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Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations

Deanna L. Ruddock

NOTES

Gregory v. Ashcroft: The Plain Statement Rule and Judicial Supervision of Federal-State Relations

Appointed state judges throughout the country may still feel the sting of the Supreme Court's decision in *Gregory v. Ashcroft* [1] upholding Missouri's mandatory retirement age for these judges.[2] The Court's refusal to extend the protection of the Age Discrimination in Employment Act (ADEA)[3] to appointed state judges will have a significant impact on Congress as well. In *Gregory* the Court placed a new burden on Congress to state clearly its intent to extend federal statutes to certain state and local governmental functions.[4] Because the Court first implemented this requirement to interpret a federal statute enacted under the Commerce Clause,[5] *Gregory* represents a Court willing to turn to statutory construction as a means to monitor federal-state relations.[6]

The ADEA provides: "[I]t shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[7] Employers, therefore, may not impose mandatory retirement ages on employees covered by the ADEA.[8] The Supreme Court in *Gregory* declined to extend the ADEA's protection to appointed state judges,[9] however,

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1. 111 S. Ct. 2395 (1991).

2. *See infra* text accompanying notes 28-29.

3. 29 U.S.C. §§ 621-634 (1988).

4. To support this requirement, the Court relied on the plain statement rule. *See infra* text accompanying notes 36-37. Before *Gregory*, the Court only used the plain statement rule to determine whether Congress intended a federal statute to apply to the states at all. *See infra* notes 125-35, 152-58 and accompanying text.

5. *See* EEOC v. Wyoming, 460 U.S. 226, 235-44 (1983) (finding that the extension of the ADEA to the states was a valid exercise of congressional power under the Commerce Clause).

6. Prior to *Gregory*, the Court held that the judiciary should play no principal role in supervising the scope of Commerce Clause legislation as it applied to state and local governments. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985).

7. 29 U.S.C. § 623(a)(1).

8. *See* Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 410 (1985) ("[P]olicies and substantive provisions of the [ADEA] apply with especial force in the case of mandatory retirement provisions.").

9. State judges may be elected or appointed. *Gregory* addressed the question whether the ADEA's protection extends to appointed state judges. *See Gregory*, 111 S. Ct. at 2398. Elected state judges fall within the exclusion for "person[s] elected to public office" and are, therefore, expressly excluded from the ADEA's protection. 29 U.S.C. § 630(f). For the full text of the relevant statutory language, see *infra* note 11.

because Congress failed to state with sufficient clarity its intention to include them within the Act's coverage.[10] Now, states may force their judges to retire notwithstanding Congress's intent to extend the ADEA to all employees, with four narrowly defined exceptions.[11]

To support its holding a majority of five justices relied on its so-called "plain statement rule."[12] This rule, as previously interpreted by the Court, requires that when a federal statute alters the balance of power between the states and federal government, Congress must state clearly its intent to extend the statute to the states.[13] In *Gregory*, however, the Court required more than an expression of Congress's clear and unequivocal intent to extend the ADEA to the states. The majority required Congress to state clearly and specifically its intention to extend the ADEA to appointed state judges, finding that such an extension would limit a state's Tenth Amendment power to determine the qualifications of its governmental officials.[14]

The majority's modified use of the plain statement rule thus requires that, when a federal statute seeks to regulate traditional state and local governmental functions, Congress must state clearly the precise applica-

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10. *Gregory*, 111 S. Ct. at 2404; *see infra* notes 41-42 and accompanying text.

11. Section 630(f) of the ADEA excludes certain classes of persons from the Act's antidiscrimination protections:

> The term "employee" means an individual employed by any employer except that the term "employee" shall not include [1] any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or [2] any person chosen by such officer to be on such officer's personal staff, or [3] an appointee on the policymaking level or [4] an immediate advisor 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.

29 U.S.C. § 630(f).

12. *Gregory*, 111 S. Ct. at 2401, 2406.

13. For a more detailed discussion of the plain statement rule, see *infra* notes 125-35, 152-58 and accompanying text. Congress amended the Act in 1974 to extend the ADEA to the states, *see infra* note 91 and accompanying text, and nine years later the Supreme Court held that the extension of the ADEA to the states was a valid exercise of congressional power under the Commerce Clause. *See* EEOC v. Wyoming, 460 U.S. 226, 235-44 (1983); *see also* Davidson v. Board of Governors, 920 F.2d 441, 443 (7th Cir. 1990) (holding that the ADEA may be extended to state officials because the statute satisfies the plain statement requirement). The statutory language satisfying this plain statement requirement provides: "The term 'employer' means . . . a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State . . . ." 29 U.S.C. § 630(b)(2).

14. *See infra* text accompanying notes 34-37. The Tenth Amendment provides: "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; *see also infra* notes 140-48 and accompanying text (outlining the Court's "political-function" cases, which recognize the states' power to determine the qualifications of their governmental officeholders).

tions of the statute. This reliance on the plain statement rule to require Congress to specify the exact details of a statute's application within the statute itself is unprecedented.[15]

This novel use of the plain statement rule signals the Court's increasing willingness to protect states from the reach of federal statutes, especially statutes passed pursuant to Congress's Commerce Clause powers.[16] Prior to *Gregory*, the Court rejected a judicial role in monitoring the scope of Commerce Clause power as it applied to state and local governments, forcing states to look to the political process, and not to the courts, for protection from congressional intrusion.[17] Now, through the use of the plain statement rule, courts may circumvent this self-imposed limitation on judicial review of Commerce Clause legislation by first determining whether Congress has clearly stated its intent to extend a statute to a particular governmental activity before turning the issue over to the political process. The Court's new use of the plain statement rule allows the Court to oversee the extension of Commerce Clause legislation to a state's government functions without overruling prior case law limiting its role in this area.

This Note examines *Gregory*'s relationship to prior Supreme Court decisions interpreting the ADEA and to cases utilizing the plain statement rule.[18] The Note concludes that, in requiring Congress to state clearly the precise application of its statutes, the majority extended the plain statement rule beyond what existing case law warranted and reached a result that conflicts with the legislative history and purpose of the ADEA.[19] By failing to explain how its new use of the plain statement rule might apply in other situations, the Court left the lower federal courts without a clear test for reviewing congressional legislation of state and local governmental activities.[20]

Four Missouri state judges brought this case against the Governor of the state in the United States District Court for the Eastern District of Missouri, alleging that a mandatory retirement provision of the Missouri

15. *See Gregory*, 111 S. Ct. at 2409 (White, J., concurring in part, dissenting in part, and concurring in judgment).

16. Congress extended the ADEA to the states pursuant to its Commerce Clause powers. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607 (current version at 29 U.S.C. § 631 (1988)), *amended by* Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189 (1978) (raising upper limit of statute's applicability to age 70), *repealed by* Pub. L. No. 99-592, § (2)(c)(1), 100 Stat. 3342, 3342 (1986) (eliminating upper-age limit).

17. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1985). For a discussion of *Garcia*, see *infra* notes 110-22 and accompanying text.

18. *See infra* notes 125-35, 152-58 and accompanying text.

19. *See infra* notes 167-81 and accompanying text.

20. *See infra* notes 188-90 and accompanying text.

Constitution[21] violated the ADEA[22] and the Equal Protection Clause of the Fourteenth Amendment.[23] The district court granted the Governor's motion to dismiss, holding that judges are not protected by the terms of the ADEA, since they fall within an exception for "appointees . . . on a 'policymaking level.' "[24] The court also found that the mandatory retirement provision did not violate the Equal Protection Clause because there was a rational basis for distinguishing between such high-level policymaking officials as judges and other state officials.[25] The United States Court of Appeals for the Eighth Circuit affirmed the dismissal, finding that Missouri's appointed state judges exercise policymaking responsibilities and that no reason exists for distinguishing between appointed and elected state judges.[26] The Supreme Court granted certiorari,[27] and a seven-justice majority also affirmed, holding that appointed state judges come within the exceptions enumerated in the ADEA[28] and that the mandatory retirement rule for judges does not violate the anti-discrimination mandate in the Fourteenth Amendment.[29] Justice O'Connor, writing for the majority,[30] acknowledged the importance of the federal constitutional scheme of dual sovereignty between the states and the federal government, noting that the principal benefit of such a system is the check on abuses of governmental power it provides.[31] Yet she recognized

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21. The Missouri Constitution provides that "[a]ll judges other than municipal judges shall retire at the age of seventy years." MO. CONST. art. V, § 26.

22. 29 U.S.C. §§ 621-634 (1988).

23. U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides, in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

24. *Gregory*, 111 S. Ct. at 2398. For relevant text of the statute, see *supra* note 11.

25. *Gregory*, 111 S. Ct. at 2398. The rational relation test used by the district court is the more lenient of two major standards of review for state action challenged as discriminatory under the Equal Protection Clause. *See infra* note 138 and accompanying text.

26. Gregory v. Ashcroft, 898 F.2d 598, 602-04 (8th Cir. 1990), *aff'd*, 111 S. Ct. 2395 (1991). Elected state judges are excluded expressly from coverage under the ADEA. *See supra* note 11.

27. Gregory v. Ashcroft, 111 S. Ct. 507 (1990).

28. *Gregory*, 111 S. Ct. at 2404; *see supra* note 11.

29. *Gregory*, 111 S. Ct. at 2408.

30. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Souter joined Justice O'Connor's majority opinion. *See id.* at 2398.

31. *Id.* at 2399. The Court outlined several other advantages preserved to the people under such a system of dual sovereignty: assurance of a decentralized government that is more sensitive to the needs of the people; increased opportunity for citizen involvement in the democratic process; more innovation and experimentation in government; and a more responsive government. *Id.* (citing Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987); Deborah J. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988)).

that the Supremacy Clause[32] gives the federal government a decided advantage over the states in maintaining the proper balance between federal and state power.[33] Justice O'Connor emphasized that the Tenth Amendment provides the states authority to determine the standards their most important officers must meet,[34] and stressed that interpreting an ambiguous congressional statute as interfering with the states' ability to determine the qualifications of their judges would upset traditional rules of federalism.[35] Employing the plain statement rule, set forth in earlier cases construing congressional statutes passed pursuant to the Eleventh and Fourteenth Amendments,[36] the Court required Congress to state explicitly its intention to extend the coverage of the ADEA to appointed state judges in order for federal courts to find that such intention exists.[37]

The majority declined to consider the legislative history of the ADEA and the similar Title VII statute, even though it admitted that the language of the ADEA was "at least ambiguous" as to whether the statute was intended to cover appointed state judges.[38] Its only reference to congressional intent was a single admission that the phrase " 'appointee[s] at [sic] the policymaking level' . . . is an odd way for Congress to exclude judges" from coverage of the ADEA.[39] Notwithstanding this admission, the Court proceeded to find that Congress's failure to explicitly include judges[40] created an ambiguity sufficient to conclude that they

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32. U.S. CONST. Art. VI.

33. *Gregory*, 111 S. Ct. at 2400.

34. *Id.* at 2402.

35. *Id.* at 2401.

36. *See, e.g.*, Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 240 (1985); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984).

37. *Gregory*, 111 S. Ct. at 2401.

38. *Id.* at 2404. The Court attributed the ambiguity to the breadth of the exceptions to the ADEA. *Id.*; *see also infra* note 101 (summarizing the available legislative history of the ADEA).

39. *Gregory*, 111 S. Ct at 2404 (quoting 29 U.S.C. § 630(f)). *But see* EEOC v. Vermont, 904 F.2d 794, 800-01 (2d Cir. 1990) (finding that policymaking is not a traditional judicial function); 87-8 Op. Vt. Att'y Gen. 4 (1987) (concluding that judges are not ordinarily policymakers but are generally confined to reviewing the policy decisions of others); EEOC Opinion Letter on Applicability of Age Discrimination in Employment Act to Appointed State Court Judges, EEOC Compl. Man. (BNA) N:1001 n.2 (Apr. 7, 1987) [hereinafter EEOC Opinion Letter] (finding that judges are not policymakers and are, therefore, protected by the ADEA); SAM J. ERVIN, JR. & RAMSEY CLARK, ROLE OF THE SUPREME COURT: POLICYMAKER OR ADJUDICATOR 8 (1970) (concluding that judges possess interpretative, not policymaking, powers).

40. *Gregory*, 111 S. Ct at 2404. The Court did not extend the plain statement rule so far as to require that the Act explicitly mention judges before protection would be found. *Id.* Nevertheless, the Court pointed out that "it must be plain to anyone reading the Act that it covers judges." *Id.* The Court concluded that the ADEA statute failed in this respect. *Id.*

are not covered.[41]

After determining that the ADEA's protection did not extend to appointed state judges, the Court relied on the plain statement rule to find that the Fourteenth Amendment's Equal Protection Clause also affords state judges no protection.[42] Although recognizing that the Fourteenth Amendment, by its terms, contemplates interference with state authority,[43] the Court noted that "the States' power to define the qualifications of their officeholders has force even as against the proscriptions of the Fourteenth Amendment,"[44] and that judicial scrutiny under the Equal Protection Clause "will not be so demanding where we deal with matters resting firmly within a state's constitutional prerogatives."[45]

The plain statement rule, as used to construe statutes under the Fourteenth Amendment, requires Congress to state clearly its intent to impose obligations on the states whenever the legislation "intrudes on traditional state authority."[46] Finding the language of the statute "at least ambiguous" on the question whether Congress intended the ADEA to cover state judges,[47] the Court held that the necessary congressional intent was absent.[48]

The Court then turned to the Missouri judges' argument that their exclusion from ADEA violated the Fourteenth Amendment's Equal Protection Clause, notwithstanding Congress's failure to extend the statute's protection to judges. The petitioners asserted that even if Congress, by not exercising its power under section five of the Fourteenth Amend-

41. *Id.*

42. *Id.* at 2405-06. In EEOC v. Wyoming, 460 U.S. 226 (1983), the Court did not address the questions whether Congress also extended the ADEA to the states pursuant to its Fourteenth Amendment powers and whether the extension would have been a valid exercise of that power. *Id.* at 243 & n.18; *see* U.S. CONST. amend. XIV, § 5. Without deciding this issue, the *Gregory* Court proceeded to find that Congress did not act pursuant to its Fourteenth Amendment powers to extend the ADEA protection to appointed state judges. *See Gregory*, 111 S. Ct. at 2405-06.

43. *Gregory*, 111 S. Ct. at 2405. The Fourteenth Amendment grants Congress the power to enforce its prohibition against state action denying equal protection of the laws. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")

44. *Gregory*, 111 S. Ct. at 2405.

45. *Id.* In reaching this conclusion, the Court relied most heavily on what it termed its "political-function" cases. *Id.*; *see infra* notes 140-48 and accompanying text.

46. *Gregory*, 111 S. Ct. at 2405. The Court relied on Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981), in which it first adopted the rule that congressional intent to enforce the Fourteenth Amendment in a manner which might intrude upon traditional state authority must be stated clearly. *See id.* at 15-16. For a discussion of *Pennhurst*, see *infra* notes 152-58 and accompanying text.

47. *Gregory*, 111 S. Ct. at 2406.

48. *Id.*

ment,[49] could be deemed to have excluded judges from the ADEA's coverage, such an interpretation would violate the Equal Protection Clause because no rational basis could exist for distinguishing judges from other persons protected by the statute.[50] The Court first acknowledged that, in accordance with its now well-developed equal protection jurisprudence, the judges correctly asserted their constitutional challenge under the rational basis theory, since age is not a suspect classification[51] and since the judges had no fundamental interest in serving on the bench.[52] Nevertheless, the Court dismissed their argument, finding that the mandatory retirement provision is rationally related to a legitimate state interest.[53] The Court explained that "[i]t is an unfortunate fact of life that physical and mental capacity sometimes diminishes with age,"[54] and noted that "the people of Missouri have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform."[55] The Court found mandatory retirement a reasonable response to such a dilemma because other alternatives for removal, such as *voluntary* retirement or impeachment, may be inadequate.[56]

The Court also found a rational basis for distinguishing between

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49. U.S. CONST. amend. XIV, § 5.

50. *Gregory*, 111 S. Ct. at 2406.

51. *Id.* The Supreme Court has recognized that certain "discrete and insular minorities" merit special protection because they have experienced a "history of purposeful unequal treatment" and have been isolated from the political process. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Suspect class status has been granted to alienage, Graham v. Richardson, 403 U.S. 365, 376 (1971), race, Loving v. Virginia, 388 U.S. 1, 11 (1967), and national origin, Korematsu v. United States, 323 U.S. 214, 216 (1944). The Court, however, has repeatedly found that age is not a suspect classification. *See* Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985); Vance v. Bradley, 440 U.S. 93, 96-97 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976).

52. *Gregory*, 111 S. Ct. at 2406; *see Rodriguez*, 411 U.S. at 33-34 (holding that a fundamental right exists only if the right is explicitly or implicitly protected by the Constitution). Some fundamental rights recognized by the Supreme Court are the right to marry, Zablocki v. Redhail, 434 U.S. 374, 398 (1978); the right to privacy, including the right to have an abortion through the second trimester of pregnancy, Roe v. Wade, 410 U.S. 113, 152-56 (1973); the right to vote, Bullock v. Carter, 405 U.S. 134, 140-44 (1972); and the right to engage in interstate travel, Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969).

53. *Gregory*, 111 S. Ct. at 2406.

54. *Id.* at 2407.

55. *Id.* (citing *Vance*, 440 U.S. at 111-12, and *Murgia*, 427 U.S. at 315).

56. *Id.* The Court noted that these other mechanisms designed to remove judges from office once their physical or mental capacity started to diminish may not serve as adequate checks on judges whose performance is deficient. *Id.* The Court reasoned that the election process may be inadequate for removal because it may be difficult for the voters to discover the deficiencies of judges. *Id.* Many voters never observe state judges in action or read judicial opinions. *Id.* State judges also serve longer terms of office than other public officials and most judges do not run in ordinary elections. *Id.*

judges and state officials not subject to the mandatory retirement provision.[57] The majority noted that other public officials are subjected to greater public scrutiny through the electoral process.[58] Deterioration in performance is more readily discernible in such officials, and they are more easily removed from office.[59]

The Court acknowledged that a mandatory retirement provision is founded on a generalization, and that not all judges subjected to the mandatory retirement provision will suffer a significant decline in performance once they turn seventy.[60] The Court emphasized, however, that a state does not violate the Equal Protection Clause merely because its classifications are imperfect,[61] and that the people of a state have the prerogative to establish the qualifications of their judges.[62] Accordingly, the Court found that the people of Missouri made a rational choice in determining these qualifications, and refused to read either the ADEA or the Equal Protection Clause so as to take that choice away.[63]

Justice White, in a separate opinion that Justice Stevens joined, concurred with the majority's finding that state judges are exempt from coverage under the ADEA and that a rational basis exists for requiring judges to retire at the age of seventy, but strongly criticized the majority's modified use of the plain statement rule to determine that the ADEA does not apply to judges.[64] Justice White contended that the majority had misapplied prior case law involving the plain statement rule and, in fact, had used its modified rule to bypass earlier decisions limiting its ability to review statutes passed pursuant to the Commerce Clause.[65]

Justice White first disagreed with the majority's reliance on the Court's Eleventh and Fourteenth Amendment cases that employed its plain statement rule.[66] The issue in the Eleventh Amendment cases "was

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* (citing Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 316 (1976)).

62. *Id.* at 2408.

63. *Id.*

64. *Id.* at 2408-14 (White, J., dissenting in part, concurring in part, and concurring in judgment).

65. *Id.* at 2408-11 (White, J., dissenting in part, concurring in part, and concurring in judgment). For a discussion of the relationship between *Gregory* and prior plain statement cases, see *infra* notes 106-22 and accompanying text.

66. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 69 (1989) (finding no clear legislative intent to extend 42 U.S.C. § 1983 to the states); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985) (applying the plain statement rule to find no clear legislative intent to override Eleventh Amendment guarantee of state sovereign immunity); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 15-16 (1981) (applying plain statement rule to determine

whether Congress intended a particular statute to extend to the States *at all.*"[67] Justice White reminded the majority that, in amending the ADEA, Congress expressly extended coverage to the States.[68] Likewise, the Fourteenth Amendment case of *Pennhurst State School & Hospital v. Halderman* (*Pennhurst I*)[69] only addressed whether a particular statute was enacted pursuant to the Fourteenth Amendment.[70] By contrast, in *Gregory* the Court used its modified version of the plain statement rule to determine the precise applications of a federal statute after Congress properly extended the statute to the states.[71] Justice White then contended that the majority erred in relying on the Court's "political function" cases, which recognize a state's ability to determine the qualifications of its most important governmental officials, to support its extension of the plain statement rule to *Gregory*.[72] White noted that the political-function exception merely creates a standard of reduced judicial scrutiny for states that exclude aliens from certain political functions.[73] These cases, Justice White argued, should not be used as a method for

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whether Congress intended to act pursuant to its Fourteenth Amendment powers); *see infra* notes 125-35, 152-58 and accompanying text.

67. *Gregory*, 111 S. Ct. at 2409 (White, J., concurring in part, dissenting in part, and concurring in judgment); *see also infra* notes 125-35 and accompanying text (outlining the use of the plain statement rule in these cases).

68. *Gregory*, 111 S. Ct. at 2409 (White, J., concurring in part, dissenting in part, and concurring in judgment); *see supra* text accompanying note 13.

69. 451 U.S. 1 (1981).

70. *Gregory*, 111 S. Ct. at 2411-12 (White, J., concurring in part, dissenting in part, and concurring in judgment) (citing *Pennhurst I*, 451 U.S. at 16); *see infra* notes 152-58 and accompanying text. Justice White pointed out that the requirement in *Pennhurst I* that Congress state expressly its intention to act pursuant to the Equal Protection Clause is very different from the *Gregory* majority's apparent holding that, even when Congress acts pursuant to the Fourteenth Amendment, it nevertheless must state specifically the precise application of its legislation. *Gregory*, 111 S. Ct. at 2411-12 (White, J., concurring in part, dissenting in part, and concurring in judgment) (citing *Pennhurst I*, 451 U.S. at 16). Justice White also criticized the majority for failing to "recognize the special status of [congressional] legislation enacted pursuant to the [Equal Protection Clause]," noting that the Clause was designed specifically to expand federal power and its ability to intrude upon state sovereignty. *Id.* (White, J., concurring in part, dissenting in part, and concurring in judgment).

71. *See supra* notes 42-48 and accompanying text.

72. *Gregory*, 111 S. Ct. at 2409-10 (White, J., concurring in part, dissenting in part, and concurring in judgment). The political-function cases recognize that state statutes excluding certain persons from positions that "go to the heart of representative government" will be subjected to a lesser standard of scrutiny under the Equal Protection Clause. *See infra* text accompanying notes 144-49.

73. *Gregory*, 111 S. Ct. at 2409 (White, J., concurring in part, dissenting in part, and concurring in judgment). Until *Gregory*, the "political-function" exception had never been applied outside of the alienage context in which it developed. *See infra* notes 136-39 and accompanying text.

interpreting rights created by Congress.[74] Finally, Justice White argued that the Court's modified application of the plain statement rule directly contravenes the Court's decisions in *Garcia v. San Antonio Metropolitan Transit Authority*[75] and *South Carolina v. Baker*,[76] in which the Court held that protecting the states against congressional intrusion under the Commerce Clause is left primarily to the political process.[77] He concluded that "the majority disregards those decisions in its attempt to carve out areas of state activity that will receive special protection from federal legislation."[78]

Justice Blackmun, in a harsh dissent joined by Justice Marshall, agreed with Justice White's conclusion that the majority's use of the plain statement rule was unsupported, but argued that both Justice White and the majority erred in concluding that appointed state judges are "appointee[s] on the policymaking level."[79] Blackmun relied heavily on general rules of statutory construction[80] and on the legislative his-

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74. *Gregory*, 111 S. Ct. at 2409-10 (White, J., concurring in part, dissenting in part, and concurring in judgment).

75. 469 U.S. 528, 556-57 (1985). *Garcia*, which upheld congressional authority to impose minimum wage requirements on municipal employees, overruled National League of Cities v. Usery, 426 U.S. 833 (1976), which denied Congress such authority. *See infra* notes 110-22 and accompanying text. Then-Justice Rehnquist wrote the majority opinion in *National League of Cities* and dissented in *Garcia*, promising a return to the *National League of Cities* standard as soon as the votes were available. *See infra* note 122.

76. 485 U.S. 505 (1988).

77. *Gregory*, 111 S. Ct. at 2410 (White, J., concurring in part, dissenting in part, and concurring in judgment).

78. *Id.* (White, J., concurring in part, dissenting in part, and concurring in judgment). Justice White criticized the majority for not explaining the precise application of its modified version of the plain statement rule, pointing out that "[t]he vagueness of the majority's rule undoubtedly will lead States to assert that various federal statutes no longer apply to a wide variety of State activities if Congress has not expressly referred to those activities in the statute." *Id.* (White, J., concurring in part, dissenting in part, and concurring in judgment). Justice White added that the failure of the majority to restrict explicitly its modified version of the plain statement rule to situations that " 'go to the heart of representative government' " may in fact extend this rule to all state governmental activity. *Id.* at 2410 (White, J., concurring in part, dissenting in part, and concurring in judgment) (quoting Sugarman v. Dougall, 413 U.S. 634, 647 (1973)).

79. *Id.* at 2414-19 (Blackmun, J., dissenting).

80. *Id.* at 2415 (Blackmun, J., dissenting). Justice Blackmun reminded the majority of the rule of statutory construction that "words grouped in a list should be given related meaning." *Id.* (Blackmun, J., dissenting) (quoting Dole v. Steelworkers, 494 U.S. 26, 36 (1990)). He explained that when the "policymaking" exception is read in connection with the other categories of employees listed, it becomes clear that the exception should be limited to "employees who work closely with their appointing official and who are directly accountable to that official." *Id.* (Blackmun, J., dissenting). Justice Blackmun also contended that if Congress intended to exclude a broad category of employees who make policy, the expansive category would have been placed at the end of the listing of exceptions, not in the middle. *Id.* (Blackmun, J., dissenting) (citing EEOC v. Vermont, 904 F.2d 794, 798 (2d Cir. 1990)).

tory[81] of the ADEA's policymaking language to support his conclusion that this exception does not apply to judges.[82] Blackmun reminded the majority and Justice White that if a statutory term is ambiguous, the court construing the statute should give deference to a reasonable interpretation of that term offered by an administrative agency responsible for the statute.[83] According to Justice Blackmun, the majority should have given deference to the EEOC's argument that appointed judges are not "appointee[s] on a policymaking level."[84]

Although the *Gregory* Court's holding is in line with the decisions of a majority of the courts that have considered the issue,[85] the reasoning it offered significantly extends the plain statement rule beyond its use in the Eleventh and Fourteenth Amendments.[86] *Gregory* also represents a departure from the rule announced in *Garcia v. San Antonio Metropolitan Transit Authority*,[87] in which the Court determined that it had a very limited role in interpreting Congress's Commerce Clause powers.[88] To understand the implications of the Court's decision, a review of the development of the plain statement rule and the Court's decision in *Garcia* is necessary. First, however, the conflict between the ADEA and state law's mandatory retirement provisions for appointed state judges warrants discussion.

The friction between the ADEA and state law mandatory retirement provisions for appointed state judges has recently been contested in several state and federal courts.[89] When Congress originally enacted the

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81. *Id.* at 2416-18 (Blackmun, J., dissenting). Justice Blackmun noted that the only indication of Congress's interpretation of the policymaking exception is a reference by Senator Javits to members of a governor's cabinet. *Id.* at 2418 (Blackmun, J., dissenting); *see infra* note 101.

82. *Gregory*, 111 S. Ct. at 2419 (Blackmun, J., dissenting).

83. *Id.* at 2418 (Blackmun, J., dissenting) (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)).

84. *Id.* (Blackmun, J., dissenting); *see* EEOC Opinion Letter, *supra* note 39, at N:1001 n.2 (finding that judges do not come within the "appointee[s] on the policymaking level" exception).

85. Of the six courts that have addressed the issue, four held that the ADEA does not extend protection to appointed state judges. *See* Gregory v. Ashcroft, 898 F.2d 598, 604 (8th Cir. 1990), *aff'd*, 111 S. Ct. 2395 (1991); EEOC v. Massachusetts, 858 F.2d 52, 58 (1st Cir. 1988); EEOC v. Illinois, 721 F. Supp. 156, 159 (N.D. Ill. 1989); *In re* Stout, 521 Pa. 571, 589, 559 A.2d 489, 498 (1989).

86. *See infra* notes 125-35, 152-58 and accompanying text.

87. 469 U.S. 528 (1985).

88. *See infra* notes 110-22 and accompanying text.

89. *See* EEOC v. Vermont, 904 F.2d 794, 797-802 (2d Cir. 1990); EEOC v. Massachusetts, 858 F.2d at 54-58; EEOC v. Illinois, 721 F. Supp. at 158-60; Schlitz v. Virginia, 681 F. Supp. 330, 332-34 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988); *Stout*, 521 Pa. at 582-86, 559 A.2d at 495-98.

ADEA in 1967, the statute prohibited discrimination against federal employees between the ages of forty and sixty-five,[90] but did not apply to state or local governments at all. Congress extended that Act to cover state and local governments in 1974,[91] and in 1983 the Supreme Court held that the extension of the ADEA to the states was a valid exercise of congressional power under the Commerce Clause.[92] In 1986 Congress's decision to remove the upper-age limitation of the ADEA,[93] in an effort to "eliminate mandatory retirement,"[94] created discord with such restrictions in state statutes.[95] Prior to the removal of the upper-age restriction of sixty-five, federal and state courts uniformly upheld mandatory retirement provisions for state judges.[96] None of these state law provisions

90. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607 (current version codified at 29 U.S.C. § 631 (1988)), *amended by* Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189 (1978) (raising upper limit of statute's applicability to age 70), *repealed by* Pub. L. No. 99-592, § (2)(c)(1), 100 Stat. 3342, 3342 (1986) (eliminating upper-age limit).

91. The ADEA was extended to cover state and local governments as part of the Fair Labor Standards Amendments of 1974. *See* Pub. L. No. 93-259, § 28(a)(1)(2), 88 Stat. 55, 74 (current version codified at 29 U.S.C. § 630(b) (1988)).

92. *See* EEOC v. Wyoming, 460 U.S. 226, 243 (1983).

93. Age Discrimination in Employment Act Amendments of 1986, Pub. L. No. 99-592, § 2(c)(1), 100 Stat. 3342, 3342 (eliminating upper-age limitation in 29 U.S.C. § 631 (1982)).

94. H.R. REP. No. 756, 99th Cong., 2d Sess. 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5628, 5634. In 1978 Congress had raised the upper-age limitation to age 70 for state, local, and private employees. Age Discrimination in Employment Amendments of 1978, Pub. L. No. 95-256, § 3(a), 92 Stat. 189, 189, *repealed by* Pub. L. No, 99-592, § 2(c)(1), 100 Stat. 3342, 3342 (1986) (repealing upper-age limit). These amendments had no effect on state mandatory retirement provisions, however, as no state retirement provision mandates retirement of its appointed state judges before the age of 70. *See infra* note 104.

95. *See* EEOC v. Vermont, 904 F.2d 794, 797-98 (2d Cir. 1990); EEOC v. Massachusetts, 858 F.2d 52, 54-57 (1st Cir. 1988); EEOC v. Illinois, 721 F. Supp. 156, 158-60 (N.D. Ill. 1989); Schlitz v. Virginia, 681 F. Supp. 330, 332-34 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988); *In re* Stout, 521 Pa. 571, 582-86, 559 A.2d 489, 495-98 (1989).

96. *See* Hatten v. Rains, 854 F.2d 687, 691-93 (5th Cir. 1988) (rejecting Fourteenth Amendment equal protection challenge to Texas constitutional provision requiring retirement of elected judges at age 75), *cert. denied.*, 490 U.S. 1106 (1989); Malmed v. Thornburgh, 621 F.2d 565, 571-73 (3d Cir.) (finding Pennsylvania constitutional provisions mandating retirement of judges at age 70 valid under Equal Protection and Due Process Clauses of the Fourteenth Amendment), *cert. denied*, 449 U.S. 955 (1980); Trafelet v. Thompson, 594 F.2d 623, 627-29 (7th Cir.) (rejecting Fourteenth Amendment challenge to Illinois statute requiring retirement of elected judges at age 70), *cert. denied*, 444 U.S. 906 (1979); Rubino v. Ghezzi, 512 F.2d 431, 432-33 (2d Cir.) (upholding the constitutionality of a New York statute requiring retirement of elected officials at age 70), *cert. denied*, 423 U.S. 891 (1975); Zielasko v. Ohio, 693 F. Supp. 577, 586-87 (N.D. Ohio 1988) (finding Ohio constitutional provision precluding election or appointment to judicial office past age 70 valid under First and Fourteenth Amendment), *aff'd*, 873 F.2d 957 (6th Cir. 1989); Gondelman v. Pennsylvania, 520 Pa. 451, 465-69, 554 A.2d 896, 903-05 (upholding Pennsylvania constitutional provision requiring mandatory retirement of judges), *cert. denied*, 110 S. Ct. 146 (1989); *see* Tina E. Sciocchetti, Comment, *Mandatory Retirement of Appointed State Judges—Age Discrimination?*, 85 NW. U. L. REV. 866, 866 & n.5 (1991).

mandated retirement before the age of seventy, however.[97]

Following the removal of the upper-age limitation, judges subjected to state law mandatory retirement provisions contended that the Supremacy Clause of the United States Constitution mandates the conclusion that the ADEA should prevail over state laws requiring retirement.[98] As long as appointed state judges are "employees" within the definition outlined in the ADEA, the judges argued, mandatory retirement provisions could not be enforced against them.[99]

Lower federal courts agreed that judges did not fall within the ADEA's exceptions for elected officials, the personal staff of elected officials, or advisors.[100] The courts split, however, on the question whether appointed state judges are "appointee[s] on the policymaking level."[101] Four courts held that appointed judges engage in policymaking and

97. For a list of state statutes establishing mandatory retirement ages for judges, see *infra* note 104.

98. *See* cases cited *supra* note 95.

99. *See* cases cited *supra* note 95; *see also supra* note 11 (listing the exceptions to the ADEA).

100. *See* EEOC v. Vermont, 904 F.2d 794, 797-98 (2d Cir. 1990); EEOC v. Massachusetts, 858 F.2d 52, 54 (1st Cir. 1988); EEOC v. Illinois, 721 F. Supp. 156, 158-59 (N.D. Ill. 1989).

101. *See* EEOC v. Vermont, 904 F.2d at 798; EEOC v. Massachusetts, 858 F.2d at 55-58; EEOC v. Illinois, 721 F. Supp. at 159-60. There is scant legislative history of § 630(f) to aid in interpreting the ADEA's precise definition of "appointee on the policymaking level." Title VII of the Civil Rights Act of 1964, § 701(f), 42 U.S.C. § 2000e(f) (1988), however, contains language identical to the policymaking exception found in the ADEA. Courts using legislative history to determine the precise meaning of this exception gave substantial weight to the legislative history surrounding the Title VII provisions. *See* EEOC v. Vermont, 904 F.2d at 798; EEOC v. Massachusetts, 858 F.2d at 55. The Supreme Court also endorsed the use of Title VII's legislative history for the purpose of interpreting the ADEA. *See* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) ("[The] interpretation of Title VII . . . applies with equal force in the context of age discrimination . . . ."); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979) ("[S]ince the legislative history of [the ADEA] indicates that its source was [Title VII], we may properly conclude that Congress intended that the construction of [the ADEA] should follow that of [Title VII]." (citing Northcross v. Memphis Bd. of Educ., 412 U.S. 427, 428 (1973))); Lorillard v. Pons, 434 U.S. 575, 584 (1978) ("[T]he prohibitions of the ADEA were derived *in haec verba* from Title VII."). Several commentators, in light of these Supreme Court decisions, turned to Title VII for guidance in construing the terms of the ADEA. *See, e.g.*, Sciocchetti, *supra* note 96, at 874-76; Alan L. Bushlow, Note, *Mandating Retirement of State-Appointed Judges Under the Age Discrimination in Employment Act*, 76 CORNELL L. REV. 476, 505-07 (1991).

The relevant language in Title VII was added in 1972, when the Civil Rights Act's definition of "employee" was extended to include government workers. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (current version at 42 U.S.C. § 2000e(f) (1988)). Senator Ervin, who was concerned that the original definition of employee would be too broad when applied to governmental entities, initiated most of the debate surrounding the definition. 118 CONG. REC. 4096 (1972). Senator Ervin insisted repeatedly that the unamended definition of "employee" could be construed to cover "persons who exercise the legislative, executive, and judicial powers of the States and political subdivisions of the States." *Id.* at 1838. Senator Ervin proposed an amendment to ensure that the

therefore fall within the policymaking exception,[102] while two others held the opposite.[103]

Gregory puts to rest the issue of whether judges are "appointee[s] on the policymaking level" and thus subject to states' mandatory retirement provisions. Given the fact that at least thirty states currently have mandatory retirement provisions,[104] the Court's findings that appointed

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term "employee" would not include persons elected to public office or any person selected by an elected official to advise him with respect to the powers of his office. *Id.* at 4096, 4483.

Senator Williams proposed to expand this exclusion even further to include the elected official's personal staff. *Id.* at 4492-93. Senator Williams noted that the purpose of the exemption was to exclude governmental officials "who are chosen by the Governor or the mayor or the county supervisor, 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 advisors." *Id.* As a result of Senator Williams's comments, Senator Ervin's proposed amendment was expanded to exclude an elected official "or any person chosen by such officer to be a personal assistant, or an immediate adviser in respect to the exercise of the constitutional or legal powers of the office." *Id.* at 4493. The Senate adopted the amendments, thereby excluding both personal staff members and immediate advisors from Title VII coverage.

The policymaking exception appears to stem from Senator Javits's concern that the scope of the "adviser" phrase was too broad. *Id.* at 4097. At Senator Javits's urging, the conference committee on the bill agreed to replace the language of the Senate amendment with a single "policymaker" exception and adopted the exclusion of "appointees on the policymaking level." *See* H.R. CONF. REP. No. 899, 92d Cong., 2d Sess. 15 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2179-80. (The original version of the exclusion read as follows: "[A]ppointees of such officials on a policy making level." *Id.* at 15, U.S.C.C.A.N. at 2180.) In defining the scope of the exclusion, the conferees explained:

> 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 advisors 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. It is the conferees[']' intent that this exemption shall be construed narrowly.

Id. at 15-16, U.S.C.C.A.N. at 2180.

102. *See* Gregory v. Ashcroft, 898 F.2d 598, 600-04 (8th Cir. 1990), *aff'd*, 111 S. Ct. 2395 (1991); EEOC v. Massachusetts, 858 F.2d at 54-57; EEOC v. Illinois, 721 F. Supp. at 159-60; *In re* Stout, 521 Pa. 571, 582-86, 559 A.2d 489, 495-98 (1989).

103. *See* EEOC v. Vermont, 904 F.2d at 797-802; Schlitz v. Virginia, 681 F. Supp. 330, 332-34 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988).

104. Thirty states currently have either constitutional or statutory mandatory retirement provisions. *See* ALA. CONST. amend. 328, § 6.16 (retirement at age 70); ALASKA CONST. art. IV, § 11 (retirement at age 70); ARIZ. CONST. art. VI, § 20 (retirement at age 70); COLO. CONST. art. VI, § 23(1) (retirement by age 72); CONN. CONST. art. V, § 6 (retirement at age 70); FLA. CONST. art. V, § 8 (retirement at age 70); LA. CONST. art. V, § 23 (retirement at age 70); MD. CONST. art. IV, § 3 (retirement at age 70); MASS. CONST. pt. 2, ch. III, art. I (Articles of Amendment, art. XCVIII) (retirement at age 70); MICH. CONST. art. VI, § 19 (no judge elected or appointed to office after age 70); MO. CONST. art. V, §§ 26, 27 (retirement at age 70, legislature may raise to 76); N.H. CONST. pt. 2, art. 78 (retirement at age 70); N.Y. CONST. art. VI, § 25 (retirement at age 70); N.C. CONST. art. IV, § 8 (empowering legislature to set retirement age); N.D. CONST. art. VI, §§ 12, 12.1 (empowering legislature to set retirement); PA. CONST. art. V, § 16 (retirement at age 70); TEX. CONST. art. V, § 1-a (retirement at age 75); VT. CONST. ch. II, § 35 (retirement at age 70); VA. CONST. art. VI, § 9 (empowering legisla-

judges are policymaking appointees and thus are not protected by the ADEA, and that mandatory retirement provisions for judges do not violate the federal constitution, will have a profound impact on the careers of appointed state judges throughout the country.[105] The significance of *Gregory* does not lie solely in its effect on appointed state judges, however, for the *Gregory* Court's new rule of statutory construction also will pose a significant threat to the balance of power between state and federal governments.

Prior to *Gregory* the federal judiciary almost entirely relinquished its role as mediator between the states and federal government in the area of commerce. With its decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[106] the Supreme Court limited the federal judiciary's ability to invalidate statutes enacted pursuant to the Commerce Clause to legislation that effectively eliminates state and local governmental functions.[107] In *Gregory*, however, the Court employed the plain statement rule to sidestep *Garcia* and review the ADEA, even though the ADEA

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ture to set retirement age); WASH. CONST. art. IV, § 3(a) (legislature to set age of retirement between 70 and 75); WIS. CONST. art. VII, § 24 (retirement at age 70 unless legislature prescribes longer term); ARK. CODE ANN. § 24-8-215 (Michie Supp. 1991) (retirement by age 70 to receive retirement benefits); GA. CODE ANN. § 47-9-70 (Michie Supp. 1991) (retirement by age 75 to keep benefits); ILL. ANN. STAT. ch. 37, para. 23.71 (Smith-Hurd 1990) (retirement at age 75); KAN. STAT. ANN. § 20-2608 (Supp. 1990) (retirement at age 70); MINN. STAT. ANN. § 490.125 (West 1991) (retirement at age 70); N.J. STAT. ANN. § 43:6A-7 (West Supp. 1991) (retirement at age 70); S.C. CODE ANN. § 9-1-1530 (Law. Co-op. Supp. 1991) (retirement at age 70); S.D. CODIFIED LAWS ANN. § 16-1-4.1 (1987) (retirement at age 70); WYO. STAT. § 5-1-106 (Supp. 1991) (retirement by age 70).

105. The North Carolina Supreme Court recently upheld the constitutionality of a mandatory provision requiring state judges to retire at the age of 72. *See* Martin v. North Carolina, 330 N.C. 412, 419, 410 S.E.2d 474, 478 (1991) (reviewing the constitutionality of N.C. GEN. STAT. § 7A-4.20 (1989)). The North Carolina statute provides:

> No justice or judge of the appellate division . . . may continue in office beyond the last day of the month in which he attains his seventy-second birthday, and no judge of the superior court or district court division . . . may continue in office beyond the last day of the month in which he attains his seventieth birthday . . . .

N.C. GEN. STAT. § 7A-4.20 (1989).

Two state appellate judges challenged the statute as unconstitutional because it limited the petitioner's ability to hold office for the constitutionally proscribed eight-year term. *Martin*, 330 N.C. at 413, 410 S.E.2d at 475; *see also* N.C. CONST. art. IV, § 16 (providing that judges "shall be elected by the qualified voters and shall hold office for terms of eight years").

The supreme court upheld the mandatory retirement provision, finding that the people of North Carolina, in amending Article IV, § 8 of the North Carolina Constitution to allow the general assembly to prescribe maximum age limits for judges, indicated clearly their "intent to empower the legislature to interrupt judicial terms of office with an age limit on active service." *Martin*, 330 N.C. at 416, 410 S.E.2d at 476; *see* N.C. CONST. art. IV, § 8.

106. 469 U.S. 528 (1985).

107. *Id.* at 546-47.

did not threaten to eliminate any state governmental function.[108] By holding that the ADEA does not apply to appointed state judges, the Court construed the ADEA narrowly, limiting Congress's Commerce Clause powers without directly confronting the constraints imposed by *Garcia*.[109]

In *Garcia* the Court extended the federal minimum wage and overtime provisions of the Fair Labor Standards Act to a municipally-owned and operated mass transit system.[110] *Garcia* overruled the Court's earlier decision in *National League of Cities v. Usery*,[111] which held that Congress lacked the authority to regulate wages of state employees, because such action restricted a state's freedom of choice as to how to allocate resources in traditional state and local governmental functions.[112] In striking down the *National League of Cities* decision, the Court rejected the "traditional governmental function" test[113] and concluded that the judiciary should play a very limited role in determining whether state and local governments were entitled to immunity from Commerce Clause legislation.[114]

Garcia's rejection of the *National League of Cities* test marked the end of the judiciary's role in supervising the scope of the Commerce Clause power as it applied to state and local government activities. In a series of cases beginning with *National League of Cities*, however, the Court had developed the rule that congressional regulation of state activity would be invalid if the Court determined that the statute regulated the "states as states"; that it addressed matters that were attributes of state or local sovereignty; that it required state compliance with federal legislation in a manner that directly impaired a state's ability to structure its operations in "traditional function" areas; and that state interests outweighed federal interests.[115] The *National League of Cities* Court used

108. *See infra* text accompanying notes 163-64.

109. *See Gregory*, 111 S. Ct. at 2403.

110. *Garcia*, 469 U.S. at 547-55.

111. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

112. *Id.* at 840-52 (relying on the Tenth Amendment to find that congressional enactments under the Commerce Clause are unconstitutional whenever they "operate to directly displace the State's freedom to structure integral operations in areas of traditional governmental functions").

113. *Garcia*, 469 U.S. at 546-47.

114. *Id.* at 545-47.

115. *See* EEOC v. Wyoming, 460 U.S. 226, 236-39 (1983) (determining the applicability of ADEA to state and local governments); FERC v. Mississippi, 456 U.S. 742, 753-58 (1982) (applying federal energy regulation to state public utilities); United Transp. Union v. Long Island R.R., 455 U.S. 678, 682-90 (1982) (determining applicability of Railway Labor Act to state-owned commuter railroads); *National League of Cities*, 426 U.S. at 840-52 (finding mini-

this test to impose restrictions on congressional power under the Commerce Clause for the first time since 1936.[116] Although later cases contributed to the development of the "traditional governmental functions" limitation,[117] *National League of Cities* proved to be the only case in which the Court found that federal legislation fell within this rule.

In the nine years between *National League of Cities* and *Garcia*, the Court had three opportunities to consider the applicability of *National League of Cities*.[118] The Court, however, did not find immunity from federal legislation in any of these cases,[119] leaving lower courts without a clear standard for determining when a federal law was an undue extension of Congress's Commerce Clause powers.[120] This difficulty in articulating a consistent test for determining the immunity of certain "traditional governmental functions" contributed to the Court's holding in *Garcia* that the judiciary has a limited role in determining whether states and local governments are entitled to immunity from Commerce Clause legislation.[121] After *Garcia*, state and local governments, fearful that federal legislation could impair state governmental functions, were forced to look to the political process, rather than the Court, for relief from this legislation.[122]

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mum wage and overtime provisions of Fair Labor Standards Act inapplicable to state government employees).

116. *See* Carter v. Carter Coal Co., 298 U.S. 238, 297-99 (1936).

117. *See EEOC*, 460 U.S. at 236-39; *FERC*, 456 U.S. at 753-58; *United Transp. Union*, 455 U.S. at 682-90.

118. *See EEOC*, 460 U.S. at 236-39 (determining the applicability of ADEA to state and local governments); *FERC*, 456 U.S. at 753-58 (applying federal energy regulation to state public utilities); *United Transp. Union*, 455 U.S. at 682-90 (determining applicability of Railway Labor Act to state-owned commuter railroads).

119. *See supra* note 115 and accompanying text. One explanation for the failure of the *National League of Cities* doctrine is that it never commanded a solid majority of the Court. *See* Martha A. Field, Garcia v. San Antonio Metropolitan Transit Authority: *The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 87 (1985). Justice Blackmun, who concurred in *National League of Cities*, quickly changed his views and, following the decision, voted consistently with the four justices who dissented in *National League of Cities*. *Id.* These five justices eventually comprised the *Garcia* majority. *Id.* Justice Blackmun's switch in voting effectively reduced the proponents of *National League of Cities* to dissenters whenever an issue of state immunity arose. *Id.* at 88.

120. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539 (1985) ("Thus far, this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*.").

121. *Id.* at 546-47.

122. *Id.* The *Garcia* decision was met with great resistance by the justices who supported *National League of Cities*: Chief Justice Burger, then-Justice Rehnquist, Justice Powell, and Justice O'Connor, who replaced the retired Justice Stewart. *See id.* at 557-79 (Powell, J., dissenting); *id* at 579-80 (Rehnquist, J., dissenting); *id.* at 580-889 (O'Connor, J., dissenting). In harsh dissenting opinions by Justices Powell and O'Connor, these justices expressed grave concern over the great power given to the federal government by the *Garcia* decision and lamented

In *Gregory* the Court relied on a modified version of the plain statement rule to avoid direct confrontation with *Garcia*'s limitation on judicial supervision in the area of commerce. This avoidance of *Garcia* is in accordance with the basic principle that a federal court should avoid deciding a constitutional issue if possible.[123] It is far from certain, however, that a constitutional problem would have arisen if the Court had found that, in light of its decisions in *Garcia*, the ADEA applied to appointed state judges.[124] The Court must have had another reason for employing the plain statement rule in this context. A close examination of the case law supporting the Court's newly revised rule of statutory construction may shed light on the rule's intended purpose.

To support the use of the plain statement rule to determine the applications of federal statutes directed to state governmental activity, the *Gregory* Court called on three distinct bodies of case law. The first group of cases concerns the Court's use of the plain statement rule in cases involving the Eleventh Amendment. The latter two groups focused on Congress's ability to intrude on state sovereignty through its Fourteenth Amendment powers.

The Eleventh Amendment cases cited in *Gregory* required clear congressional intent to abrogate state sovereign immunity under the Eleventh Amendment.[125] In *Atascadero State Hospital v. Scanlon*[126] the

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the reduced role of the judiciary in monitoring abuses of the federal government. *See id.* at 567-72 (Powell, J., disenting); *id.* at 580-81 (O'Connor, J., dissenting).

Justice Powell, writing the principal dissent, relied on the *Federalist Papers* to establish the limited nature of the federal government and to support the proposition that the states should retain sovereignty over all but the "few and defined" powers specifically delegated to the federal government. *Id.* at 570-72 (Powell, J., dissenting) (citing THE FEDERALIST No. 17, at 107 (Alexander Hamilton) (Jacob E. Cook ed., 1961); THE FEDERALIST No. 39, at 256 (James Madison) (Jacob E. Cook ed., 1961); THE FEDERALIST No. 45, at 313 (James Madison) (Jacob E. Cook ed., 1961)). Justice Powell also stressed the essential role of the Tenth Amendment in maintaining the federal system so carefully designed by the framers of the Constitution. *Id.* at 570 (Powell, J., dissenting). Justice Powell scolded the majority for making Congress the sole judge of the limits of their own power, thereby disregarding the fundamental constitutional provision that it is the "province of the federal judiciary 'to say what the law is.'" *Id.* at 567 (Powell, J., dissenting) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). Justice Powell argued that such judicial acquiescence in federal overreaching "undermines the constitutionally mandated balance of power between the States and the Federal Government." *Id.* at 572 (Powell, J., dissenting).

Justice Rehnquist wrote a one-paragraph dissent, joining in the opinions of Justices Powell and O'Connor and predicting that the principles outlined in *National League of Cities* would, once again, command a majority of the Court. *Id.* at 579-80 (Rehnquist, J., dissenting).

123. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

124. *See Gregory*, 111 S. Ct. at 2410 (White, J., concurring in part, dissenting in part, and concurring in judgment).

125. The Eleventh Amendment provides: "The Judicial power of the United States shall

Court addressed the question whether the Eleventh Amendment bars states from being sued[127] under section 504 of the Rehabilitation Act of 1973.[128] The Court concluded that the enactment of the Rehabilitation Act did not abrogate the states' constitutional immunity because Congress failed to make its intention to do so "unmistakably clear in the language of the statute."[129] *Atascadero* required Congress to state clearly in the language of the statute itself its intent to override the guarantees of the Eleventh Amendment and announced that the Court would not look for the necessary congressional intent beyond the four corners of the statute.[130]

The *Gregory* Court also relied on *Will v. Michigan Department of State Police*,[131] another Eleventh Amendment case, in which it had articulated the requirements of the plain statement rule. In *Will* the plaintiff sued under 42 U.S.C. § 1983, alleging that he was denied a promotion because his brother was a student activist.[132] The issue before the Court was whether a state is a "person" within the meaning of section 1983.[133] The Court concluded that the state is not a "person" within the meaning of section 1983, because the statute failed to state clearly Congress's intent to extend the statute to the states.[134] Explaining its decision, the Court relied on several other cases in which it had required a clear statement of congressional intention:

> [I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the

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not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. The Court's Eleventh Amendment jurisprudence is exceedingly complex and controversial. For a thorough discussion of this rich vein of constitutional law, see JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987).

126. 473 U.S. 234 (1985).

127. *Id.* at 240.

128. 29 U.S.C. § 794 (1988).

129. *Atascadero*, 473 U.S. at 242, 246.

130. *Id.* at 240, 242-46.

131. 491 U.S. 58 (1989).

132. *Id.* at 60. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983 (1988).

133. *Will*, 491 U.S. at 60.

134. *Id.* at 65.

> statute." . . . Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States . . . . "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."[135]

As the *Gregory* Court recognized, the plain statement rule set forth in *Atascadero* and *Will* simply acknowledged that states retain certain sovereign powers with which Congress does not readily interfere and noted that Congress must state expressly its intent to interfere with these sovereign powers.[136] Although these Eleventh Amendment cases spelled out the requirements of the plain statement rule, they do little to support *Gregory*'s extension of this rule to the determination of whether a state may impose a mandatory retirement age on its appointed judges. To support this leg of its analysis, the Court relied on a long line of "political-function" cases recognizing a state's ability to determine the qualifications of its most important governmental officials.

The "political-function" exception relied on in *Gregory* was an offshoot of the Court's past analyses of the Equal Protection Clause. The Supreme Court has recognized that the Equal Protection Clause of the Fourteenth Amendment grants Congress the power to intrude upon state authority when a state attempts to deny its people equal protection of the laws.[137] Such power is not without limitation, however, and the Supreme Court has developed two major standards of review for state action challenged as discriminatory under the Equal Protection Clause: the rational

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135. *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); United States v. Bass, 404 U.S. 336, 349 (1971), and citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Justice Brennan, in a dissenting opinion, criticized the majority's application of the plain statement rule, cautioning that the case law upon which it relied did not "permit substitution of an absolutist rule of statutory construction for thorough statutory analysis." *Id.* at 74-77 (Brennan, J., dissenting). Justice Brennan pointed out that, in each of the cases cited by the majority, the Court did not rely solely on the language of the statute but also performed a careful analysis of the legislative history and the purpose of the statute. *Id.* at 75 (Brennan, J., dissenting).

Justice Brennan conceded that *Atascadero* may lend support to the majority's holding that the congressional intent must be manifest in the language of the statute itself. *Id.* (Brennan, J., dissenting). Justice Brennan stressed, however, that the principle of interpretation set forth in *Atascadero* is limited to Eleventh Amendment cases and therefore was irrelevant to *Will*. *Id.* at 75-76 (Brennan, J., dissenting).

136. *Gregory*, 111 S. Ct. at 2401.

137. *See* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *id.* § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

relation test[138] and the strict scrutiny test.[139]

Sugarman v. Dougall,[140] the first case to articulate the political-function exception, applied the strict scrutiny test to find that New York could not exclude aliens from all state jobs unless the state furnished "compelling justifications" for doing so.[141] The Court's holding followed its earlier decision in *Graham v. Richardson*,[142] in which it had granted aliens suspect class status and applied the strict scrutiny test to declare unconstitutional two state welfare statutes denying benefits to noncitizens.[143]

At first glance, the *Sugarman* Court appeared to reinforce the use of the strict scrutiny test to review statutes adversely affecting aliens. In dictum, however, the Court carved out a significant exception to *Graham*'s requirement of strict scrutiny.[144] This exception, known as the "political-function" exception, acknowledges "a State's historical power to exclude aliens from participation in its democratic political institu-

138. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 488-91 (1955); Railway Express Agency, Inc. v. New York, 336 U.S. 106, 109-10 (1949); *see also* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-10 (1972) (outlining development of judicial scrutiny in Fourteenth Amendment cases). Under the rational relation test, also known as "minimum scrutiny review," states may take discriminatory action for the benefit or disadvantage of certain groups as long as the discriminatory classification is rationally related to a legitimate state purpose. *See Williamson*, 348 U.S. at 488-91; *Railway Express Agency*, 336 U.S. at 109-11. The rational relation test is the more lenient standard of review, because statutes satisfy this test if the courts can conceive of any set of facts to justify the statute. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). *See generally* J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 950-54 (1975) (describing the Court's rational relation and strict scrutiny tests). Courts utilizing the rational relation test rarely set aside statutory discrimination. *See* Gunther, *supra*, at 8.

139. *See* Plyler v. Doe, 457 U.S. 202, 217 n.15 (1982); Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667-70 (1966). Strict scrutiny was first articulated by Justice Stone in his now-famous "footnote four" in United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). The strict scrutiny standard of review requires that discriminatory state action be narrowly tailored to advance a compelling state interest in order to be declared constitutional. Wilkinson, *supra* note 138, at 951. Courts invoke strict scrutiny when the statute burdens a judicially recognized suspect class or impinges on an important fundamental right. *Id.*; *see also supra* notes 51-52 and accompanying text (noting that age is not a suspect class nor do judges have a fundamental right to serve as judges).

140. 413 U.S. 634 (1973).

141. *Id.* at 642-43. Since *Sugarman*, the Court rejected the strict scrutiny analysis as applied to classifications based on alienage and adopted a lesser intermediate level scrutiny. *See Plyler*, 457 U.S. at 216-24.

142. 403 U.S. 365 (1971).

143. *Id.* at 374-76.

144. *Sugarman*, 413 U.S. at 647-48 (dictum).

tions,"[145] and recognizes that the strict scrutiny test should not be used when reviewing state statutes that exclude aliens from important governmental functions.[146] Instead, *Sugarman* implied that the rational relation test was the appropriate standard of review for state statutes that "go to the heart of representative government."[147]

The Supreme Court gradually broadened its political-function exception, extending to the states a new way to evade restrictions imposed upon them by congressional action.[148] The *Gregory* Court seized upon this long line of political-function cases to support its conclusion that the states' power to define the qualifications of officeholders is an important limitation on Congress's power. By removing this political-function exception from its Fourteenth Amendment context and combining it with the plain statement rule from the Eleventh Amendment cases, the Court developed a new version of the plain statement rule, through which the Court requires clear legislative intent to extend federal statutes to cover employees in positions that " 'go to the heart of representative government.' "[149]

The *Gregory* Court's variation of the plain statement rule did not end with the determination of whether Congress intended to extend the ADEA to appointed state judges under the Commerce Clause; it also relied on the rule to determine whether Congress intended to extend the statute to these judges pursuant to its powers under the Fourteenth Amendment.[150] In so doing, the Court turned to *Pennhurst I*,[151] which employed the plain statement rule in the context of the Fourteenth Amendment.

In *Pennhurst I* the Court applied the plain statement rule to determine whether Congress passed a provision of the Developmentally Dis-

145. *Id.* at 648 (dictum) (citing Pope v. Williams, 193 U.S. 621, 632-34 (1904); Boyd v. Nebraska, 143 U.S. 135, 161 (1892)).

146. *Id.* (dictum).

147. *Id.* at 647-48 (dictum).

148. *See* Cabell v. Chavez-Salido, 454 U.S. 432, 444-47 (1982) (broadening exception to include deputy probation officers); Ambach v. Norwick, 441 U.S. 68, 75-80 (1979) (holding that public school teachers come within once-narrow confines of political-function exception); Foley v. Connelie, 435 U.S. 291, 297-300 (1978) (expanding political-function exception to include a statute excluding aliens from state police force).

149. *Gregory*, 111 S. Ct. at 2401 (quoting *Sugarman*, 413 U.S. at 647); *see supra* text accompanying notes 34-37.

150. *See supra* notes 46-48 and accompanying text.

151. 451 U.S. 1 (1981). The Court ultimately decided the *Pennhurst* litigation on Eleventh Amendment grounds. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123 (1984) (*Pennhurst II*). The *Gregory* Court, however, cited *Pennhurst I* for its development of the " 'appropriate test for determining when Congress intends to enforce' the guarantees of the Fourteenth Amendment." *Gregory*, 111 S. Ct. at 2405 (quoting *Pennhurst I*, 451 U.S. at 16).

abled Assistance and Bill of Rights Act (DDA/BRA)[152] pursuant to its powers under section five of the Fourteenth Amendment.[153] The Court found that because Fourteenth Amendment legislation makes state compliance with federal policy involuntary, and "because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment."[154] The *Pennhurst I* Court held that in the DDA/BRA Congress did not state clearly its intent to intrude upon the state's authority,[155] and concluded that Congress did not intend to legislate pursuant to the Fourteenth Amendment.[156] When the Court considered *Pennhurst* a second time,[157] it again stressed its reluctance to intrude on the Eleventh Amendment's guarantee of states sovereign immunity, noting that the Court requires "an unequivocal expression of congressional intent to 'overturn the constitutionally guaranteed immunity of the several states.' "[158]

The *Gregory* majority relied on this new use of the plain statement rule, which combines aspects of the plain statement rule with the political-function exception, to find that Congress, in enacting the ADEA, provided no clear legislative intent to intrude on a state's ability to determine the qualifications of its officeholders. *Gregory* thus reveals a Court willing to rely on statutory construction to check the excesses of federal congressional powers, especially when Congress enacts a statute pursuant to the Commerce Clause.[159] With its decision in *Garcia v. San Antonio*

152. Developmentally Disabled Assistance and Bill of Rights Act, Pub. L. No. 94-103, § 201, 89 Stat. 502 (1975) (codified as amended at 42 U.S.C. § 6010 (1988)).

153. *Pennhurst I*, 451 U.S. at 15-16. The respondent, Halderman, contended that Congress passed § 6010 pursuant to § 5 of the Fourteenth Amendment and intended to place an obligation on the states to provide certain kinds of treatment to the disabled regardless of whether they received federal funds. *Id.* at 15.

154. *Id.* at 16.

155. *Id.* at 18.

156. *Id.*

157. *Pennhurst II*, 465 U.S. 89 (1984). After finding that 42 U.S.C. § 6010 did not create any substantive rights for the residents of Pennhurst, the *Pennhurst I* Court remanded the case to the court of appeals to determine if the petitioners were entitled to relief under state law, the Constitution, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982) (amended 1984, 1986, 1991), or other provisions of the DDA/BRA. *See Pennhurst I*, 451 U.S. at 27-31. The Supreme Court granted certiorari, 457 U.S. 1131 (1982), to review the Third Circuit's decision that the petitioners were entitled to relief under Pennsylvania's Mental Health and Mental Retardation Act, PA. STAT. ANN. tit. 50, § 4201 (Purdon 1969). *See* Halderman v. Pennhurst State Sch. & Hosp., 673 F.2d 647, 651-56 (3d Cir. 1982) (en banc), *rev'd*, 465 U.S. 89 (1984).

158. *Pennhurst II*, 465 U.S. at 99 (quoting Quern v. Jordan, 440 U.S. 332, 342 (1979)).

159. *See Gregory*, 111 S. Ct. at 2400 ("One can fairly dispute whether our federalist system has been quite as successful in checking governmental abuse . . . but there is no doubt about

Metropolitan Transit Authority,[160] the Court limited its role in granting states and local governments immunity from legislation passed pursuant to the Commerce Clause.[161] Through its innovative use of the plain statement rule to review the ADEA despite the mandate of *Garcia*, the *Gregory* Court turned to statutory construction as a means to curtail the scope of Commerce Clause legislation directed at the states without expressly overruling *Garcia*.[162]

According to *Garcia* the Court should not have addressed the question whether the ADEA protects appointed state judges at all, because the judicial role in constraining Commerce Clause powers is limited to those specific instances in which Commerce Clause legislation threatens to eliminate state and local government functions.[163] Invalidating mandatory retirement provisions for appointed state judges in no way eliminates or even impairs the states' local functions.[164] Judicial review of the issue, therefore, should be improper.

Realizing its limited role in reviewing Commerce Clause legislation, the Court ignored the mandates of *Garcia* and used the plain statement rule under the pretext of avoiding a potential constitutional problem.[165] In doing so, however, the Court laid down a new rule directly in conflict with *Garcia*[166] that allows the examining tribunal first to determine whether Congress intended to extend a statute's protections to state government officials, and whether that intent is clearly stated, before turning the issue over to the political process. If, as in *Gregory*, the Court deter-

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the design. If this 'double security' is to be effective, there must be a proper balance between the States and the Federal Government.").

160. 469 U.S. 528 (1985).

161. *See supra* notes 106-22 and accompanying text.

162. The Rehnquist Court's growing resistance to federal legislation affecting state governments may stem from changes in the Court's membership since it decided *Garcia* in 1985. Since that time, Justices Scalia, Kennedy, and Souter joined the Court, following the retirements of then-Chief Justice Burger and Justices Powell and Brennan. With the retirement of Justice Brennan, one of the five members composing the *Garcia* majority, the precedential value of *Garcia* grew doubtful. In *Gregory* each new member of the Court joined with Chief Justice Rehnquist and Justice O'Connor, the only remaining proponents of *National League of Cities*, *see supra* note 122, to form the *Gregory* majority. *See Gregory*, 111 S. Ct. at 2398. Since *Gregory*, Justice Marshall, another member of the *Garcia* majority, has also retired, and it is unclear how his replacement, Justice Thomas, will vote on this issue. Nevertheless, by effectively reducing the *Garcia* majority to a minority, the *Gregory* decision may be the first in a series of cases sounding the death knell for *Garcia*.

163. *See supra* text accompanying notes 106-07.

164. *See* Brian M. Welch, Note, *Mandatory Retirement of Appointed State Judges: Balancing State and Federal Interests*, 25 VAL. U. L. REV. 125, 148, 149 n.162 (1990).

165. *See Gregory*, 111 S. Ct. at 2405-06.

166. *See supra* notes 106-22 and accompanying text.

mines that the requisite congressional intent is missing, the scope of the legislation will be narrowed.

The *Gregory* Court's use of the plain statement rule represents a significant departure from ordinary rules of statutory construction. When a statute's language is ambiguous, common principles of statutory construction demand review of the legislative history and the purpose of the statute.[167] Despite the *Gregory* Court's acknowledgment that the language of the ADEA is ambiguous, the majority never mentioned the legislative history nor the purpose of the ADEA statute.[168] *Gregory*, therefore, indicates that the Court's willingness to consider legislative history to determine the intended reaches of federal statutes is increasingly questionable.

Traditionally, courts have looked to the legislative history both to determine the meaning of ambiguous phrases and to confirm or rebut the plain meaning of clear statutory language.[169] Recent cases suggest that the Court is shifting away from a review of the legislative history when the statute is clear, preferring instead to rely on the statute's language to determine its meaning.[170] *Gregory* reflects a further move away from the traditional approach, however, because the Court declined to review the available legislative history even though it found the statutory language ambiguous.[171]

As a consequence of the Court's failure to examine the legislative history, inconsistencies emerge between the legislative history and the Court's conclusion. The Court did not address Congress's expressed intention that the ADEA should *broadly* prohibit age discrimination in the workplace and that the exceptions it enumerated should be narrowly construed.[172] By avoiding the ADEA's available legislative history, the Court also dismissed the fact that, besides Senator Sam J. Ervin's initial observation that the statute's original definition of "employee" included elected judges, the judiciary was not mentioned in any subsequent con-

167. *See* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION §§ 45.09, 48.01-.20 (5th ed. 1992).

168. *See supra* notes 38-39 and accompanying text.

169. *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626 (1990).

170. *See, e.g.*, City of Milwaukee v. Illinois, 451 U.S. 304, 315 (1981) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)); Mohasco Corp. v. Silver, 447 U.S. 807, 826 (1980).

171. *See Gregory*, 111 S. Ct. at 2406. Prior to *Gregory*, the Court repeatedly reviewed the legislative history when it found the statutory language to be ambiguous. *See* Oklahoma v. New Mexico, 111 S. Ct. 2281, 2290 (1991); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 511 (1989); Pierce v. Underwood, 487 U.S. 552, 565-67 (1988); Blum v. Stenson, 465 U.S. 866, 892-96 (1984).

172. *Cf. supra* note 101 (discussing legislative history of the ADEA).

gressional debate.[173] Most important, the Court disregarded the fact that Senator Ervin, the very legislator who formulated the ADEA's policymaker exception, did not view policymaking as a proper judicial function.[174]

The majority's failure to refer to the ADEA's legislative history suggests that Congress may no longer rely on its intent that its exclusions be narrowly drawn without risk that the Court will find the exclusions ambiguous and exclude persons entitled to coverage. Instead, to ensure that all who are entitled to do so receive protection, Congress must spell out clearly each and every beneficiary in the statute itself. If the statute is intended to extend to many governmental employees, this burden may be great.

Legislative history proved to be only one source of statutory construction neglected by the *Gregory* Court, however. The majority also ignored the EEOC's ruling that appointed state judges are protected by the ADEA.[175] According to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[176] a court must accept any construction of statutory terms offered by the responsible agency so long as the agency interpretation is reasonable and Congress has "not directly addressed the precise question at issue."[177] The *Gregory* Court acknowledged that the statute was "at least ambiguous" as to whether Congress intended to extend the ADEA to appointed state judges.[178] The Court, therefore, should not "substitute its own construction of [the ADEA] for a reasonable interpretation made by [the EEOC]."[179] *Gregory* nonetheless adopted a judicial interpretation in direct conflict with the opinion offered by the EEOC[180] without even discussing the reasonableness of the EEOC interpretation.[181] Congress's future ability to rely on an administrative agency's interpretation is, therefore, uncertain.

The Court's use of statutory construction to interpret a statute in a

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173. *Cf. id.* (discussing Senator Ervin's comments).

174. *See* ERVIN & CLARK, *supra* note 39, at 8.

175. *See supra* text accompanying notes 83-84.

176. 467 U.S. 837 (1984).

177. *Id.* at 842-43.

178. *See supra* notes 34-38 and accompanying text.

179. *Chevron*, 467 U.S. at 844.

180. *See* EEOC Opinion Letter, *supra* note 39, at N:1001 n.2 (finding that judges are not policymakers and are therefore protected by the ADEA).

181. *See supra* text accompanying notes 83-84. This refusal even to consider the agency's interpretation is remarkable given Justice Scalia's recent praise of *Chevron*. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512. In his article Justice Scalia described *Chevron* as "a highly important decision—perhaps the most important in the field of administrative law since *Vermont Yankee Nuclear Power Corp. v. NRDC.*" *Id.*

manner inconsistent with congressional intent is not confined to *Gregory*. In fact, *Gregory* may well reflect a trend, especially in civil rights cases, in which the Court employs a "plain meaning" form of statutory interpretation to construe a statute more narrowly than Congress intended.[182] The Court's variation of the plain statement rule to contravene its earlier decision in *Garcia* and to bypass ordinary rules of statutory construction may represent its strongest statement that it will apply its interpretative tools to check federal congressional powers to state and local governments.

The Court's willingness to construe federal statutes affecting state and local government officials narrowly is evident in such cases as *Atascadero* and *Will*. In these cases, the Supreme Court limited Congress's ability to intrude on the states' sovereign immunity by requiring clearly expressed legislative intent before a particular federal statute will be applied to the states.[183] The *Gregory* Court takes this requirement even further now requiring a clear expression of legislative intent not only to determine whether the statute applies to the states, but also to determine to whom the statute applies.[184] This requirement gives the states considerable leeway to assert that Congress did not intend federal legislation to apply to their activities.

After *Gregory*, the Court's novel use of the plain statement rule also becomes the appropriate test for determining whether Congress intended to extend the Fourteenth Amendment's protection to particular state officials.[185] Using the plain statement rule in this context represents a broadening of the plain statement rule announced in earlier Fourteenth Amendment cases. Prior to *Gregory* the Court had invoked the plain statement rule only to determine whether Congress intended to enact a statute under the Fourteenth Amendment.[186] In refusing to find Fourteenth Amendment protection for judges because of ambiguity in the ADEA statute, the *Gregory* Court greatly extended the plain statement rule. Now, even when Congress has stated clearly its intent to act pursuant to the Fourteenth Amendment, it still must state expressly how the

182. *See* Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 38 (1991) (noting that the Supreme Court consistently cites the "plain meaning" of statutes to construe civil rights statutes more narrowly than Congress intended); Charles S. Ralston, *Court vs. Congress: Judicial Interpretation of The Civil Rights Acts and Congressional Response*, 8 YALE L. & POL'Y REV. 205, 205-06 (1990) (analyzing a "recurring pattern" in which the Supreme Court restrictively interprets civil rights statutes, forcing Congress to amend or enact new laws to correct the Court's interpretations).

183. *See supra* notes 125-35 and accompanying text.

184. *See supra* notes 40-41 and accompanying text.

185. *See supra* notes 46-48 and accompanying text.

186. *See supra* notes 152-58 and accompanying text.

particular statute is to be applied. If Congress fails to meet this burden, it will be forced to amend or enact new laws to correct the Court's interpretation of its statutes.[187]

To support its extension of the plain statement rule, the *Gregory* Court relied on its well-developed political-function exception. By combining this exception with its earlier plain statement rule cases, however, the Court extended this exception far beyond the alienage context in which it developed.

Before *Gregory*, the political-function exception only established that the rational relation test should be applied to state statutes excluding aliens from those governmental positions that "go to the heart of representative government."[188] *Gregory* now takes this exception from the alienage context and combines it with the Court's plain statement cases to require a clear expression of legislative intent before federal statutes will be applied to all employees in state or local government. The Court did not explain how cases limiting *judicially created* scrutiny may be relied upon to restrain Congress's legislative authority, nor did the Court explain its rationale for combining this exception with its prior plain statement rule cases to develop such a rule. Most importantly, however, the Court failed to limit *Gregory*'s rule of statutory construction to situations that " 'go to the heart of representative government,' " as it did when it first articulated the political-function exception.[189] This leaves lower courts unsure of the limitations they should place on the new use of the plain statement rule. This absence of clear limitation on the rule allows states to assert that the political-function restriction on congressional authority extends to all state governmental activity.[190]

In *Gregory* the Court forced Congress to specify with clarity the precise application of statutes within the statutes themselves.[191] The Court has never subjected Congress to such a strict requirement, and the Court offered no rationale for its departure from established precedent in developing this rule. Nevertheless, the Court created this unprecedented use of the plain statement rule to avoid legislative history and the severe limitations *Garcia* placed upon its ability to review the ADEA. Thus, the Court sent a strong message to Congress that it takes state sovereignty seriously and established itself as a forum growing increasingly hostile to

187. *See supra* note 182.

188. Sugarman v. Dougall, 413 U.S. 634, 647 (1973). For a discussion of pre-*Gregory* applications of the political-function test, see *supra* notes 140-48 and accompanying text.

189. *See Gregory*, 111 S. Ct. at 2409-10 (White, J., concurring in part, dissenting in part, and concurring in judgment) (quoting *Sugarman*, 413 U.S. at 647).

190. *See supra* note 78 and accompanying text.

191. *See supra* notes 36-48 and accompanying text.

congressional regulation of state governmental functions, particularly in the area of commerce. Indeed, *Gregory* may represent an attempt by the Rehnquist Court to return to *National League of Cities*, which allowed the Court to construe federal statutes affecting traditional state governmental functions.[192] Given Chief Justice Rehnquist's promise to return to *National League of Cities* as soon as the votes were available, this is not surprising.[193]

The Court, in altering the plain statement rule without expressly overruling *Garcia*, left many unanswered questions about the precise application of the rule. Justice White offered an apt description of the confusion the Court's new rule creates:

> This majority's approach is . . . unsound because it will serve only to confuse the law. First, the majority fails to explain the scope of its rule. Is the rule limited to federal regulation of the qualifications of state officials? Or does it apply more broadly to the regulation of any "state governmental functions"? Second, the majority does not explain its requirement that Congress' intent to regulate a particular state activity be "plain to anyone reading [the federal statute]." Does that mean that it is now improper to look to the purpose or history of a federal statute in determining the scope of the statute's limitations on state activities?[194]

By leaving so many issues unresolved, *Gregory* undermines the Court's once-clear rule in *Garcia* that the judiciary's role in reviewing Commerce Clause legislation is limited, and once again leaves the lower federal courts without a clear standard for examining federal legislation affecting a state's traditional governmental functions.[195]

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192. *See supra* notes 111-12 and accompanying text.

193. *See supra* note 122.

194. *Gregory*, 111 S. Ct. at 2410 (White, J., concurring in part, dissenting in part, and concurring in judgment) (citations omitted).

195. *Cf. supra* notes 118-21 and accompanying text (discussing difficulties faced by lower federal courts prior to *Garcia*).