advisers" is a term that includes the types of officials, apart from elected officials, who are exempted by the statute: personal staff, appointees on the policymaking level, and "immediate advisers with respect to the constitutional or legal powers of the office."[58] The First Circuit decision assumed that "policymakers" comprise a separate category of officials who are not among an elected official's advisers. This holding misreads the statute.[59] The legislative history compels the conclusion that "policymakers" are not separate from "advisers," but rather are among the advisers exempted.[60] Congress meant to exempt persons who worked for the elected official, but limited that exemption to specific categories.[61] These categories, namely, those who are personal staffers, close advisers, or high policymaking level officers of the elected official, are separate, but they are subcategories of persons who work closely with an elected official.

If one accepts the argument that Congress intended to exempt only those appointees who are the elected officials' closest and highest level advisers, then it follows that judges appointed by the governor or state legislature[62] are not

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56. *See* Anderson v. Albuquerque, 690 F.2d 796, 801 (10th Cir. 1982) (court emphasized that the purpose of the exclusion from coverage under § 2000(e) was to "exempt ... those who are chosen by the Governor or the mayor ..., whatever the elected official is, and who are in a close personal relationship and an immediate relationship with him. Those who are his first line of advisors."). *See also* Owens v. Rush, 654 F.2d 1370, 1375 (10th Cir. 1979) (§ 2000(e) exemption applied "only to those individuals who are in highly intimate and sensitive positions of responsibility on the staff of the elected official"); EEOC v. Vermont, 717 F. Supp. 261, 265 (D. Vt. 1989) ("The ADEA's exemptions include elected officials as well as those whose power and job tenure emanate directly from elected officials."); Bostick v. Rappleyea, 629 F. Supp. 1328, 1333 (N.D.N.Y. 1985) (legislative budget analyst not the type of position that was "sensitive and intimate" to the Legislative Committee that employed her, so as to fall within the "policymaking" or "immediate advisor" exceptions to § 2000(e).).

57. EEOC v. Massachusetts, 858 F.2d 52, 55-56 (1st Cir. 1988).

58. *See supra* notes 46-56 and accompanying text.

59. 858 F.2d at 55-56.

60. *See supra* notes 46-56 and accompanying text.

61. *See supra* notes 24, 43-45 and accompanying text.

62. Judges appointed by a member of the judiciary require a closer analysis. The following states appoint some of their judges by members of their judiciary: Alaska, Illinois, Iowa, Ohio, Oklahoma, and South Dakota. COUNCIL OF STATE GOVERNMENTS, *supra* note 5. *See, e.g.*, ILL. REV. STAT. ch. 110A, para. 39 (1989) (Circuit judges appoint associate judges to serve as trial judges in the circuit courts). The analysis should focus on how cases are assigned to the appointed judge, and how much discretion the judge retains in deciding cases. In Illinois, once the associate

exempt since, as judges, they are independent of any elected official.[63] This appears to be the most reasonable analysis of the exemption, as well as the one most consistent with the legislative history. Further, this analysis allows the courts to resolve the matter without considering the more complex issue of whether judges are "on the policymaking level" in the general sense.

Yet, the First and Eighth Circuit Courts of Appeal, in holding that appointed judges are not protected by the ADEA, have virtually ignored the legislative history on the exemption requiring a close working relationship between elected officials and their appointees.[64] These courts concluded that Congress intended to exempt appointees on the policymaking level across all three branches of government and confined their analysis to the role of judges as policymakers.[65] These courts not only erroneously interpreted the reach of the exemption, but further erred by finding that appointed judges are primarily policymakers.

2. Are Judges "Policymakers?"

Courts deciding whether appointed state judges are protected by the ADEA should not find it necessary to examine the general question of whether judges are policymakers.[66] When Congress drafted the definition of "employee" and exempted elected officials and their closest advisers, it intended a specialized notion of policymaking.[67] However, despite the indications that Congress did not intend to include judges within the policymaker exemption, several courts that have considered the application of the ADEA to appointed judges have

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judge receives an assignment from the chief judge or someone designated by the chief judge, the associate judge conducts the proceedings independent of any direction by circuit judges. *See* People *ex rel.* Filkin v. Flessner, 48 Ill. 2d 54, 56, 268 N.E.2d 376 (1971) (judge of circuit court and associate judge are members of the same court and circuit judge was not entitled to command an associate judge by any writ of mandamus or prohibition). One should also analyze the appeal procedure and whether decisions rendered by the appointed judge are appealed directly to the reviewing court without review of the appointing judge. *See, e.g.*, ILL. CONST. Art. VI, § 6, and ILL. REV. STAT. ch. 110A, para. 301 (1989).

63. For instance, the Vermont judiciary is separate from the executive branch and exercises its own legal and constitutional powers. The Supreme Court of Vermont is not authorized to give advisory opinions to the Governor; it resolves legal controversies between adverse litigants. *See In re* Constitutionality of House Bill 88, 115 Vt. 524, 64 A.2d 169 (1949).

64. *See* Gregory v. Ashcroft, 898 F.2d 598, 602 (8th Cir. 1990); EEOC v. Massachusetts, 858 F.2d 52, 55 (1st Cir. 1988). *See also supra* notes 46-56 and accompanying text.

65. Gregory v. Ashcroft, 898 F.2d 598, 600-02 (8th Cir. 1990); EEOC v. Massachusetts, 858 F.2d 52, 54-55 (1st Cir. 1988). *See also* EEOC v. Illinois, 721 F. Supp. 156, 159 (N.D. Ill. 1989).

66. A policy is a "projected program consisting of desired objectives and the means to achieve them." Policies are guideposts for present and future conduct. Laws, whether judge-made or statutory, are mandatory standards of conduct. WEBSTER THIRD NEW INT'L DICTIONARY (1971); EEOC v. Vermont, 717 F. Supp. 261, 265 (D. Vt. 1989).

67. *See supra* notes 42-61 and accompanying text.

focused on generalized notions of the role of the judiciary.[68] Under this approach, judges inevitably will be exempt from ADEA coverage since they are, to a certain extent, policymakers.[69] The test, however, for courts engaging in this type of policymaker analysis should be whether an official is primarily involved with making policy.[70] To require a lower standard would render the exemption meaningless since many persons, especially most state government officials, could be characterized as policymakers.[71] Thus, if courts are going to engage in this analysis, then the proper inquiry should be what Congress perceived the role of judges to be.[72]

The legislative history of the ADEA is devoid of any meaningful discussion of the definition of "employee."[73] However, the primary mover of the identical Title VII provision, Senator Ervin, would not have considered appointed judges to be exempt under the policymaker exemption because he did not consider policymaking to be the role of the judiciary.[74] Ervin believed that the role of the United States Supreme Court was that of an adjudicator, "which determines judicially legal controversies between adverse litigants."[75] The Court, according to Ervin, has no "discretionary power to fashion policies based on such considerations as expediency or prudence...."[76] Ervin added that justices are denied policymaking power and are endowed instead "with power to interpret any provision of the Constitution or any law or treaty which is determinative of the issue arising in a case coming before them."[77]

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68. *See e.g.*, Gregory v. Ashcroft, 898 F.2d 598, 601-02 (8th Cir. 1990); EEOC v. Massachusetts, 858 F.2d 52, 55 (1st Cir. 1988); *In re* Stout, 521 Pa. 571, 559 A.2d 489, 495-97 (1989).

69. *See* Gold, *The Similarity of Congressional and Judicial Lawmaking Under Title VII of the Civil Rights Act of 1964*, 18 U.C. DAVIS L. REV. 721, 748 (1985) ("[E]ventually, the judges will take possession of a statute and, for practical purposes, convert it to a common law doctrine that courts are free to modify. For as time passes, the judges will deal with more aspects of a social issue than the legislature could have foreseen."); Kaplan, *Do Intermediate Appellate Courts Have a Lawmaking Function?* 70 MASS. L. REV. 10, 11 (1985) ("the intermediate courts will not be confined to the correction of the judgments of the trial courts for breach of established doctrines, but will make law, and will contribute significantly to the evolution of law"); Clinton, *Judges Must Make Law: A Realistic Appraisal of the Judicial Function in a Democratic Society*, 67 IOWA L. REV. 711 (1982) (as a matter of necessity, judges from time to time make, rather than interpret, law); Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975).

70. *See infra* notes 94-97 and accompanying text.

71. *See* EEOC v. Vermont, 717 F. Supp. 261, 266 (D. Vt. 1989).

72. *See infra* notes 73-79.

73. *See supra* note 32.

74. S. ERVIN & R. CLARK, ROLE OF THE SUPREME COURT: POLICYMAKER OR ADJUDICATOR (1970). *See* Brief for EEOC as Appellee at 21, EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) (No. 89-6178).

75. S. ERVIN & R. CLARK, *supra* note 74, at 1.

76. *Id.*

77. *Id.* at 6.

Further, the conference report accompanying the bill that extended Title VII coverage to the states demonstrates that the managers of the bill also believed that judges are not policymakers.[78] The managers stated in the conference report that the exemption applied to the "officials on the highest policymaking levels such as cabinet members or other immediate advisers of such elected officials...."[79] This language indicates that Congress viewed policymaking in the traditional sense exercised by members of the executive and legislative branches, not in terms of the discretion that exists at the margins of adjudicating.

Congress' perception that policymaking is not the role of the judiciary was endorsed by both the district court and the Second Circuit Court of Appeals in *EEOC v. Vermont*.[80] The district court held that "policies are guideposts for present and future conduct, while laws, whether judge-made or statutory, are mandatory standards of conduct."[81] The Second Circuit reasoned that courts principally resolve disputes by either applying established legal principles or by reconciling seemingly conflicting legal principles.[82] The Second Circuit implicitly rejected the First Circuit's argument in *EEOC v. Massachusetts*[83] that policymaking is a part of the function of judging to the extent that "judging involves lawmaking to fill the interstices of authority found in constitutions, statutes, and precedents."[84] If the Massachusetts' court type of gap-filling constituted policymaking, that standard would render most appointed officials "policymakers," allowing the exemption to swallow the rule.[85]

However, in *Gregory v. Ashcroft*, the Eighth Circuit rejected the reasoning of the district court in *EEOC v. Vermont*, and adopted instead the reasoning of the First Circuit,[86] observing that judges establish either general standards or specific rules of decision that may be relied upon by other judges, other branches of government, and attorneys.[87] Regardless of the philosophy of the

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78. *See* Conference Report on H.R. 1746 (Section by Section Analysis), 118 CONG. REC. 7166 (1972).

79. *Id.*

80. 904 F.2d 794 (2d Cir. 1990), *aff'g*, 717 F. Supp. 261 (D. Vt. 1989).

81. 717 F. Supp. 261, 265 (D. Vt. 1989).

82. 904 F.2d 794, 800 (2d Cir. 1990).

83. 858 F.2d 52, 55 (1st Cir. 1988).

84. EEOC v. Vermont, 904 F.2d 794, 800 (2d Cir. 1990).

85. EEOC v. Vermont, 717 F. Supp. 261, 264-65 (D. Vt. 1989).

86. EEOC v. Massachusetts, 858 F.2d 52, 55 (1st Cir. 1988) *quoting* EEOC v. Massachusetts, 680 F. Supp. at 462 (D. Mass. 1988) (policymaking is indisputably a part of the function of judging to the extent that judging involves lawmaking to fill the interstices of authority found in constitutions, statutes, and precedents. Moreover, the phrase "on the policymaking level" is analogous to the interests such as "exercise of discretion" and "exercise of judgment," which describe most of the performance of judges.).

87. Gregory v. Ashcroft, 898 F.2d 598, 601 (8th Cir. 1990).

particular judge regarding his proper role, the Eighth Circuit added, some of his decisions will resolve unsettled areas of the law and become precedent.[88]

The First and Eighth Circuits fail to recognize that, depending on the level of the judge, the opportunity for policymaking may be severely limited.[89] Because appellate courts deal primarily with questions of law and the impact their interpretation will have on future parties, they will frequently make policy decisions.[90] However, because trial courts deal primarily with factual determinations, they set policy only occasionally.[91] Therefore, any ruling that all judges are policymakers is overinclusive.[92]

To avoid bringing many officials into the policymaking sweep, courts must apply the exemption only to those officials who are *primarily* involved with making policy. This requirement comports with Congress' intent that the exemption should not be interpreted to swallow the new law affording ADEA protections to employees of the states.[93] Therefore, those courts resorting to a policymaker analysis should determine on a case-by-case basis whether the appointed judge is primarily a policymaker. The courts should consider the following factors: the level of the court involved;[94] the state supreme court's definition of the proper role of its state judiciary;[95] the proportion of common to statutory law in the judge's state; and the type and amount of administrative

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88. *Id.*

89. *See* EEOC v. Vermont, 904 F.2d 794, 801 (2d Cir. 1990) ("[E]ven if we thought Congress intended to encompass dispute resolution under the rubric of policymaking, we would be hard pressed to view the exception in § 630(f) as applying to judges of the lower-level courts, for the exception extends to appointees on a policymaking 'level.' Though lower-court judges... are called upon at times to fill lacunae in the law, the lower court's decisions may be modified or reversed on appeal, may easily be overruled in another case, and may even be considered not binding on sister lower courts.").

90. *See* H. JACOB, JUSTICE IN AMERICA 32-35 (3rd ed. 1978); Kaplan, *supra* note 69, at 11; Hopkins, *supra* note 69.

91. H. JACOB, *supra* note 90, at 33.

92. *See supra* note 89 and accompanying text.

93. *See* Conference Report *supra* note 78 ("This exemption is ... in no way intended to establish an overall narrowing of the expanded coverage of State and local governmental employees....").

94. *See supra* note 89.

95. For instance, the Supreme Court of Vermont has frequently noted that the power of the Vermont judiciary is in interpreting the legislature's policies, not making its own. *See, e.g.*, State v. Jacob, 144 Vt. 70, 472 A.2d 1247, 1250 (1984) (It is not a "legitimate function of this Court to expand a statute by implication, that is, by reading into it something which is not there, unless it is necessary in order to make it effective.... To do so would usurp the exclusive prerogative of the Legislature; ... and violate the border lines drawn by the constitutional doctrine of separation of powers.").

duties required of the judge.[96] Of course, in light of Congress' intent to exempt only those advisers who are in a close personal relationship with the elected official, courts should never have to consider the difficult and potentially unworkable question of whether appointed judges are primarily policymakers. Nevertheless, courts that dismiss the legislative history and clear language of the ADEA and decide the case by determining whether a judge is a policymaker in a generalized sense should at least examine whether the particular judge is primarily a policymaker.[97]

This analysis is bolstered by Congress' explicit intention that the exemptions for certain state employees be construed very narrowly.[98] Recognizing that states might try to sweep many employees into the policymaker exemption, Congress stated its intent that any ambiguity existing in the exemption be construed in favor of extending the protections against discrimination to as many state employees as possible.[99] Furthermore, the narrow construction of the exemption is appropriate since Congress was capable of explicitly exempting judges if it wished to do so; yet nowhere in the statute, or in the relevant legislative history, did Congress express a desire to exempt judges.[100]

Finally, an argument that Congress did not specifically exempt judges because most state judges are elected, and therefore, the representatives and senators would not have had any reason to consider the applicability of the ADEA exemptions to appointed judges, lacks merit.[101] When Congress extended ADEA coverage to the states, thirty-six states appointed judges at some level.[102] Thus, it is reasonable to conclude that the senators and representatives from these thirty-six states would have been aware that the

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96. The courts must first determine if the judges administrative duties could be considered policymaking. If such a determination is made, the courts should then weigh the amount and type of administrative duties with the judge's legal duties. EEOC v. Vermont, 717 F. Supp. 261, 265 (D. Vt. 1989). *But see* Gregory v. Ashcroft, 898 F.2d 598, 602 (8th Cir. 1990) ("Furthermore, many of Missouri's appointed judges exercise considerable policymaking responsibility in the supervision of the Missouri court system.... The Missouri Supreme Court is responsible for adopting the rules governing the professional conduct of the Missouri judiciary and the Missouri Bar. Moreover, the Missouri Supreme Court is responsible for resolving disputes within the judicial hierarchy.").

97. *See* Joint Explanatory Statement, *supra* note 55 and accompanying text.

98. *See* Conference Report, *supra* note 78; Joint Explanatory Statement, *supra* note 55.

99. *See* Joint Explanatory Statement, *supra* note 55.

100. *See* EEOC v. Vermont, 904 F.2d 794, 801-02 (2d Cir. 1990); Schlitz v. Virginia, 681 F. Supp. 330, 334 (E.D. Va. 1988).

101. *See* Brief for Appellee at 13, Gregory v. Ashcroft, 898 F.2d 598 (8th Cir. 1990) (No. 89-2360EM).

102. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, Table 5 (1972-73).

"elected official" provision did not exempt all state judges.[103] Finally, when Congress created new exemptions to ADEA coverage in 1986, it opted not to exempt appointed judges.[104] In fact, the House Rules Committee discussed the application of the Act to the state judiciary and yet no exemption was created for appointed state judges.[105] One may conclude, therefore, that Congress would not object to ADEA coverage of appointed state judges.

B. Congress' Rationale for Distinguishing Between Appointed and Elected Officials

In states where some judges are appointed and others are elected, extension of the ADEA to appointed judges will have the result of protecting only the appointed judges from mandatory retirement. This anomaly raises the question of whether Congress intended to make this type of distinction, and if it did, whether such a distinction has a rational basis.

The best evidence of Congress' intent to distinguish between elected and appointed officials is found in the remarks of Senator Ervin during debates concerning the identical exemption for Title VII.[106] Senator Ervin expressed concern that the extension of coverage to the states created the possibility that elected officials would be covered. Ervin advocated adopting an exemption for elected officials and their advisers because, without such an exemption, a federal judge would have the power to second-guess the voters' reasons for electing a particular official and perhaps to remove that elected official from office.[107] This power would be inconsistent with the democratic process because it would violate the electorate's need for anonymity and privacy. Furthermore, it would

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103. Additionally, over half of the managers of the bill creating the Title VII version of the exemption were from states where judges were appointed at some level; still, there is no mention of a desire to exempt judges. Of the twenty representatives who managed the bill in the house, nine came from states where appointment was part of the selection process for some judges (Rep. Hawkins, Rep. Bell, Rep. Burton, California; Rep. Mink, Hawaii; Rep. Clay, Missouri; Rep. Biaggi, Rep. Kemp, New York; Rep. Pucinski, Illinois; Rep. Brademas, Indiana). Of the twelve senators who managed the bill in the Senate, six came from states where appointment was part of the selection process for some judges: Sen. Williams, New Jersey; Sen. Pell, Rhode Island; Sen. Stevenson, Illinois; Sen. Hughes, Iowa; Sen. Javits, New York; Sen. Stafford, Vermont. *See* 1972 U.S. CODE CONG. & ADMIN. NEWS at 2186 (listing managers of the bill in the Senate and House of Representatives); 1971-72 Cong. Index (CCH) at 1899-1900 and 3381-86 (listing members of Congress by state); and THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, Table 5 (1972-73) (describing each state's method of judicial selection).

104. *Supra* note 3 and accompanying text.

105. Letter from Senator James M. Jeffords to the Honorable Louis P. Peck (May 18, 1989).

106. *See supra* note 46-56 and accompanying text.

107. *See supra* notes 48-49 and accompanying text.

be impossible for a judge to determine exactly the role that age bias played in the voting decision.[108]

Moreover, Congress clearly intended to draw a distinction between elected and appointed *officials*, including judges.[109] It is practically impossible to determine if the electorate was motivated by discrimination in electing an official. Congress could have rationally decided to foreclose the possibility of cases alleging that voters had refused to elect an individual to office because of his age.

Despite these reasons for differentiating between elected and appointed officials, several courts have held that appointed judges are not entitled to ADEA protection because it would create the absurd result of protecting the appointed judges from mandatory retirement, yet subjecting the elected judges to mandatory retirement.[110] Although it may seem wrong to protect some judges from mandatory retirement simply because of the way in which they assumed their offices, that is a policy question left to Congress.[111] Congress' choice to distinguish between elected and appointed officials has a rational basis.

II. CONSTITUTIONAL ANALYSIS[112]

Once one answers in the affirmative the question of whether Congress

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108. In *Schlitz v. Commonwealth of Virginia*, 681 F. Supp. 330 (E.D. Va. 1988), the district court found that Congress meant to distinguish between elected and non-elected officials, and that doing so was not irrational. *Id.* at 334.

109. Schlitz v. Virginia, 681 F. Supp. at 334 ("Through § 630(f), the ADEA specifically exempts all elected officials, while only exempting certain appointed officials. The proper comparison is not the treatment of elected state judges vis-a-vis appointed state judges, but rather is elected officials generally, vis-a-vis appointed officials. Congress based application of the ADEA upon whether an official is elected, not whether he is an elected judge.").

110. *See, e.g.*, Gregory v. Ashcroft, No. 88-0221C(3) (E.D. Mo. 1989) (implying that the distinction between elected and appointed judges is irrational). However, *Gregory* fails to mention the grounds upon which such a distinction is based, while assuming almost off-handedly that mandatory retirement is rational. *Id.* at 14-15.

111. *See* EEOC v. Vermont, 904 F.2d 794, 802 (2d Cir. 1990) ("Any perceived imprudence in this dichotomy is a matter to be addressed by Congress."); Schlitz v. Virginia, 681 F. Supp. at 334 ("It is not for this Court to determine whether Congress established the best possible scheme for combatting age discrimination, and the Court renders no such judgment.").

112. The Constitutional analysis is confined to a discussion of potential Tenth and Eleventh Amendment implications arising from ADEA coverage of appointed state judges. Because the Supreme Court has held that age is not a suspect class, any possible Fourteenth Amendment Equal Protection challenges are without merit. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Gregory v. Ashcroft, 898 F.2d 598, 605 (8th Cir. 1990) (holding that a mandatory retirement provision applied to state judges does not violate the Equal Protection clause of the Fourteenth Amendment since it is a "rational method by which Missouri may serve its legitimate goal of maintaining a highly qualified and vigorous state judiciary").

intended to protect appointed state court judges from mandatory retirement, the next inquiry is whether Congress may constitutionally do so. The First and Eighth Circuits supported their holdings that Congress may not protect appointed state judges from mandatory retirement by questioning the federal government's power to regulate through the Commerce Clause[113] a "core state function," namely, the characteristics of a state's judiciary.[114] The first prong in the constitutional analysis is whether Congress possesses the authority to preempt a state law or constitution on the issues of judicial qualifications and selection.[115] If one concludes that Congress has the power to regulate a state's conduct and thereby preempt a state law that concerns an essential power reserved to the states, the next question concerns the degree of specificity required of Congress to preempt the state law.[116]

A. Congress' Power to Regulate State and Local Government Entities

The present position of the Supreme Court is to restrict the Tenth Amendment[117] as a restraint on application of federal legislation to state and local governments.[118] The Court held in *Garcia v. San Antonio Metropolitan Transit Authority*,[119] that where Congress has the power to legislate under the Commerce Clause, notions of traditional state functions will not preclude exercise of that power directed at the states.[120] However, prior to *Garcia* the position of the Court had been to limit the power of the federal government to

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113. "The Congress shall have power ... [t]o regulate commerce with foreign Nations, and among the Several states, and with the Indian Tribes." U.S. CONST., art. I, § 8, cl. 3.

114. *See* Gregory v. Ashcroft, 898 F.2d 598, 600 (8th Cir. 1990)("[w]e do not think Congress would have passed legislation that so significantly intrudes on a state's power to regulate its judiciary without giving serious consideration to the consequences of the legislation, its implication for our federal system, and the question of its constitutional basis."); EEOC v. Massachusetts, 858 F.2d 52, 58 (1st Cir. 1988) ("we conclude, therefore, that Congress did not intend to apply the ADEA to appointed state judges....").

115. *See infra* notes 117-63 and accompanying text. For an example of the state's arguments on the issue of Congress' authority to preempt state laws, see Brief for Connecticut as *amicus curiae* in support of Appellants at 13-14, EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) (No. 89-6178) [hereinafter Brief for Connecticut]; Brief for the Lincoln Legal Foundation (LLF) and New Mexico as *amicus curiae* in support of Appellants at 20, EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) (No. 89-6178) [hereinafter Brief for Lincoln Legal Foundation].

116. *See infra* notes 164-200 and accompanying text.

117. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

118. J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW 160 (3rd ed. 1986).

119. 469 U.S. 528 (1985).

120. *Id.* at 546-47 ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.").

commercially regulate state or local governments.[121]

Between 1976 and 1985, the Court attempted to establish tests to determine when a federal law could or could not be applied to state and local governments consistently with the Tenth Amendment. In a series of cases, the Court established that federal law would be an undue extension of the commerce power if the federal law: (1) regulated the "states as states;" (2) addressed matters that were attributes of state or local sovereignty; and (3) required state compliance with the federal law in a manner that directly impaired the ability of state or local governments to structure operations in areas of traditional functions.[122] The Court began a formulation of these tests in *National League of Cities*, a significant decision because for the first time since 1936,[123] the Supreme Court placed restrictions on Congress' exercise of its Commerce Clause power.[124] Under the *National League of Cities* approach, the Supreme Court held that the minimum wage and overtime pay provisions of the Fair Labor Standards Act could not be applied to the employees of state governments,[125] because federalization of a local government's or state's ability to determine its employee's wages would infringe on a state's sovereignty.[126] The Court held that the federal wage regulation would impair essential governmental activities by restricting local governments' freedom of choice in allocating local resources to carry out traditional state and local government functions, and for this reason the regulation could not be applied to state or local governments.[127]

In the nine years between *National League of Cities* and *Garcia*, there were four Supreme Court decisions in which the applicability of *National League of*

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121. J. NOWAK, *supra* note 118, at 160.

122. *See* EEOC v. Wyoming, 460 U.S. 226 (1983) (applicability of the ADEA to state and local governments); Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, *rehearing denied*, 458 U.S. 1131 (1982) (state public utilities and federal energy regulation); United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982) (applicability of Railway Labor Act to state-owned commuter railroads); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (surface mining environmental controls); National League of Cities v. Usery, 426 U.S. 833 (1976).

123. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

124. *See* Matsumoto, National League of Cities--*From Footnote to Holding--State Immunity From Commerce Clause Regulation*, 1977 ARIZ. ST. L.J. 35, 37 n.14; Note, *State Sovereignty Meets the National Political Process*, 54 UMKC L. REV. 369, 373 (1986).

125. 426 U.S. 833, 840-52 (1976).

126. *Id.* at 850-51.

127. *Id.* at 851 ("Application [of the 1974 amendments] will significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation....[I]f Congress may withdraw from the States the authority to make those fundamental employment decisions upon which their systems for performance of these functions must rest, we think there would be little left of the States' 'separate and independent existence.'").

Cities was a central issue.[128] In none of these cases did the Court ultimately find an immunity from federal legislation.[129] One of these decisions that is of particular importance to the issue of ADEA application to appointed state judges is *EEOC v. Wyoming*.[130] In *Wyoming*, the Court held that Congress' 1974 amendment to the ADEA, extending the Act to state and government employees, was a valid exercise of congressional power under the Commerce Clause and that ADEA coverage of state and local government employees does not unduly intrude on state sovereignty so as to violate the Tenth Amendment.[131] The Court further held that application of the Act to Wyoming does not "'directly impair' the state's ability to 'structure integral operations in areas of traditional governmental functions,'"[132] and that the state's interests are not seriously threatened by the ADEA because the state remained free to continue requiring approval of game wardens, providing it could demonstrate that age is a "bona fide occupation qualification" for the job.[133] According to *Wyoming*, the state may continue to retire its employees, but must do so on an individual basis.[134]

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128. *See supra* note 122 and accompanying text.

129. J. NOWAK, *supra* note 118, at 164.

130. 460 U.S. 226 (1983).

131. 460 U.S. at 235-44.

132. *Id.* at 236-39. Of course, *Wyoming* was decided before *National League of Cities* was overruled and thus applied the "traditional government functions" test that the Court later abandoned. If application of the ADEA to the states did not violate the Tenth Amendment under the *National League of Cities* approach, it certainly does not under *Garcia*.

133. *Id.* at 240. Congress recognized that employers should be permitted to use neutral criteria not directly dependant on age, and that even criteria that are based on age are occasionally justified. To this end, the Act provides that certain otherwise prohibited employment practices would not be unlawful "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) (1988); 29 C.F.R. §§ 1625.6(a)-(c) and 1625.7(a)-(f) (1990). The determination of whether an occupational qualification will be deemed to be "bona fide" to a specific job and "reasonably necessary to the normal operation of the particular business," is determined on the basis of all pertinent facts surrounding the particular situation. This exception to the Act must be narrowly construed. 29 C.F.R. § 1625.6 (a) (1990).

Section (c) states: "Many State and local governments have enacted laws or administrative regulations which limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under section 4(f)(1) of the Act, they will be considered in conflict with and effectively superseded by the ADEA." 29 C.F.R. § 1625.6(c) (1990). *See also* Note, *The BFOQ Defense in ADEA Suits: The Scope of "Duties of the Job,"* 85 MICH. L. REV. 330 (1986).

134. 460 U.S. at 239. Vermont argued that *EEOC v. Wyoming* is not controlling because the mandatory retirement policy in *Wyoming* affected game wardens rather than judges. However, as the EEOC observed, *Wyoming*'s rejection of the Tenth Amendment argument had nothing to do with the particular position at issue. Rather, the Court focused on the availability of alternative, nondiscriminatory methods for Wyoming to meet its needs, which are equally available as to judges. Amended Brief for Appellee at 36, n.29, EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) (No. 89-6178).

Because the Court never established a test for determining when a federal law impaired the sovereignty of a state or local government in a "traditional governmental function" to the extent that the regulation could not be applied to those governmental units, the lower courts struggled with application of the Tenth Amendment standard, which resulted in inconsistent applications of *National League of Cities*.[135] This difficulty in part led the Court to hold in *Garcia* that the judiciary has a very limited role in granting to state and local governments an area of immunity from otherwise valid federal commerce power legislation.[136] In *Garcia*, the Court overruled its decision in *National League of Cities*[137] and abandoned the "traditional governmental function"[138] concept as a limit on Congress' Commerce Clause power.[139] The *Garcia* majority held that the national political process established by the Constitution was the primary safeguard for state and local governments against legislation that unduly burdened the states.[140] Finding that the states have a meaningful role in the creation of legislation, the Court observed that voters would not likely return to office federal legislators whose actions destroy the ability of their state and local governments to provide them with basic governmental services.[141] The Court later added in *South Carolina v. Baker*[142] that there could be no rejection of

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135. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539 (1985) ("Thus far, this Court has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*."). In that case the Court set forth examples of protected and unprotected functions, *see* 426 U.S. at 851, 854, n.18, but provided no explanation of how those examples were identified. *See also* Note, *The Repudiation of* National League of Cities, 69 CORNELL L. REV. 1048, 1068-71 (1984) (critical of *National League of Cities). See also* Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985) (defending *National League of Cities* as a modest sort of federalism restraint on Congress).

136. *Id.* at 546-47.

137. 426 U.S. 833 (1976).

138. *See supra* notes 122-27 and accompanying text.

139. *Garcia*, 469 U.S. 528, 547 (1985).

140. *Id.* at 552-57. The notion that states possess the ability to protect themselves through the national political process surfaced initially in *National League of Cities*, 426 U.S. at 876-77, in the dissent of Justices Brennan, White and Marshall. These dissenters observed that Congress is constituted of Senate and House representatives elected from the States, and that decisions of Congress concerning the "extent of federal intervention under the Commerce Clause into the affairs of the states are in that sense decisions of the states themselves." (citing 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)).

141. To demonstrate how meaningful this role can be, the Court cited examples of where the states have effectively limited obligations imposed by Congress under the Commerce Clause, including The Federal Power Act, the National Labor Relations Act, the Labor-Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Sherman Act. 469 U.S. at 553.

142. 469 U.S. at 552-57; South Carolina v. Baker, 485 U.S. 505, 512 (1988) ("Although *Garcia* left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment, the Court in *Garcia* had no occasion to identify or define the defects that might lead to such invalidation."). *See*

the decisions of the democratic process, as reflected in federal statutes, in the absence of extraordinary defects in that process.[143]

Of course, there are limits on the power of Congress to regulate the states' conduct.[144] *Garcia* suggests that the judiciary may intervene if Congress takes action that virtually eliminates the local functions of state and local governments in the federal system.[145] Unfortunately, the opinion gave no indication of the types of laws that might contravene this undefined limitation on the federal power to regulate state and local governments.[146]

The Supreme Court's holdings in *Garcia* and *Wyoming* clearly support the proposition that application of the ADEA to appointed state judges does not violate the Tenth Amendment.[147] First, the political process under which the ADEA was extended to state employees lacks any indication of extraordinary defects.[148] The only state to challenge the political process under which the

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also Fisher, *Constitutional Interpretation By Members of Congress*, 63 N.C.L. REV. 707 (1985) (arguing that Congress has ample resources to perform effective constitutional analysis); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980).

143. On November 27, 1990, the Supreme Court granted *certiorari* in *Gregory v. Ashcroft*, and presumably will reexamine *Garcia* and the power of the federal government to regulate state and local government entities. Gregory v. Ashcroft, 898 F.2d 598 (8th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3391 (U.S. Nov. 27, 1990) (No. 90-50).

144. *See* 469 U.S. 528, 556 (1985) (there exist "affirmative limits the constitutional structure might impose on federal action affecting the states under the Commerce Clause").

145. *See also* FERC v. Mississippi, 456 U.S. 742 (1982), which left open the possibility that the Tenth Amendment might set some limits on Congress' power to compel states to regulate on behalf of federal interests. *Id.* at 761-64.

146. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. at 556, citing New York v. United States, 326 U.S. 572, 583 (Frankfurter, J.) ("The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond that required for a reasoned disposition of the kind of controversy now before the Court."). The only example provided by the Court of the federal government unduly burdening the states was *Coyle v. Oklahoma*, 221 U.S. 559 (1911) (finding that the federal government may not tell a state where it may locate its capital).

147. *See* EEOC v. Vermont, 904 F.2d 794, 802 (2d Cir. 1990); Schlitz v. Virginia, 681 F. Supp. 330, 332 (E.D. Va. 1988) ("There are few limitations on Congress' power to legislate under the Commerce Clause on matters of state sovereignty.").

148. *See* EEOC v. Vermont, 904 F.2d 794, 802 (2d Cir. 1990) ("the absence of a given legislator or legislators, so long as the legislative body's appropriate procedural rules have been followed, does not mean that the national process leading to the enactment of a given piece of legislation was flawed"); Schlitz v. Virginia, 681 F. Supp. at 332 ("There is no indication that the political process under which the ADEA was extended to state employees, including judges, was inadequate to protect the States from being unduly burdened by the federal government."). When Congress amended the ADEA in 1974 to extend coverage to state and local government employees, *see supra* note 4, fully thirty six states appointed judges on at least one level. COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, Table 5 (1972-73). Certainly, the legislators from those states were aware of their state's method of selection and could have questioned the application of

ADEA was extended to state and local governments is Vermont.[149] Vermont argued that the political process was defective because Vermont's senators were not present at the vote.[150] However, the Second Circuit held that this absence was insufficient to render the process extraordinarily defective under the *Garcia-Baker* test.[151] The proper recourse for any state dissatisfied with ADEA application to its appointed judges is not through the courts, but through the national political process.[152]

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the ADEA to appointed judges. Yet nowhere in the legislative history of the ADEA does any discussion of ADEA coverage of appointed judges appear. The Senate voted 69 to 22 in favor of the amendment. 120 CONG. REC. 5743 (1974). The amendment extending coverage passed in the House by a margin of 375 to 37. 120 CONG. REC. 7337-38 (1974).

Moreover, members of Congress are required to take an oath of office to uphold the Constitution. Therefore, all federal legislation, even pre-*Garcia* legislation, should be presumed to be valid since legislators would vote against legislation they thought to be unconstitutional. The fact that the Supreme Court did not make clear until 1985 in *Garcia* that the national political process would be given such deference in legislation affecting the federal-state balance does not negate the claim that members of Congress had an incentive to enact constitutional legislation, and to represent the interests of their states. *See* Fisher, *supra* note 142, at 718-22; Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

149. *See* EEOC v. Vermont, 904 F.2d 794, 802 (2d Cir. 1990).

150. *Id.*

151. *Id.* The Supreme Court held in *South Carolina v. Baker*, 485 U.S. 505 (1988), that the failure of South Carolina to even allege that it was deprived of any right to participate in the national political process, or that it was singled out in a way that left it politically isolated and powerless, was sufficient to support a finding that the national political process did not operate in a defective manner. *Id.* at 512.

But see Brief for the Lincoln Legal Foundation, *supra* note 115, at 19 (the political process did not function properly because before *Garcia* "Congress could reasonably anticipate that the courts would act if Congress exceeded its constitutional authority"). This argument is fundamentally flawed. It assumes that application of the ADEA would be unconstitutional today, but if Congress reenacted the ADEA tomorrow, it would be constitutional. Furthermore, Lincoln Legal Foundation's argument that Congress could expect the courts to act if Congress exceeded its constitutional authority fails to recognize that two years after *Garcia* was decided Congress amended Title VII to extend its coverage to persons 70 and over. *See* Pub. L. No. 99-592. Congress, at the same time, created additional exemptions to coverage, *see* Section 2(c)(1)(2), *codified at* 29 U.S.C. §§ 623 and 631(c)(1).

152. South Carolina v. Baker, 485 U.S. 505, 512 (1988) (in explaining its decision in *Garcia*, the Court stated that "The Tenth Amendment limits on Congress' authority to regulate state activities ... are structural not substantive--i.e., that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."). *But see* Schwartz, National League of Cities *Again--R.I.P. or a Ghost That Still Walks?* 54 FORD. L. REV. 141 (1985) (the *Garcia* holding that the judiciary could not decide whether a federal law violated the limits on Congress' authority to regulate the states under the Commerce Clause is inconsistent with the fundamental principles of our constitutional system); Comment, *State Autonomy After* Garcia: *Will the Political Process Protect States' Interests*, 71 IOWA L. REV. 1527, 1543 (1986)("In rejecting judicial determination of traditional governmental functions, the Court has placed unwarranted faith in the ability of the political process to protect states' interests.").

Further, *Garcia*'s recognition that federal legislation may be invalidated by the federal judiciary when it goes so far as to virtually eliminate the functions of state and local governments is simply inapplicable to ADEA protection of state judges.[153] Invalidating mandatory retirement provisions for appointed judges will not eliminate or greatly impair any local or state function.[154] Congress is simply requiring the states to utilize their existing judicial retention and review procedures; it is not attempting to tell the states how to select their judiciary, set the terms of judges, or dictate the duties of state judges.[155] Admittedly, such legislation might extend beyond the "affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause."[156] However, that concern is not raised by the ADEA, which leaves a state with virtually total discretion in structuring its judiciary.[157]

Moreover, extending ADEA coverage to appointed state judges will not necessarily require additional administrative mechanisms to determine on an individualized basis if a particular judge should be removed, since a state can simply choose not to mandatorily retire its judges. Even if additional mechanisms are required, they will not rise to the level of inconvenience contemplated in *Garcia*.[158] Every state presently has some form of review and retention procedure for its judiciary,[159] thus demonstrating that the judicial performance of sitting judges may be evaluated on an individualized basis

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153. South Carolina v. Baker, 485 U.S. 505, 512 (1988); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556-57 (1985).

154. *See infra* note 162 and accompanying text.

155. *See* EEOC v. Massachusetts, 858 F.2d 52, 57 (1st Cir. 1988), where the court reasoned that Congress is attempting to regulate the requirements a state can impose on those who hold office in the state's judiciary. However, the *Massachusetts* court states too much. Congress may be regulating *one* of the requirements a state can impose--an age requirement--but standing alone that requirement does not rise to the level of greatly impairing any state function.

156. Garcia, 469 U.S. 528, 556 (1985).

157. *Compare* Brief for the Lincoln Legal Foundation, *supra* note 115, at 17 (arguing that the extension of the ADEA to appointed state judges will violate this affirmative limit, and citing *Coyle v. Oklahoma,* 221 U.S. 559 (1911), where the Court held that a state's power to locate its own seat of government is essentially a state power upon which Congress lacks the authority to impinge.). Thus *Coyle* suggests that there is an enclave of sovereignty reserved to the states. But even assuming this to be so, the discretion to choose the location of a state's seat of government surely cannot be compared to arbitrary age discrimination. As *EEOC v. Wyoming* demonstrates, the extension of the ADEA to the states does not infringe on the states' sovereignty so as to violate the Tenth Amendment. 469 U.S. at 239.

158. *See supra* notes 144-46 and accompanying text.

159. THE COUNCIL OF STATE GOVERNMENTS, *supra* note 5, at Table 4.5. Forty-eight states currently have some type of judicial qualifications commission to evaluate the performance of sitting judges and make recommendations to the Governor, General Assembly, or State Supreme Court whether the judge should be removed for mental or physical disability. *Id.* The two states without formal commissions, Arkansas and Vermont, delegate the review and removal of judges to the Governor or Supreme Court. *Id.*

without a prohibitive loss in public confidence in the courts and without sacrificing judicial standards.

The First Circuit recently held that forced removal of judges is a sensitive and problematic procedure, and a state's desire to avoid that procedure should be respected.[160] Yet, the court provided no basis for this argument and completely ignored the procedures already implemented in all of the states. Furthermore, the argument that it is problematic to remove judges is simply a superficial justification for mandatory retirement, which Congress has rejected as a matter of national policy.[161] The procedure of removing a judge may be uncomfortable for the participants, but that inconvenience does not outweigh the injustice of removing individuals from the judiciary who are perfectly capable of discharging their duties.[162] Protecting appointed state judges from mandatory retirement does not violate the Tenth Amendment because there were no defects in the political process under which the ADEA was extended to the states, and because the extension of the ADEA to state judges will not unduly burden the states' right to determine the characteristics of their judiciary.[163]

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160. EEOC v. Massachusetts, 858 F.2d 52, 57 (1st Cir. 1988) ("Massachusetts does not wish to take up the perilous task of evaluating the performance of its older judges, and impeaching ... those the legislature feels are no longer qualified. This task is as undesirable as it is difficult....").

161. *See supra* note 1 and accompanying text.

162. One additional argument advanced in support of rejecting ADEA coverage of state employees as violative of the Tenth Amendment is that it intrudes on the state's right to determine the characteristics of its judiciary. Mandatory retirement is supported by some courts as a necessary procedure to maintain the quality of a state's judiciary, as well as create openings for younger members of society who are more attuned to the views of the majority. Gregory v. Ashcroft, 898 F.2d 794, 605-06 (8th Cir. 1990); EEOC v. Massachusetts, 858 F.2d 52, 57 (1st Cir. 1988); Apkin v. Treasurer and Receiver Gen'l, 401 Mass. 427, 435-36, 517 N.E.2d 141 (1988).

This argument, though, is flawed in two respects. First, there has been no evidence presented by those courts recognizing such a right that individual evaluation of appointed judges in any way infringes the states' right to the degree required by *Garcia*. The exception in *Garcia* requires that the federal legislation virtually eliminate the function of state and local government. This exception will rarely be satisfied, and certainly no basis is present for invoking the exception by virtue of any alleged infringement on the state's right to determine who may serve on its judiciary. Second, mandatory retirement cannot be justified as assuring the quality of a state's judiciary since the states are obviously adequately prepared to make such determinations as to individual judges. Furthermore, the premise that elderly judges are not sensitive to the views of the majority flies in the face of Congress' purpose in enacting the ADEA of eliminating irrational, unjustified employment decisions based upon assumptions about relationship between age and ability. *See* Ramirez v. Puerto Rico Fire Service, 715 F.2d 694, 698-99 (1983). *See also* S. Rep. 16853, 99th Cong., 2d Sess. (1986) ("Age alone has nothing to do with an employee's ability to work. Justice Oliver Wendell Holmes served with distinction in the Supreme Court into his 90's."). No evidence has been adduced in any of the recent mandatory retirement cases that elderly judges are not capable of recognizing the views of the majority, or the minority, for that matter.

163. Despite the seemingly straightforward application of *Garcia* and *Wyoming* to ADEA coverage of appointed state judges, at least one *amicus* has argued that application of the ADEA to appointed judges violates the Tenth Amendment. The ADEA application is asserted to violate the

B. *Degree of Specificity Required in Federal Legislation that Regulates a State Activity*

Although the courts have generally recognized that Congress has the power to extend the ADEA to appointed state judges, all of the courts finding that the ADEA does not protect appointed judges have held that when Congress attempts to infringe on an area that strikes close to the heart of state sovereignty, it must manifest its intent in clear and unequivocal terms.[164] These courts required more than Congress' clear and unequivocal intent to extend ADEA coverage to state and local governments. Instead, they required clear congressional intent to extend ADEA protection specifically to appointed state court judges because legislation preempting a state law regarding the composition of a state's judiciary

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Tenth Amendment because the composition of a state's judiciary is not commerce among the several states and the application of the ADEA to appointed judges would force states with appointed judiciaries to implement elections, thereby infringing on the state's ability to structure a core state function. *See e.g.*, Brief for the Lincoln Legal Foundation, *supra* note 115, at 20-25.

The argument asserted that the composition of a state's judiciary is not "commerce" and therefore is beyond the scope of congressional regulatory power under the Commerce Clause is not persuasive. Citing the common dictionary definition of commerce, and the definition of commerce recognized at the time the Constitution was written and ratified, the LLF asserts that the functions of the judicial branch of a state are not related to the definitions of commerce. Even though judges adjudicate cases involving litigants, the arrangement and functioning of the court itself are attributes of a sovereign government acting in a governmental capacity, the LLF argues. Brief for the Lincoln Legal Foundation, *supra* note 115, at 20-25.

The Supreme Court has liberally construed the Commerce Clause to include any activity that *affects* commerce among the states. *See, e.g.*, Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) (surface coal mining affects interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (discriminatory operation of motel affected interstate commerce); Katzenbach v. McClung, 379 U.S. 294 (1964) (discrimination in restaurant affects interstate commerce). Certainly state judges affect commerce among the states through their decisions. Not only may their decisions involve litigants from diverse states, but these decisions involve, for example, applications of tort, contract, and property law, areas of the law which undoubtedly touch upon some aspects of commerce.

It is conceded that ADEA coverage of appointed state judges might give a state an incentive to elect, rather than appoint, judges, to avoid the ADEA. However, no state is compelled to adopt any particular means of selecting judges. Also, *Wyoming* held that states need not abandon their goals, but may achieve them in a more individualized and careful manner. *Wyoming*, 460 U.S. 226, 239 (1982). Clearly, states may retain an appointed judiciary and comply with the ADEA by determining the fitness of their older judges on an individual basis. There is even the possibility that the voters of a state with mandatory retirement for its appointed judges may not wish to revert to an elected judiciary if the sole motivation is to avoid the ADEA and enforce mandatory retirement. Public attitudes concerning mandatory retirement have changed over the last two decades and it is possible that the voters will remain content with an appointed judiciary protected by the ADEA.

164. *See* Gregory v. Ashcroft, 898 F.2d 598, 600 (8th Cir. 1990); EEOC v. Massachusetts, 858 F.2d 52, 54 (1st Cir. 1988); Apkin v. Treasurer and Receiver Gen'l, 401 Mass. 427, 517 N.E.2d 141 (1988).

alters the delicate federal-state balance.[165] This application of the "clear statement rule" is inappropriate because it improperly extends the rule beyond its Eleventh Amendment origin,[166] it requires an analysis that was rejected in *Garcia* as unworkable,[167] and it requires specificity in federal legislation that is impracticable.[168]

The clear statement rule has been invoked by the courts most often in the context of the Eleventh Amendment.[169] Despite the unambiguous language of the Eleventh Amendment,[170] Congress may abrogate a state's constitutional sovereign immunity and create a private cause of action against the states in federal court. Because Congress has the power to provide for private suits against states or state officials, which are constitutionally impermissible in other contexts,[171] the federal courts must be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment.[172] As the Court has acknowledged, this power is "carved out of"[173] state sovereignty by the supremacy of federal law.[174]

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165. EEOC v. Massachusetts, 858 F.2d 52, 54 (1st Cir.) (because ADEA coverage of appointed judges is a significant intrusion into properly state-dominated affairs, the court would look to see if Congress "clearly and unequivocally manifested an intent to regulate the requirements a State can impose on those who hold office in the state's judiciary").

166. *See infra* notes 169-82 and accompanying text.

167. *See infra* notes 183-89 and accompanying text.

168. *See infra* notes 190-200. *See also* EEOC v. Wyoming, 460 U.S. 226, 239 (1983) (state interest in mandating retirement of game and fish wardens does not require impossible demands of specificity on the national legislature).

169. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("We ... affirm that 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. The fundamental nature of the interests implicated by the Eleventh Amendment dictates this conclusion."). *See also* Dellmuth v. Muth, 491 U.S. 223 (1989) (unmistakable language is required to protect the "'constitutionally mandated balance of power' between the States and the Federal Government ... adopted by the framers to ensure the protection of 'our fundamental liberties.'"); Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).

170. "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 Subject of any Foreign State." U.S. CONST. amend. XI.

171. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

172. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985).

173. 427 U.S. 445, 455 (quoting Ex parte Virginia, 100 U.S. 339, 346 (1880)) (concluding that the enforcement provision of the Fourteenth Amendment limits the scope of state sovereign immunity).

174. Congress' right to override the Eleventh Amendment has been widely criticized. Justice Scalia is one of the most vocal critics of this right. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (Scalia, J., concurring in part, dissenting in part), Hoffman v. Connecticut Dept. of Income Maintenance, ___ U.S. ___, 109 S. Ct. 2818, 2824 (1989) (Scalia, J., concurring) ("It makes no sense to affirm the constitutional principle established by Hans v. Louisiana, 134 U.S. 1 (1890), that 'a suit directly against a state by one of its own citizens is not one to which the judicial power of the United States extends, unless that state itself consents to be sued,' ... and to hold at

In *Atascadero State Hospital v. Scanlon*,[175] the Supreme Court announced that it will not look beyond the four corners of a statute to find congressional intent to abrogate state sovereign immunity.[176] Congress' intent to extend the ADEA to state and local governments, and in effect, create private causes of action against the states, was clearly and unequivocally evinced in 1974 when Congress extended ADEA protection to state and local government employees.[177] That Congress intended to extend the ADEA to state and local governments was made manifestly clear by Congress' amending the definition of "employer" to include the state and local governments, and amending the definition of "employee" to exempt elected officials and their advisers.[178] Therefore, Congress has satisfied any requirement of clear statement to extend the ADEA to state and local government employees, including appointed state judges.[179]

The recent decisions finding that the ADEA does not protect appointed state judges have held that since ADEA protection of appointed state judges infringes on sovereign rights protected by the Tenth Amendment, Congress must manifest clear and unequivocal intent to extend the ADEA to state judges.[180] This rationale for the clear statement rule, assuming that judges are so "important" to the state as to require a higher standard of congressional intent, fails to balance the state's interest in determining the characteristics of its judiciary against the federal interest of banning arbitrary age discrimination. Congress has repeatedly expressed its disapproval of mandatory retirement and has consistently affirmed its intention that individuals be guaranteed the right to be evaluated on an individual basis.[181] Eliminating mandatory retirement based solely upon age is an important federal policy endorsed by Congress, because

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the same time that Congress can override this principle by statute in the exercise of its Article I powers.").

175. 473 U.S. 234 (1985).

176. *Id.* at 240.

177. Pub. L. No. 93-259, Section 28(a)(1)-(4), 88 Stat. 74 (1974), (amending 29 U.S.C. § 630(b)). 29 U.S.C. § 630(b) now provides in relevant part: "The term [employer] also means ... (2) a State or political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State, and any interstate agency,...."

178. *Supra* notes 4 and 46-56 and accompanying text.

179. *See* EEOC v. Wyoming, 460 U.S. 226, 239 (1983) (the Court declined to "override Congress' express choice to extend its regulatory authority to the states"); Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 698-99 (1st Cir. 1983) ([e]xpress authority in Age Discrimination in Employment Act for maintenance of suits against state employers was sufficient evidence to demonstrate congressional will that Eleventh Amendment immunity be abrogated). *See also* Fitzpatrick v. Bitzer, 427 U.S. 445, 452 (1976) (in enacting the 1972 amendments to Title VII, Congress intended to override the states' Eleventh Amendment immunity).

180. Gregory v. Ashcroft, 898 F.2d 598, 600 (8th Cir. 1990); EEOC v. Massachusetts, 858 F.2d 52, 54 (1st Cir. 1988); EEOC v. Illinois, 721 F. Supp. 156, 159 (N.D. Ill. 1989).

181. *See* H.R. REP. NO. 527, 95th Cong., 1st Sess. part 1, 2 (1977).

age alone is a poor indicator of one's ability to perform a job.[182] This federal interest must be weighed against the important interests of the state -- the "interest" in discriminating solely on the basis of age.

Moreover, the reasoning of those courts requiring a clear statement to cover judges directly conflicts with the Supreme Court's holdings in *Wyoming*[183] and *Garcia*.[184] When the Supreme Court overruled *National League of Cities*, it did so in part because the framework announced in *National League of Cities* proved too difficult to establish and produced inconsistent results.[185] Yet the First and Eighth Circuits require this exact type of determination when they hold that a federal law that applies to state judges infringes on state sovereignty and, therefore, requires a higher standard of congressional intent.[186] Both the First and Eighth Circuits held that because judges occupy a more "serious" role in society, federal legislation affecting them requires a higher standard of intent.[187] However, these courts failed to offer any test or analysis for determining which state and local government positions occupy such "serious" roles in society. Rather than force courts into making difficult determinations about which state functions are traditional, the Supreme Court in *Garcia* recognized that the political process is capable of protecting these traditional state functions.[188] Accordingly, Congress may amend the ADEA to exclude appointed state judges if it determines that extending the ADEA to appointed state judges infringes on the state judicial selection process.[189]

Finally, properly applied, the clear statement rule does not require explicit mention of each official to be included within the scope of the ADEA. This requirement would lead to the absurd result that *no* job categories are covered because Congress did not explicitly include any particular class of officials when it extended the ADEA to the states.[190] To satisfy this standard, Congress would have had to explicitly list every position in every state government that it wished to cover.[191] Instead, Congress broadly covered state "employees" and then exempted certain state officials.[192] The clear statement rule simply

182. *Id.*

183. *See supra* notes 130-34 and accompanying text.

184. *See supra* notes 137-41 and accompanying text.

185. *See supra* note 135 and accompanying text.

186. Gregory v. Ashcroft, 898 F.2d 598, 600 (8th Cir. 1990); EEOC v. Massachusetts, 858 F.2d 52, 54 (1st Cir. 1988). *See also* Brief for Appellants at 23, EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990) (No. 89-6178).

187. Gregory v. Ashcroft, 898 F.2d at 600; EEOC v. Massachusetts, 858 F.2d at 54.

188. *See supra* notes 135-43 and accompanying text.

189. South Carolina v. Baker, 485 U.S. 505, 512 (1988).

190. *See supra* notes 4 and 24 and accompanying text.

191. Amended Brief for Appellee, at 27, EEOC v. Illinois, No. 89-3421 (7th Cir.).

192. *See supra* notes 24 and 35-41.

requires that Congress "clearly state" that the ADEA be applied to the states, and this requirement has plainly been met.[193]

An examination of pertinent Title VII[194] language supports the proposition that Congress need not explicitly mention state judges in the ADEA. Title VII broadly bars discrimination on the basis of race, national origin, religion, or sex.[195] The definition of employee for Title VII purposes is identical to the definition of employee found in the ADEA.[196] The Title VII legislative history is devoid of any discussion of its coverage of appointed state judges, yet certainly the defendants in the recent ADEA cases would not assert that state and local governments may discriminate on the basis of race, religion, sex, and national origin when determining the composition of their judiciary, without running afoul of Title VII.

Requiring such explicit mention of appointed judges for ADEA purposes creates a standard that is difficult to satisfy and one that has been squarely rejected.[197] Furthermore, requiring explicit mention of appointed judges leads to the conclusion that the ADEA will not protect any state or local government employees, including appointed judges, if a court deems that such employees occupy a role in the state government that is somehow "central" to the state or local government.[198] This would undermine Congress' express desire to provide protection for state government employees.[199] The proper standard to utilize in determining Congress' intent is simply whether Congress clearly intended to extend the ADEA to state and local government employees, and not whether it expressed a clear intent to cover appointed judges in particular.[200]

CONCLUSION

Appointed state judges are employees according to the terms of the ADEA. Because appointed judges do not fit within one of the narrow exemptions to the ADEA definition of employee, state laws mandating the retirement of appointed judges are in conflict with the ADEA. The plain language of the ADEA definition of employee leads to the conclusion that Congress intended to protect appointed judges from mandatory retirement. The legislative history of the ADEA, supplemented by the legislative history of identical Title VII provisions,

193. *Supra* note 4 and accompanying text.
194. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (1988).
195. *Id.*
196. *See supra* note 46 and accompanying text.
197. *See supra* notes 183-89 and accompanying text.
198. *See supra* notes 180-82 and accompanying text.
199. *See supra* notes 3-4, 180-82 and accompanying text.
200. *Supra* notes 175-79 and accompanying text.

supports the conclusion that Congress intended to exempt only specific categories of policymakers. The only appointees at the policymaking level that are exempted from coverage are the close and personal advisers of the elected official. A reading of the exemptions that limits their reach to the executive and legislative branches of government is fully supported by the legislative history of the ADEA and Title VII. Therefore, the courts have no occasion to consider if appointed judges are policymakers in the generalized sense of that term.

Furthermore, Congress may constitutionally extend ADEA protection to state court judges. Congress clearly and unequivocally expressed its intent to extend ADEA protection to state and government employees with its 1974 amendment to the ADEA. Courts should not interpret Congress' decision to avoid the quixotic task of listing every state and local governmental employee to be protected to mean that Congress did not intend to protect appointed judges.

What is perhaps the most disturbing aspect of the recent decisions finding that the ADEA does not protect appointed judges is the courts' conspicuous lack of recognition of the balance between the competing federal and state interests. The recent courts have allowed the states' interest in determining one characteristic of their judiciary to override the federal interest in banning arbitrary age-based discrimination. The states' interest is deserving of some deference, but their interests can be adequately protected through an individual assessment of the qualifications of the members of their judiciary. Requiring the states to abandon their mandatory retirement laws for their appointed judges will not unduly jeopardize the states' interest in determining who shall interpret their laws. Instead, the repeal of these mandatory retirement laws will further the important national policy of eliminating arbitrary age-based discrimination in the workplace.

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