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I. INTRODUCTION

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[1] Although the Supreme Court has expanded the scope of Eleventh Amendment immunity far beyond the boundaries of the amendment's actual text,[2] state immunity from suits brought by private citizens in federal court is not absolute. One limitation to Eleventh Amendment immunity arises from the power of Congress to enforce equal protection rights.[3] Congress may abrogate the states' immunity through legislation.[4] To do so, however, it must (1) provide within the language of the statute an "unmistakably clear" statement of its intent to revoke state immunity to claims arising under that legislation, and (2) properly enact the immunity-abrogating statute pursuant to its authority to enforce the Fourteenth Amendment.[5]

Seven federal circuits have concluded that Congress properly manifested its intent to abrogate the states' Eleventh

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

2. *See, e.g.*, Hans v. Louisiana, 134 U.S. 1, 15 (1890).

3. *See* U.S. CONST. amend. XIV, § 5. Section 5 states, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id*. Another limitation to Eleventh Amendment immunity is a State's ability to waive its immunity by enacting state legislation or by participating in a particular federal program. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985). In addition, the Eleventh Amendment does not prohibit federal court actions brought to enjoin the enforcement of an unconstitutional statute by a State official. *See Ex parte* Young, 209 U.S. 123, 159-60 (1908).

4. *See Atascadero*, 473 U.S. at 241-43.

5. *Id*. at 242-43.

Amendment immunity when it amended the Age Discrimination in Employment Act ("ADEA" or "Age Act")[6] to include the states within the definition of potentially liable employers.[7] Conversely, a minority of circuits have held that the language of the Age Act does not contain an effective expression of congressional intent.[8] In *Humenansky v. Regents of the University of Minnesota*, for example, the Eighth Circuit held that the ADEA fails to abrogate the Eleventh Amendment in part because the statute does not contain a plain statement of intent in any single section within the text, nor a direct reference to the Eleventh Amendment or sovereign immunity.[9]

The circuit split over whether Congress properly manifested its intent to abrogate state immunity is a product of the courts' diverging interpretations of the "unmistakably clear" requirement referred to above and originally set forth in *Atascadero State Hospital v. Scanlon*.[10] This Note will attempt to clarify the *Atascadero* standard for expressing congressional intent by analyzing the *Humenansky* decision. Part II will review the history of the Eleventh Amendment, noting several landmark cases that have expanded or restricted the scope of the amendment during the last two centuries. Part II will also provide a brief introduction to the ADEA. Part III will summarize the facts of the *Humenansky* case and the court's conclusions. Part IV will analyze the *Humenansky* decision as it relates to the *intent* requirement for Eleventh Amendment abrogation. By examining the language of the ADEA in light of several statutes that have previously been held by the Supreme Court to possess sufficient or insufficient manifestations of congressional intent, this section will provide a framework for analyzing statutory language that purports to deprive the states of their immunity. This part will also demonstrate that, in light of

6. 29 U.S.C. §§ 621-30 (1994).

7. *See* Scott v. University of Miss., 148 F.3d 493, 500 (5th Cir. 1998); Keeton v. University of Nev. Sys., 150 F.3d 1055, 1057 (9th Cir. 1998); Hurd v. Pittsburg State Univ., 109 F.3d 1540, 1544 (10th Cir. 1997); Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 695 (3d Cir. 1996); Santiago v. New York State Dep't of Correctional Servs., 945 F.2d 25, 31 (2d Cir. 1991); Davidson v. Board of Governors, 920 F.2d 441, 443 (7th Cir. 1990); Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 701 (1st Cir. 1983).

8. *See* Humenansky v. Board of Regents of the Univ. of Minn., 152 F.3d 822, 824-25 (8th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3504 (U.S. Feb. 1, 1999) (No. 98-1235); Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 902 (1999).

9. *See id.* at 824-25.

10. *See* Atascadero State Hosp. V. Scanlon, 473 U.S. 234, 242-43 (1985).

this multi-statute comparison, the ADEA does in fact possess a sufficiently clear expression of intent to abrogate the states' Eleventh Amendment immunity to ADEA suits. Section B of Part IV will demonstrate that the ADEA also meets the second prong of the Eleventh Amendment abrogation test—it was enacted pursuant to the Fourteenth Amendment.[11] Finally, Part V will conclude that the Supreme Court, if faced with the issue, should reject the *Humenansky* court's position on both the authority and intent issues and hold that the ADEA does effectively abrogate the states' Eleventh Amendment immunity.

II. BACKGROUND

A. Evolution of Eleventh Amendment Immunity

1. Inception of the Eleventh Amendment

The Eleventh Amendment was enacted in response to the 1793 Supreme Court decision, *Chisholm v. Georgia*.[12] In *Chisholm*, a South Carolina citizen, acting as executor for a deceased South Carolina citizen, sued the State of Georgia for the value of military supplies which the deceased had sold to the State.[13] Georgia challenged the Supreme Court's original jurisdiction over suits between a state and citizens of another state,[14] but the Court held that states were subject to the Supreme Court's original jurisdiction under both Article III, section 2 of the Constitution,[15] and the Judiciary Act of 1789.[16]

11. *See* Seminole Tribe v. Florida, 517 U.S. 44, 65-66 (1996). The Court recognized that "the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." *Id.* The fact that the Eleventh Amendment may be abrogated through Fourteenth Amendment legislation does not justify limiting the Eleventh Amendment on the basis of constitutional provisions that predate the Eleventh Amendment. *See id.*

12. 2 U.S. (2 Dall.) 419 (1793).

13. *See id.* at 420.

14. *See id.* at 419.

15. U.S. CONST. art. III, § 2, cl. 1. This section provides in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—[and] between Citizens of different States . . . .

U.S. CONST. art. III, § 2, cl. 1.

Within two days of the *Chisholm* decision, a resolution, now codified as the Eleventh Amendment to the Constitution, was introduced in the House of Representatives.[17] The proposal provided that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[18]

2. Supreme Court expansion of the Eleventh Amendment

Almost a century later, the Supreme Court first expanded the scope of the Eleventh Amendment.[19] In *Hans v.* Louisiana, a Louisiana citizen sued the State of Louisiana for damages arising out of a contract for the sale of state-issued bonds.[20] Reasoning that the Eleventh Amendment was intended to embody the common law doctrine of sovereign immunity that existed at the time the Constitution was ratified, the Court held that the Eleventh Amendment is not limited to the scope of its actual text.[21] The Court extended the amendment to preclude suits brought against a state by its own citizens, regardless of whether the claim originated under federal or state law.[22]

3. Exceptions to the Supreme Court's expanded interpretation of sovereign immunity

Following *Hans,* however, the Supreme Court constricted the scope of sovereign immunity by carving out several exceptions to the Court's previously broad interpretation of the Eleventh Amendment. As a result, the Eleventh Amendment no longer precludes suits for prospective relief against state officials acting in violation of federal law.[23] In *Ex parte Young,* shareholders of various railroads sued the State of Minnesota

16. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80 (1789) (repealed 1948).

17. *See* Kenneth S. Weitzman, Comment, *Copyright and Patent Clause of the Constitution: Does Congress Have the Authority to Abrogate State Eleventh Amendment Sovereign Immunity After* Pennsylvania v. Union Gas Co.*?*, 2 SETON HALL CONST. L.J. 297, 302 n.17 (1991).

18. U.S. CONST. amend. XI.

19. *See* Hans v. Louisiana, 134 U.S. 1 (1890).

20. *See id.*

21. *See id.* at 12-15.

22. *See id.*

23. *See Ex parte* Young, 209 U.S. 123, 159-60 (1908).

in federal court, alleging that state legislation regulating railroad rates was confiscatory and violated the Fourteenth Amendment.[24] The Court held,

> If the act which the state . . . seeks to enforce [is] a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.[25]

The Supreme Court has also held that states may waive their immunity by consenting to federal jurisdiction,[26] and, as will be shown, states are no longer protected from suits by private citizens in federal court where Congress manifests an intent to abrogate the Eleventh Amendment while legislating pursuant to its constitutional powers.[27]

4. Restricting congressional authority to abrogate state immunity

In 1985, the Eleventh Amendment pendulum swung again in favor of the states when the Supreme Court made it more difficult for Congress to abrogate the Eleventh Amendment.[28] *Atascadero State Hospital v. Scanlon* involved a plaintiff whose application for employment was rejected by a state hospital.[29] The applicant sued under the Rehabilitation Act of 1973, alleging that the hospital discriminated against him by refusing to hire him because of his disabilities.[30] The hospital moved for dismissal of the complaint on the ground that the Eleventh Amendment barred the federal court from jurisdiction over the claim.[31] Granting the state hospital's motion, the Supreme Court held that Congress could not abrogate the states' immunity unless it manifested "its intention to abrogate the Elev-

24. *See id.* at 123-26.

25. *Id.* at 159-60.

26. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 235 (1985); Hans v. Louisiana, 134 U.S. 1, 17 (1890).

27. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

28. *See Atascadero*, 473 U.S. at 278.

29. *See id.* at 236.

30. *See id.*

31. *See id.*

enth Amendment in unmistakable language in the statute itself."[32]

In 1996, the Supreme Court further limited congressional abrogation power by holding, in *Seminole Tribe v. Florida*, that Eleventh Amendment immunity may be nullified only through Fourteenth Amendment legislation.[33] In an earlier decision, the Supreme Court had taken a broader view of Congress's authority to circumvent sovereign immunity. *Pennsylvania v. Union Gas* involved a suit by the United States against a fuel plant to recover money that the United States had paid to reimburse a state government for expenses incurred in the cleanup of hazardous waste generated by the defendant's facility.[34] The fuel company filed a third-party suit against the state, asserting that the state was liable as an owner and operator of the contaminated site under CERCLA.[35] A divided court rejected the state's motion for dismissal, and held that Congress may strip the states of their Eleventh Amendment immunity through either Commerce Clause or Fourteenth Amendment legislation.[36]

But this expansion of congressional power was short-lived. The Court later overruled *Union Gas* in *Seminole Tribe v. Florida*,[37] a case involving an Indian tribe suit against the State of Florida under the Indian Gaming Regulatory Act.[38] This Act allows Indian gaming activities to be conducted if performed pursuant to a valid compact between the tribe and the state in which the gaming activities take place.[39] Under the Act, the states have a duty to negotiate such a compact with a tribe.[40] If a state fails to negotiate in good faith, a tribe may sue in federal court in order to compel state cooperation.[41]

The Seminole Tribe sought to compel negotiations under the Indian Gaming Regulatory Act,[42] but Florida claimed that the suit should be dismissed on Eleventh Amendment

32. *Id.* at 243.
33. *See* Seminole Tribe v. Florida, 517 U.S. 44, 65-66 (1996).
34. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 5-6 (1989) (plurality opinion).
35. *See id.*
36. *See id.* at 23.
37. 517 U.S. at 71-74.
38. *See id.* at 47-51.
39. *See* 25 U.S.C. § 2710(d)(1)(C) (1994).
40. *See* 25 U.S.C. § 2710(d)(3)(A).
41. *See* 25 U.S.C. § 2710(d)(7).
42. *See Seminole Tribe*, 517 U.S. at 51.

grounds.[43] The Supreme Court agreed with Florida, holding that "the Eleventh Amendment prevent[s] Congress from authorizing suits by Indian tribes against States . . . to enforce legislation enacted pursuant to the Indian Commerce Clause."[44] More importantly, the Court held that Congress lacks the authority to abrogate state immunity through any Commerce Clause legislation—leaving the Fourteenth Amendment as the only source of congressional abrogation power.[45] In reaching this conclusion, the *Seminole* Court noted that Article III—which prohibits federal court suits by private citizens against the states—is ordinarily the "*exclusive* catalog of permissible federal-court jurisdiction."[46] Although the Fourteenth Amendment "operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment," the Eleventh Amendment cannot be limited by "antecedent provisions of the Constitution," such as the Commerce Clause.[47]

5. The Fourteenth Amendment and further constriction of congressional power to abrogate state immunity

In *City of Boerne v. Flores*,[48] the Court further narrowed congressional abrogation power by articulating a more restrictive interpretation of Congress's authority to enact Fourteenth Amendment legislation.[49] The Fourteenth Amendment provides in relevant part that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[50] The Amendment further states that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[51] *City of Boerne v. Flores* arose when a Catholic parish sued the local government under the Religious Freedom Restoration Act of 1997 (RFRA) after the City of Boerne denied the church a permit to build additional worship space.[52] In *Boerne,* the Supreme

43. *See id.*
44. *Id.* at 53, 76.
45. *See id.*
46. *Id.* at 65.
47. *Id.* at 65-66.
48. 521 U.S. 507 (1997).
49. *See id.* at 519-29.
50. U.S. CONST. amend. XIV, § 1.
51. *Id.* § 5.
52. *See Boerne*, 521 U.S. at 507.

Court addressed the issue of whether Congress had exceeded the scope of its Fourteenth Amendment, Section 5 enforcement power in enacting the RFRA.[53] The RFRA prohibited the government from substantially burdening a person's exercise of religion unless the government could show that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest."[54] The Court held that the "compelling government interest" and "least restrictive means" test was too restrictive of government action and created substantive rights not recognized by the Constitution.[55] Congress has the power to enact remedial statutes in order to protect against Equal Protection Clause violations, but it does not have the power "to determine as a matter of substantive constitutional law what situations fall within the ambit" of the Fourteenth Amendment.[56] The Supreme Court considered the RFRA to be "so out of proportion to a supposed remedial or preventive object" that it could not "be understood as responsive to, or designed to prevent, unconstitutional behavior."[57] Therefore, the RFRA could not have been enacted pursuant to the Fourteenth Amendment.[58]

The *Boerne* decision did not directly focus on Eleventh Amendment issues. Nevertheless, the decision will likely have a substantial impact on the future of Eleventh Amendment jurisprudence because it limited the scope of the Fourteenth Amendment—the only source of congressional power to abrogate Eleventh Amendment immunity.[59]

B. Age Discrimination in Employment Act

1. Purpose of the ADEA

In studies conducted during the 1960s, Congress found that older workers were finding it increasingly difficult to retain employment and regain employment after being terminated.[60]

53. *See id.*

54. 42 U.S.C. § 2000bb-1 (1994).

55. *See Boerne*, 521 U.S. at 509.

56. Oregon v. Mitchell, 400 U.S. 112, 296 (1970) (Stewart, J., concurring in part, dissenting in part).

57. *See Boerne*, 521 U.S. at 509.

58. *See id.* at 512-17.

59. *See* Seminole Tribe v. Florida, 517 U.S. 44, 71-74 (1996).

60. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81

Congress also found that "the setting of arbitrary age limits . . . [had] become a common practice."[61] The Age Discrimination in Employment Act[62] was enacted in 1967 "to promote employment of older persons based on their ability rather than age" and "to prohibit arbitrary age discrimination" by employers.[63] The ADEA prohibits employers from "fail[ing] or refus[ing] 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[.]"[64] The statute provides that a court may enforce the Act by granting legal or equitable relief "as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under" the Act.[65]

2. ADEA claims against state employers

Originally, the ADEA's definition of "employer" only included private entities, and specifically excluded state employers.[66] The 1967 statute provided: "The term 'employer' means a person engaged in an industry affecting commerce who has twenty-five or more employees . . . but such term does not include the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof."[67]

In 1974, however, Congress amended the Act to eliminate the language excluding states from ADEA suits, and to include the states within the employer definition.[68] Specifically, the Act now provides that the class of employers against whom ADEA actions may be brought includes, among others, "a State or po-

Stat. 602 (1967).

61. *Id*.

62. 29 U.S.C. §§ 621-30 (1994).

63. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2(b), 81 Stat. 602 (1967).

64. 29 U.S.C § 623(a)(1).

65. *Id*. § 626(b).

66. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 11, 81 Stat. 602, 605 (1967).

67. *Id*.

68. *See* 29 U.S.C. § 630(b)(2).

litical subdivision of a State and any agency or instrumentality of a State."[69]

Elsewhere in the statute, the ADEA explicitly grants jurisdiction over claims against employers who violate the Act.[70] The Act provides, "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . ."[71] Although this provision merely authorizes ADEA suits in "any court of competent jurisdiction" and does not specifically authorize federal court jurisdiction, the ADEA otherwise incorporates by reference the procedural provisions of the Fair Labor Standards Act, which in turn specifically authorize federal court jurisdiction.[72]

Despite the 1974 amendments, however, the federal circuits are split as to whether the Act effectively abrogates the states' Eleventh Amendment immunity under the *Atascadero* "unmistakably clear" standard.[73] This dispute has most recently been addressed by the Eighth Circuit in *Humenansky v. Board of Regents of the University of Minnesota*.[74]

III. *HUMENANSKY V. REGENTS OF THE UNIVERSITY OF MINNESOTA*

A. Facts

Humenansky involved an electron technician who was employed by the University of Minnesota for twenty-five years before being laid off.[75] The former employee sued the university,

69. *Id*.

70. *See* § 626(c).

71. *Id*.

72. *See* § 626(b).

73. *Compare* Scott v. University of Miss., 148 F.3d 493, 500 (5th Cir. 1998), Keeton v. University of Nev. Sys., 150 F.3d 1055, 1057 (9th Cir. 1998), Hurd v. Pittsburg State Univ., 109 F.3d 1540, 1544 (10th Cir. 1997), Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 695 (3d Cir. 1996), Santiago v. New York State Dep't of Correctional Servs., 945 F.2d 25, 31 (2d Cir. 1991), Davidson v. Board of Governors, 920 F.2d 441, 443 (7th Cir. 1990), *and* Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 701 (1st Cir. 1983), *with* Humenansky v. Board of Regents of the Univ. of Minn., 152 F.3d 822, 824-25 (8th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3504 (U.S. Feb. 1, 1999) (No. 98-1235), *and* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 902 (1999).

74. 152 F.3d 822 (8th Cir. 1998).

75. *See* Humenansky v. Board of Regents of the Univ. of Minn., 958 F. Supp. 439, 440 (D. Minn. 1997), *petition for cert. filed*, 67 U.S.L.W. 3504 (U.S. Feb. 1, 1999) (No.

alleging age discrimination and retaliation in violation of the ADEA.[76]

Upon the university's motion for summary judgment, the district court dismissed the plaintiff's action in its entirety, holding that the Eleventh Amendment barred the employee's ADEA claims against the state employer.[77] On appeal, the Eighth Circuit affirmed the district court's decision to dismiss the employee's claims.[78] The appellate court held that the state's Eleventh Amendment immunity had not been abrogated by the ADEA because Congress (1) failed to sufficiently express its intent to abrogate state immunity with the ADEA, and (2) did not enact the ADEA pursuant to the Fourteenth Amendment.[79]

B. The Humenansky *Court's Reasoning*

1. Congressional intent to abrogate Eleventh Amendment immunity with the ADEA

The Eighth Circuit held that Congress failed to adequately manifest its intent to abrogate the Eleventh Amendment for ADEA claims.[80] In support of its conclusion, the court looked to similar language from the Fair Labor Standards Act (FLSA), which had been held by the Supreme Court to be insufficient as an expression of congressional intent to abrogate.[81] Originally, neither the FLSA nor the ADEA were intended to apply to state employers.[82] In 1966, however, Congress attempted to provide for FLSA suits against the states by amending the definition of "employer" to include certain state agencies.[83] Despite the change, the Supreme Court held in *Employees of the*

98-1235).

76. *See id.*

77. *See Humenansky*, 152 F.3d 822, 824.

78. *See id.* at 824-28.

79. *See id.*

80. *See id.* at 825.

81. *See id.* at 824-25.

82. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602, 605 (1967); Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 282 (1973) (noting that under "§ 3(d) of [FLSA], 'employer' was first defined to exclude the United States or any State or political subdivision of a State.").

83. *See Humenansky*, 152 F.3d at 824-25.

Department of Public Health and Welfare v. Department of Public Health and Welfare that the Act did not sufficiently express an intent to abrogate Eleventh Amendment immunity because Congress failed to correspondingly amend the statute's enforcement provision—the provision which authorizes suit against violators of the act and designates the courts in which an action may be brought.[84] In other words, despite Congress's reference to the states as possible defendants, the Court refused to deprive the states of their immunity unless Congress provided some other indication that their constitutional immunity was swept away.[85]

To overturn this decision, Congress amended the FLSA's enforcement provision to allow claims "against any employer (including a public agency) in any Federal or State court."[86] A number of courts have since held that the 1974 amendments express an unmistakably clear intent to abrogate Eleventh Amendment immunity.[87]

At the same time Congress amended the FLSA enforcement provision to permit suits in federal court against the states, it amended the ADEA definition of "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State."[88] But Congress failed to simultaneously amend the enforcement provision of the ADEA; the current provision does not expressly provide for federal court suits against the states.[89] On the other hand, the ADEA does incorporate the current FLSA procedures by reference, including the FLSA's extremely clear authorization for federal court jurisdiction over state defendants.[90] Nevertheless, the Eighth Circuit concluded that, because the ADEA still does not expressly authorize federal court suits in its *own* text, Congress has not

84. *See id*. at 285.

85. *See id*.

86. Amendments to Fair Labor Standards Act of 1938, Pub. L. No. 93-259, § 6, 88 Stat. 55, 58 (1974) (amending 29 U.S.C. § 216(b) (1966)).

87. *See, e.g.*, Reich v. New York, 3 F.3d 581, 590-91 (2d Cir. 1993); Hale v. Arizona, 993 F.2d 1387, 1391-92 (9th Cir. 1993).

88. Humenansky v. Board of Regents of the Univ. of Minn., 152 F.3d 822, 825 (8th Cir. 1998) (citing Pub. L. No. 93-259, § 28, 88 Stat. 74 (codified at 29 U.S.C.§ 630(b)(2) (1994))), *petition for cert. filed*, 67 U.S.L.W. 3504 (U.S. Feb. 1, 1999) (No. 98-1235).

89. *See Humenansky*, 152 F.3d at 825 (citing 29 U.S.C. § 626(c) (1994)).

90. At 29 U.S.C. § 626(c) (1994), the ADEA incorporates, *inter alia*, 29 U.S.C. § 216(b) of the FLSA, which authorizes claims "against any employer (including a public agency) in any Federal or State court."

clearly expressed its intent to abrogate Eleventh Amendment immunity from ADEA suits.[91]

2. Congressional authority to abrogate Eleventh Amendment immunity

The *Humenansky* court also concluded that even if Congress intended to abrogate the states' immunity to federal court ADEA suits, it lacked the authority to do so.[92] The overwhelming majority of courts disagree with the Eighth Circuit. They argue that Congress has the power to deter Fourteenth Amendment violations through legislation that prohibits conduct which is not itself unconstitutional, so long as the remedy is proportional to the injury Congress seeks to prevent.[93] The majority contends that the ADEA is a proportional remedy because the Act is "narrowly drawn to protect older citizens from arbitrary and capricious action,"[94] and, according to the ADEA's legislative history, age discrimination was prevalent at the time of its enactment.[95]

The *Humenansky* court rejected this argument, concluding that the ADEA does not constitute valid Fourteenth Amendment legislation.[96] In reaching this conclusion, the Eighth Circuit noted several cases in which the Supreme Court refused to extend Fourteenth Amendment protections against age discrimination as far as the ADEA does.[97] In *Massachusetts Board of Retirement v. Murgia*,[98] for example, the Supreme Court up-

91. *See Humenansky*, 152 F.3d at 825.

92. *See id.* at 827.

93. *See, e.g.*, Scott v. University of Miss., 148 F.3d 493, 501 (5th Cir. 1998).

94. *Id.* at 503.

95. *See* 29 U.S.C. § 621(a)-(b) (1994).

96. *See Humenansky*, 152 F.3d at 827.

97. The court explained:

> Age is not a suspect class entitled to a heightened level of equal protection scrutiny. . . . In *Vance v. Bradley*, . . . the Court upheld a federal statute mandating that Foreign Service officers retire at age sixty against an equal protection challenge, concluding the classification was valid under rational basis review. The Equal Protection Clause applies not only to statutes such as those at issue in *Murgia* and *Vance*, but also to the day-to-day employment decisions of a myriad of state officers and agencies. But these isolated executive actions are unconstitutional only if they are the product of intentional discrimination that "fail[s] to comport with the requirements of equal protection."

Id. (alterations in original) (citations omitted).

98. 427 U.S. 307 (1979).

held a police department's mandatory retirement policy because it furthered the rational state objective of eliminating physically unfit police officers.[99] The Court held that age is not a suspect class entitled to a heightened level of equal protection scrutiny.[100] Based on *Murgia* and similar cases, the Eighth Circuit reasoned that, "given the many economic and social factors that may justify adverse employment action based upon age in a particular situation, it seems likely that only a few isolated, egregiously irrational instances of age discrimination would violate the Equal Protection Clause."[101]

In further support of its position, the Eighth Circuit cited *City of Boerne v. Flores*,[102] in which the Supreme Court addressed the issue of whether Congress exceeded the scope of its Section 5 enforcement power in enacting the Religious Freedom Restoration Act.[103] As explained above, the Supreme Court held that the "compelling government interest" and "least restrictive means" tests of the RFRA were so restrictive of government action that the statute could not have been enacted under the Fourteenth Amendment, which requires only a rational basis for government action.[104]

The *Humenansky* court concluded that because the ADEA, like the RFRA, exceeds the scope of the Equal Protection Clause, the Age Act does not fall within Congress's authority to prevent violations of the Fourteenth Amendment.[105] Thus, the Eighth Circuit held that the Act fails to meet the authority requirement for abrogating Eleventh Amendment immunity.[106]

99. *See id.* at 317.

100. *See id.* at 313.

101. *Humenansky*, 152 F.3d at 827 (footnote omitted).

102. 521 U.S. 507 (1997).

103. *See id.* at 512-13.

104. *See id.* at 512-35.

105. *See generally Humenansky*, 152 F.3d 822. Note, however, that the ADEA has been upheld as valid under the Commerce Clause. *See* EEOC v. Wyoming, 460 U.S. 226, 243 (1983).

106. *See Humenansky*, 152 F.3d at 827-28. The Eleventh Circuit is the only other circuit to have held that the ADEA does not effectively abrogate the States' Eleventh Amendment immunity. However, the court arrived at this conclusion with substantial disagreement. Of the three judges, only one believed that Congress did not adequately express an intent to abrogate immunity, and only one concluded that Congress did not have the authority to abrogate immunity with the ADEA. The third judge argued that Congress failed to meet either requirement. Although the court's two-to-one vote in favor of dismissing the plaintiff's claims on Eleventh Amendment grounds carried the day, the division within the Eleventh Circuit is representative of the discord among the circuits regarding both the intent and authority issues.

IV. ANALYSIS OF THE *HUMENANSKY* COURT'S REASONING

A. Clarifying the "Unmistakably Clear" Requirement: Expressing Congressional Intent to Abrogate State Immunity

Seven of the nine circuits to address the intent issue have either held or stated in dicta that Congress adequately expressed its intent to abrogate the states' immunity when it amended the ADEA in 1974.[107] The *Humenansky* court's disagreement with the majority essentially hinges on its interpretation of the "unmistakably clear" standard set forth in *Atascadero State Hospital v. Scanlon*.[108]

By definition, *unmistakable* language is that "not capable of being . . . misunderstood."[109] Similarly, the word "clear" has been defined as "free from obscurity or ambiguity: easily understood: . . . free from doubt."[110] Each word, taken alone, demands an extremely high level of explicitness. When construed together, however, the words "intensif[y] the implications" of each other, creating an even more demanding standard of clarity.[111] The level of clarity required under *Atascadero* is magnified even further when the phrase "unmistakably clear" is combined with another intent requirement: that the unequivocal language be contained within the text of the statute itself.[112] For the purposes of this Note, the combination of these two elements will be referred to as the "*Atascadero* standard" or the "unmistakably clear requirement."

107. *Compare* Scott v. University of Miss., 148 F.3d 493, 500 (5th Cir. 1998), Keeton v. University of Nev. Sys., 150 F.3d 1055, 1057 (9th Cir. 1998), Hurd v. Pittsburg State Univ., 109 F.3d 1540, 1544 (10th Cir. 1997), Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 695 (3d Cir. 1996), Santiago v. New York State Dep't of Correctional Servs., 945 F.2d 25, 31 (2d Cir. 1991), Davidson v. Board of Governors, 920 F.2d 441, 443 (7th Cir. 1990), *and* Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 701 (1st Cir. 1983), *with* Humenansky v. Board of Regents of the Univ. of Minn., 152 F.3d 822, 824-25 (8th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3504 (U.S. Feb. 1, 1999) (No. 98-1235), *and* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 902 (1999).

108. 473 U.S. 234, 238, 243 (1985).

109. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1294 (10th ed. 1997).

110. *Id.* at 213.

111. Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1430 n.6 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 902 (1999).

112. *See* Dellmuth v. Muth, 491 U.S. 223, 227-28 (1989).

1. A framework for analyzing congressional intent

The Supreme Court has suggested that legislative history is largely irrelevant in determining congressional intent to abrogate the Eleventh Amendment.[113] Thus, the *Atascadero* standard goes more to the *structure* of statutory language than to the Court's desire to understand Congress's intent.[114] Conceivably, Congress could produce *volumes* of legislative history regarding its intent to abrogate Eleventh Amendment immunity through a piece of legislation. But if the text of the statute lacked one or more of a few key phrases, the Supreme Court would be unlikely to find the statute abrogates sovereign immunity. A court may be thoroughly convinced that Congress intended to abrogate Eleventh Amendment immunity and yet conclude that Congress did not *express* its intent with enough force.

The circuit courts' treatment of the ADEA provides substantial evidence that the courts interpret *Atascadero* as placing heavy emphasis on the *form* of would-be abrogation language. In *Kimel v. State of Florida Board of Regents*,[115] for example, Judge Edmondson stated,

> I do not dispute that some provisions of the ADEA make States look like possible defendants in suits alleging violations of the ADEA. I accept that these provisions could support an "inference that the States were intended to be subject to damages actions for violations of the [ADEA]" [b]ut . . . a permissible inference is not "the unequivocal declaration" that is required to show Congress's intent to exercise its powers of abrogation.[116]

This language suggests that the court indeed may not have been as uncertain about Congress's *intent*, as much as it was uncertain about whether Congress *expressed* its intent with sufficient explicitness. Given a less stringent standard than the "unmistakably clear" requirement, perhaps Edmondson and other judges adopting the minority position would have readily adopted the inference that the states were intended to

113. *See* Seminole Tribe v. Florida, 517 U.S. 44, 56 (1996) (holding that Congress may only abrogate state sovereign immunity "by making its intention unmistakably clear in the language of the statute") (citation omitted).

114. *See Dellmuth*, 491 U.S. at 228.

115. 139 F.3d 1426 (11th Cir. 1998).

116. *Id.* at 1432 (citations omitted).

be subject to ADEA suits in federal court. Under the *Atascadero* standard, however, Edmondson was only willing to concede that the provisions of the ADEA "could" support this inference.[117] Because of this reasoning, the courts are still divided as to whether the ADEA meets the *Atascadero* intent requirements, even though Congress amended the ADEA to explicitly include the states within the class of potential defendant-employers, and deleted all provisions which previously excluded states from the class of defendants.[118]

The question of whether the *Humenansky* court correctly applied the *Atascadero* standard can be most easily addressed by analyzing the ADEA in light of a few specific types of statutory provisions that have been held to constitute language sufficient to express intent. Specifically, the case law suggests that, for a statute to abrogate the Eleventh Amendment, the text of the statute generally must either (1) make direct reference to the Eleventh Amendment or sovereign immunity, or (2) specifically refer to the states as defendants within the section of the statute that defines the class of potential defendants.[119] If option two is invoked and there is still substantial ambiguity as to congressional intent, the courts may also require the text to authorize actions against a state within the statute's enforcement provision—the portion of the statute that authorizes suits by aggrieved persons and designates the courts in which these suits may be brought.[120]

117. *See id.*

118. *See* 29 U.S.C. § 630(b)(2) (1994).

119. *See infra* Part IV.A.3. *See also, e.g.*, Dellmuth, 491 U.S. at 231. In *Dellmuth*, despite the fact that the Education of the Handicapped Act (EHA) contained frequent references to state obligations under the Act, the Court stated:

> We cannot agree that the textual provisions on which the Court of Appeals relied, or any other provisions of the EHA, demonstrate with unmistakable clarity that Congress intended to abrogate the States' immunity from suit. The EHA makes no reference whatsoever to either the Eleventh Amendment or the States' sovereign immunity. Nor does any provision cited by the Court of Appeals address abrogation in even oblique terms, much less with the clarity *Atascadero* requires.

Id. (citation omitted).

120. In *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279 (1973), for example, the Court recognized that the states were included within the FLSA's class of defendants. But other language provided that a federal officer may sue the state on behalf of aggrieved individuals. The court reasoned that Congress might have included the states as defendants only so that they could be sued by the federal officer. Such an authorization for suit against the states would not require abrogation of the Eleventh Amendment because

2. Using "magic words" to express congressional intent

Although use of the word "immunity" or the phrase "Eleventh Amendment" would provide the clearest textual indication of congressional intent to contravene state immunity, Congress is not required to use any certain "magic words."[121] By holding Congress to the *Atascadero* standard, the Supreme Court has come *close* to requiring specific immunity-abrogating language. In fact, the Court stated in *Dellmuth v. Muth*[122] that anything

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federal court suits against the state by the federal government are not prohibited by the amendment. *See id.* at 285.

On the other hand, the possibility that a private citizen could sue a state defendant in state court has not appeared to generate as much concern for the Supreme Court regarding the meaning of statutory language that includes the states within a class of defendants. Federal law claims can generally be brought in either federal or state court. Since the Eleventh Amendment does not prohibit state court suits against the states, the Supreme Court could arguably find ambiguity as to congressional intent to abrogate sovereign immunity whenever a statute refers to the states as defendants but does not expressly refer to sovereign immunity or the Eleventh Amendment. Authorizing suits by private citizens against states would not require abrogation of the Eleventh Amendment because individuals could still sue a state in state court. Thus, the states-as-defendants language would not be rendered meaningless whether or not abrogation of the Eleventh Amendment was intended.

121. Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 n.15 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 902 (1999). In concluding that the ADEA fails to adequately express congressional intent to abrogate immunity, Judge Edmonson stated in a footnote,

> I do not say that certain magic words must be used to abrogate immunity. I accept that Congress could unmistakably signal abrogation of immunity in a variety of ways, and we write no general rules today. *See* 42 U.S.C. § 2000e-5(f)(1) (where Title VII speaks of suits by aggrieved persons against "a government, governmental agency, or political subdivision" while discussing suits in federal district courts).

Id. But compare Judge Hatchett's dissenting opinion:

> Although Judge Edmondson states that we do not require Congress to use any "magic words" to abrogate effectively the states' sovereign immunity, and that Congress may "unmistakably signal abrogation of immunity in a variety of ways," I believe that his opinion, in essence, is requiring exactly that. If Congress has not sufficiently expressed its intent to abrogate the states' immunity through including "States" in the definition of "employer" in the ADEA, after this decision, I cannot imagine in what other "variety of ways" Congress can signal the abrogation of the states' immunity, other than through the use of "magic words." The Court in *Seminole Tribe* did not require that Congress use any talismanic language to express its intent to abrogate, and could easily have done so. As I do not believe that *Seminole Tribe* requires Congress to use any particular words to express effectively its intent to abrogate the states' immunity, and because I believe that Congress's intent is clear in the language of the ADEA, I conclude that the first criterion of *Seminole Tribe* is satisfied.

122. 491 U.S. 223 (1989).

short of "perfect confidence that Congress in fact intended to abrogate sovereign immunity . . . will not suffice . . . ."[123] However, by not requiring an explicit reference to the "Eleventh Amendment" or "sovereign immunity," the Supreme Court actually stops short of requiring "perfect" clarity, as evidenced by the fact that that there is almost always substantial confusion regarding congressional intent whenever a statute does not employ these key words.[124]

3. Comparison of the ADEA with other statutes' intent language

By examining the language from statutes that have already been held to either lack or possess a sufficient manifestation of congressional intent to abrogate immunity, the following section will attempt to alleviate some of this confusion by articulating the requirements of the "unmistakably clear" rule. This section will also demonstrate that the *Humenansky* court erred in concluding that the ADEA lacks sufficient manifestation of congressional intent to abrogate state immunity.

a. Statutes that clearly do not express congressional intent to abrogate Eleventh Amendment immunity.

(1) The Rehabilitation Act. The Rehabilitation Act provides a remedy for federal employees who allege employment discrimination on the basis of their disabilities.[125] The statute provides in part that,

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the

123. *Id.* at 231.

124. *See infra* Part IV.A.3. See also *Dellmuth v. Muth*, 491 U.S. 223 (1989), in which four justices dissented from the majority's conclusion that the Education of the Handicapped Act did not abrogate states' Eleventh Amendment immunity, where the EHA was replete with references to the states and their obligations to aggrieved parties, but made no direct reference to Eleventh Amendment immunity or federal court jurisdiction. Also note that, in *Kimel*, the Eleventh Circuit held that the ADEA does not effectively abrogate the States' Eleventh Amendment immunity. But only one judge concluded that Congress failed to adequately express an intent to abrogate immunity, and only one concluded that Congress did not have the authority to abrogate immunity with the ADEA, while the third member of the panel argued that Congress failed to meet either requirement. *See* 139 F.3d 1426, 1433, 1444, 1449.

125. *See* 29 U.S.C. § 794(a) (1994).

> participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[126]

Before 1986, the Rehabilitation Act provided for remedies against "any recipient of Federal assistance."[127] In *Atascadero State Hospital v. Scanlon,* the plaintiff argued that the word "any" made this provision broad enough to include state "recipients."[128] Therefore, the plaintiff reasoned, the states were not immune to claims arising under this Act.[129] The Supreme Court expressly rejected this argument, holding that a "general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment."[130] In other words, even if the language of a statute allows or seems to *require* jurisdiction, the statute will not effectively abrogate Eleventh Amendment immunity absent a more deliberate expression of congressional intent to do so.[131]

(2) Other "general authorization" statutes. Welch v. Texas Department of Highways and Public Transportation[132] involved a state employee who was injured while working on a ferry dock owned by the Texas transportation department.[133] The employee sued the state pursuant to the Jones Act, which provides, "Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages" in federal court.[134] Addressing the state's assertion of Eleventh Amendment immunity, the Supreme Court applied the *Atascadero* standard and held that Congress had not unequivocally expressed its intention to contravene the Eleventh Amendment in unmistakably clear language within the Jones Act.[135] In the plurality opinion, Justice Powell reiterated that a "general authorization for suit in federal court" does not consti-

126. *Id.*
127. 29 U.S.C. § 794a(a)(2) (1973) (amended 1986).
128. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 245 (1985).
129. *See id.*
130. *Id.* at 246.
131. *See id.*
132. 483 U.S. 468 (1987) (plurality opinion).
133. *See id.* at 470-71.
134. 46 U.S.C. § 688 (a) (1994).
135. *See Welch*, 483 U.S. at 475.

tute adequate abrogation language.[136]

Similarly, the word "whoever" in a patent statute and the word "anyone" in a copyright statute have been held to be insufficient designations of the states as potential defendants for purposes of abrogating Eleventh Amendment immunity.[137] The federal patent statute reads in pertinent part: "[*W*]*hoever* without authority makes, uses, or offers to sell, or sells any patented invention . . . infringes the patent."[138] The copyright statute provides, "*Anyone* who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright."[139] In each case, the circuit courts found the statutory language to contain nothing more than a general authorization for suit in federal court. For example, in *Chew v. California*, the court did not find "the requisite unmistakable language of congressional intent necessary to abrogate Eleventh Amendment immunity."[140]

The patent and copyright statutes, the pre-1986 Rehabilitation Act, and the Jones Act are clear examples of legislation that fails to meet the *Atascadero* standard. Comparing the ADEA with these statutes sheds little light on the *Humenansky* holding because the language of the ADEA is much more explicit in designating states as potential defendants. Nevertheless, these "general authorization" statutes illustrate one extreme of the clarity spectrum.

b. Statutes that clearly express congressional intent to abrogate Eleventh Amendment immunity.

(1) The Americans with Disabilities Act. Congress enacted the Americans with Disabilities Act (ADA) in part because it found that discrimination against individuals with disabilities had become a pervasive problem in the United States, and that, "unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress

136. *Id.* at 476 (citation omitted).

137. *See* BV Eng'g v. U.C.L.A., 858 F.2d 1394, 1398 (9th Cir. 1988).

138. 35 U.S.C. § 271(a) (1994) (emphasis added).

139. 17 U.S.C. § 501(a) (1994) (emphasis added).

140. Chew v. California, 893 F.2d 331, 334 (Fed. Cir. 1990), *superceded by statute as stated in* Genentech, Inc. v. Eli Lilly & Co., 998 F.2d 931 (Fed. Cir. 1993).

such discrimination."[141] The ADA provides remedies for individuals discriminated against in employment and other situations because of their disabilities.[142]

Whereas the general authorization statutes described above are clearly inadequate expressions of intent under the *Atascadero* standard, the Americans with Disabilities Act (ADA) is blatantly clear in expressing intent, and falls on the other end of the spectrum. The ADA reads, "A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation" of the ADA.[143]

(2) The amended Rehabilitation Act. The present version of the Rehabilitation Act is equally explicit. In response to the Supreme Court's conclusion in *Atascadero* that the statute did not contain an unequivocal expression of congressional intent to abrogate state immunity,[144] Congress amended the Rehabilitation Act to include abrogation language similar to that of the ADA. The amended statute provides, "[A] State shall not be immune under the eleventh amendment to the Constitution of the United States . . . for a violation of [the Rehabilitation Act]."[145]

The explicit abrogation language of the ADA and the amended Rehabilitation Act is arguably the only type of language that would measure up to the *Atascadero* standard in all cases. Although the Supreme Court has never specifically required the use of precise language to abrogate immunity, perhaps it should. Given the Supreme Court's insistence that abrogation language be expressed with such extreme clarity, it would be better to take this final step and require a direct reference to sovereign immunity or the Eleventh Amendment as a sort of ritualistic signal of congressional intent to abrogate state immunity. By not taking this final step, and yet requiring unmistakable language of intent within a statute's text, the Supreme Court leaves room for confusion where a statute's expression of congressional intent lies somewhere between the perfect clarity of the ADA and the clearly inadequate general authorizations for suit provided by statutes like the Jones Act. Because the ADEA's abrogation language falls somewhere in

141. 42 U.S.C. § 12101(a)(4) (1994).

142. *See* 42 U.S.C. § 12112 (1994).

143. 42 U.S.C. § 2000d-7 (1994).

144. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985).

145. 42 U.S.C. § 12202 (1994).

this gray area, a comparison of the ADEA with other statutes lacking explicit references to the Eleventh Amendment provides insight into the issue of whether the Age Act complies with the unmistakably clear rule.

c. Statutes in the gray area of congressional expression of intent to abrogate Eleventh Amendment immunity.

(1) The Education of the Handicapped Act. The Education of the Handicapped Act (EHA) enacts a system of providing handicapped children with free public education appropriate for their individual needs.[146] The statute provides access to the courts through a cause of action for parties aggrieved by the administrative proceedings at which decisions regarding the allocation of EHA funds are made.[147] Although the EHA allows for judicial review on behalf of these "aggrieved parties," it lacks any direct reference to sovereign immunity or the Eleventh Amendment. Unlike the "general authorization" statutes, however, the EHA contains frequent references to the states, and outlines the states' and local authorities' roles in providing education for handicapped children.[148] Nevertheless, in *Dellmuth v. Muth*, a sharply divided Supreme Court found the EHA to lack a sufficient expression of intent.[149] The Court stated,

> We recognize that the EHA's frequent reference to the States, and its delineation of the States' important role in securing an appropriate education for handicapped children, make the States, along with local agencies, logical defendants in suits alleging violations of the EHA. This statutory structure lends force to the inference that the States were intended to be subject to damages actions for violations of the EHA. But such a permissible inference, whatever its logical force, would remain just that: a permissible inference. It would not be the unequivocal declaration which, we reaffirm today, is necessary before we will determine that Congress intended to exercise its powers of abrogation.[150]

Thus, we learn from *Dellmuth* that statutes without specific

146. *See* Dellmuth v. Muth, 491 U.S. 223, 225 (1989).

147. *See* 20 U.S.C. § 1415(e)(2) and (4)(1994).

148. *See Dellmuth*, 491 U.S. at 232.

149. *See id.* at 232.

150. *Id.*

reference to sovereign immunity must not only refer to the states, but must refer to the states in the *right place*. At least according to the *Dellmuth* majority, the statute must "speak to what parties are subject to suit" in the narrow portion of the text which defines these parties, regardless of the number of references to, or obligations imposed on, a state in other portions of the statute.[151] On the other hand, the fact that four justices found ample evidence of intent within the EHA suggests that this requirement should be taken with a grain of salt.

The ADEA's intent language is superior to the EHA's because the ADEA refers to the states in the section that defines the class of potential defendants in age discrimination cases.[152] Specifically, the statute defines "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State."[153]

But the existence of such language is not necessarily dispositive. If a federal statute prohibits state court jurisdiction, but includes the states within the defendant class, the states-as-defendants language is likely to be viewed as substantial evidence of congressional intent to abrogate sovereign immunity. Otherwise, the inclusion of states as defendants would be rendered meaningless. In most federal statutes, however, Congress authorizes concurrent jurisdiction. As to these statutes, the fact that a state may be sued under the statute does not necessarily suggest that Congress intended to abrogate sovereign immunity because the Eleventh Amendment does not prohibit private suits against a state in state court.

Nevertheless, the existence or absence of references to the states as potential defendants is a substantial factor in the courts' analysis of congressional intent, regardless of whether the statute at issue authorizes suit in both state and federal court.

(2) CERCLA. The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or " Superfund Act") imposes liability on those who are responsible for generating hazardous waste.[154] The Superfund Amendments and Reauthorization Act (SARA) amends and clarifies

151. *Id.*

152. *See* 29 U.S.C. § 630(b) (1994).

153. *Id.*

154. *See* 42 U.S.C. § 9606 (1994).

CERCLA.[155] On the same day that the Supreme Court decided *Dellmuth*, the Court found CERCLA, as amended by SARA, to contain sufficient language of intent because this act, unlike the EHA, *does* refer to the states within the portion of text that defines potential defendants.[156]

In *Pennsylvania v. Union Gas*, the Supreme Court addressed the issue of whether CERCLA, as amended by SARA, "permits a suit for monetary damages against a State in federal court and, if so, whether Congress has the authority to create such a cause of action when legislating pursuant to the Commerce Clause."[157] The Court answered both questions affirmatively.[158] Although the Court's holding as to the authority issue was later overruled in *Seminole Tribe v. Florida*,[159] its analysis of the intent issue is still relevant for the purpose of interpreting the "unmistakably clear" rule.

"Persons" and "owners or operators" are listed among those who may be liable under CERCLA.[160] The definition of "persons" specifically includes the "States." SARA excludes states that have "acquired ownership or control involuntarily" from the definition of "owners or operators."[161] The Act specifies, however, that this exclusion

> shall not apply to any State or local government which has caused or contributed to the release . . . of a hazardous substance . . . , and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity.[162]

The *Union Gas* Court held that these provisions conveyed congressional intent to abrogate state immunity with unmistakable clarity, because, unlike the EHA, CERCLA and SARA not only impose obligations on the states, they also refer to the states in the section which defines the potential defendants.[163]

155. *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

156. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989).

157. *Id.* at 5.

158. *See id.*

159. 517 U.S. 44, 66 (1996).

160. 42 U.S.C. § 9607(a) (1994).

161. *Id.* § 9601(20)(D).

162. *Union Gas*, 491 U.S. at 8 (quoting 42 U.S.C. § 9601(20)(D)).

163. *See id.* The Court stated, "[t]he express inclusion of States within the stat-

(3) The Fair Labor Standards Act (FLSA). In another case, however, the Supreme Court found the abrogation language of the FLSA (which regulates wages, hours, and other employment-related concerns)[164] to be insufficient,[165] despite the fact that Congress amended the original definition of "employer" to include state and local agencies.

In *Employees of the Department of Public Health and Welfare v. Department of Public Health and Welfare,* the Court invalidated Congress's attempt to abrogate sovereign immunity with its 1966 amendments to the FLSA because Congress failed to also amend the statute's enforcement provision to provide for federal court actions against the states.[166] Although states were specifically included within the class of potential defendants, the statute's enforcement clause provided only generally for private suits by the "employee" against the "employer" to recover unpaid compensation "in any court of competent jurisdiction."[167] The Court stated it would "be surprising . . . to infer that Congress deprived Missouri of her constitutional immunity without changing the [enforcement provision] under which she could not be sued or indicating in some way by clear language that the constitutional immunity was swept away."[168]

To overturn the ruling, Congress amended the enforcement provision again in 1974 to authorize private suits "against any employer (including a public agency) in any Federal or State court."[169] A number of circuits have since held that the 1974 amendments reflect an unmistakably clear intent to abrogate sovereign immunity.[170]

(4) Comparison of the ADEA with the FLSA. The ADEA's enforcement provision fails to specifically authorize federal court suits against the states. The amendments to the ADEA

ute's definition of 'persons,' and the plain statement that States are to be considered 'owners or operators'. . . together convey a message of unmistakable clarity: Congress intended that States be liable along with everyone else for cleanup costs recoverable under CERCLA." *Id.*

164. *See* 29 U.S.C. §§ 201-19 (1994).

165. *See* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 285 (1973).

166. *See id.* at 283-85.

167. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §§ 4, 7, 81 Stat. 602 (1967).

168. *Employees*, 411 U.S. at 285.

169. 29 U.S.C. § 216(b) (1994).

170. *See, e.g.,* Reich v. New York, 3 F.3d 581, 590-91 (2d Cir. 1993).

parallel those of the FLSA. Both the ADEA and the FLSA were originally intended to exclude states from their definitions of defendant-employers, and Congress subsequently amended both statutes to include states within these definitions.[171] A major difference, however, is that the FLSA's enforcement provision was amended to permit suits "against any employer (including a public agency) in any federal or State court,"[172] and the ADEA's enforcement provision, to this day, provides only a general authorization for ADEA suits: "Any person aggrieved may bring a civil action in any court of competent jurisdiction . . . ."[173]

Under *Employees,* Congress's failure to amend the ADEA's enforcement provision could arguably compel a finding that the language was insufficient as a manifestation of intent to abrogate. The *Humenansky* court reasoned, "[i]f Congress intended to abrogate Eleventh Amendment immunity for the ADEA as well as the FLSA, and recognized that *Employees* required that intent to abrogate be reflected by amending the enforcement provisions, . . . [Congress would have amended] the ADEA provision that most directly addresses the question of federal court jurisdiction."[174]

(a) ADEA and FLSA enforcement provision. The ADEA incorporates the FLSA's enforcement provision, which authorizes federal court jurisdiction against state employers. However, 29 U.S.C. § 626(b) provides that the ADEA "shall be enforced in accordance with the powers, remedies, and procedures provided in" the FLSA.[175] The FLSA's 1974 enforcement provision, which specifically allows suits by private parties against public agencies in federal court, is one of the sections that is cross-referenced in the ADEA.[176] Therefore, because Congress corrected the deficient language of the FLSA, and because the corrected language of the FLSA is incorporated by reference in the Age Act, the ADEA's immunity-abrogating language was corrected by proxy.

171. *See* Humenansky v. Board of Regents of the Univ. of Minn., 152 F.3d 822, 824-25 (8th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3504 (U.S. Feb. 1, 1999) (No. 98-1235).

172. Amendments to Fair Labor Standards Act of 1938, Pub. L. No. 93-259, § 6, 88 Stat. 55, 61 (1974).

173. 29 U.S.C. § 626(c)(1) (1994).

174. *Humenansky*, 152 F.3d at 825.

175. 29 U.S.C. § 626(b) (1994).

176. *See Humenansky*, 152 F.3d at 825.

Admittedly, the Supreme Court held in *Atascadero* that the intention to abrogate the Eleventh Amendment must be expressed within the unmistakable language of the statute itself.[177] In light of this requirement, the *Humenansky* court concluded that the ADEA's incorporation of the FLSA's immunity-abrogating language is insufficient. The court held that the ADEA still lacks sufficient language of intent because it contains no unmistakably clear expression of intent within its *own* text.[178]

However, by ignoring the cross-referenced FLSA provisions in its analysis of the ADEA's abrogation language, the Eighth Circuit takes the *Atascadero* standard too far. In *Union Gas*, the Supreme Court clearly considered the language of CERCLA's companion statute—SARA—in determining whether CERCLA abrogated the Eleventh Amendment.[179] Recall that SARA, which supplements CERCLA, provides that a "State or local government which has caused or contributed to the release . . . of a hazardous substance . . . , and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively as any nongovernmental entity."[180] If the statute had not contained this language, the Court would not likely have held that CERCLA abrogates the Eleventh Amendment.

The relationship between CERCLA and SARA is similar to that of the ADEA and the FLSA. The provisions of the FLSA are intended to supplement and clarify the ADEA. The ADEA incorporates, *inter alia*, the FLSA provision,[181] which authorizes claims "against any employer (including a public agency) in any Federal or State court."[182] Under the approach in *Union Gas*, this language should not be ignored. Although *Atascadero* requires Congress to manifest its intent to abrogate the Eleventh Amendment with language within the statute itself,[183] *Union Gas* suggests that language within statutes that are intertwined with the original statute may also be considered for

177. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985).

178. *See Humenansky*, 152 F.3d at 825.

179. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989).

180. 42 U.S.C. § 9601(24) & (35)(D) (1994).

181. *See* 29 U.S.C. § 216(b).

182. *Id*.

183. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 243 (1985).

the purpose of analyzing congressional intent. Because the *Humenansky* court discounted the relevance of the incorporation of the FLSA provision in its analysis of the ADEA's intent language, it wrongly concluded that the Age Act fails to meet the intent requirement for abrogating the Eleventh Amendment.

(b) The ADEA as distinguishable from the pre-1974 FLSA. As noted, the pre-1974, pre-*Employees* FLSA specifically included the states within its definition of potentially liable employers.[184] But the Supreme Court concluded that this provision was not a clear enough expression of congressional intent to abrogate the Eleventh Amendment.[185]

The Court's uncertainty regarding Congress's intent was largely based on the fact that other language in the statute allowed for the possibility that the Eleventh Amendment could remain in full force even if a state was sued in federal court under the FLSA.[186] The Court reasoned: if Congress did not intend to allow private individuals to sue state employers for FLSA violations, but instead intended to allow a federal officer to sue violating states in behalf of private individuals, the Eleventh Amendment would not necessarily be compromised by the statute.[187] Thus, Congress's intent to abrogate the Eleventh Amendment could not be ascertained simply because it provided for suits against state employers in the 1966 version of the FLSA.[188] The Court argued,

> By holding that Congress did not lift the sovereign immunity of the States under the FLSA, we do not make the extension of coverage to state employees meaningless. Section 16(c) gives the Secretary of Labor authority to bring suit for unpaid minimum wages or unpaid overtime compensation under the FLSA. Once the Secretary acts under § 16(c), the right of any employee . . . to sue under § 16(b) terminates. Section 17 gives the Secretary power to seek to enjoin violations of the Act and to obtain restitution in behalf of employees. Sections 16 and 17 suggest that since private enforcement of the Act was not a paramount objective, disallowance of suits by state employees

184. *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, §§ 4, 7, 81 Stat. 602, 603-05 (1967).

185. *See* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 285 (1973).

186. *See id.* at 285-86.

187. *See id.*

188. *See id.*

> and remitting them to relief through the Secretary of Labor may explain why Congress was silent as to waiver of sovereign immunity of the States. For suits by the United States against a State are not barred by the Constitution.[189]

The ADEA is distinguishable from the FLSA because the ADEA contains no such provisions within its own text. Nor is there any other ambiguous language in the ADEA which suggests that Congress included the states within the "employer" definition for any reason other than to abrogate the states sovereign immunity.

Although the Supreme Court suggested in *Employees* that the intent language of the 1966 FLSA was inadequate because it failed to refer to the states in the enforcement provision, the Court also insinuated that explicit enforcement provision language was not necessarily a prerequisite to Eleventh Amendment abrogation.[190] The Court stated that it would not deprive the states of their immunity unless Congress changed the enforcement provision and "indicat[ed] in some way by clear language that the constitutional immunity was swept away."[191] Thus, the Court left the door open to the possibility that congressional intent could be expressed clearly through *other* means, and stopped short of requiring a reference to the states in the enforcement provision.

Indeed, if the procedures relating to the Secretary's power to intervene for private employees had not existed in the FLSA, the Court would have been less likely to find the statute ambiguous as to Congress's intent to abrogate immunity—especially in light of the fact that the 1966 FLSA clearly identified the states as potentially liable employers.[192] Thus, because the text of the ADEA does not contain the Secretary of Labor intervention provisions that gave rise to the Court's uncer-

189. *Id.* (citations omitted).

190. *See id.* at 285.

191. *Id.* Note that the Court briefly acknowledged that even without the Secretary intervention procedures, the states-as-defendants provision would not necessarily have become obsolete absent Eleventh Amendment abrogation. Justice Douglas stated,

> The argument is that if we deny this direct federal court remedy, we in effect are recognizing that there is a right without any remedy. Section 16(b), however, authorizes employee suits in "any court of competent jurisdiction." Arguably, that permits suit in the [state] courts but that is a question we need not reach.

Id. at 287.

192. *See id.* at 285-86.

tainty in the first place, the holding in *Employees* cannot easily be used to prove that the Supreme Court would find the ADEA's intent language inadequate. The intent language of the ADEA is simply not as ambiguous as that of the 1966 FLSA.

(*c) The ADEA adopts the Secretary of Labor provisions and FLSA enforcement provisions by reference.* The ADEA adopts the FLSA's Secretary of Labor procedures by reference. But it does so in the same provision that incorporates the FLSA's amended enforcement provision—the very provision which cured the prior ambiguity caused by the Secretary of Labor procedures.[193] It would be incongruous to ignore the ADEA's reference to the FLSA enforcement provision for the purpose of showing that the Age Act lacks textual clarity, while simultaneously emphasizing other cross-referenced procedures in order to show that the ambiguity regarding the pre-amended FLSA also exists in the ADEA.

4. Final analysis of the ADEA's compliance with the intent requirement

Except as to statutes that specifically use the phrases "Eleventh Amendment" or "sovereign immunity," to abrogate state immunity, there has been much disagreement among the federal circuits and Supreme Court justices regarding the types of provisions that do and do not constitute unmistakably clear expressions of congressional intent to abrogate the Eleventh Amendment.[194] Examination of Supreme Court cases that address the sufficiency of various would-be abrogation provisions provides the clearest available picture of the types of provisions that meet the *Atascadero* standard.

To contravene state immunity, a statute must contain more than a general authorization for suit against a class of unspecified defendants.[195] Furthermore, if the abrogation language does not explicitly mention the Eleventh Amendment or sovereign immunity, it must usually refer to the states specifically in the portion of the statute which defines the class of potential

193. *See* 29 U.S.C. § 626(b) (1994).

194. *See supra* Part IV.A. Also compare, for example, the conflicting opinions of *Dellmuth v. Muth*, 491 U.S. 223, 231 (1989), and *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1429 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 902 (1999).

195. *See supra* Part IV.A.3.a; *see also* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 246 (1985).

defendants.[196] But even where states were included within the defendant class, the Supreme Court, in one case, required further reference to the states within the statute's enforcement provisions.[197] However, this additional hurdle is likely to only be imposed where the statute creates substantial ambiguity regarding Eleventh Amendment immunity even in light of references to the states as defendants.[198]

The *Atascadero* standard, in itself, establishes a highly demanding standard of congressional expression, but the *Humenansky* court applied the *Atascadero* standard to the ADEA even more stringently than the test has been applied in any Supreme Court decision. Although the ADEA falls short of explicitly stating that the states' Eleventh Amendment immunity is abrogated, it contains an unequivocal expression of Congress's intent to abrogate the Eleventh Amendment. By expressly including the states within the class of potential ADEA defendants, Congress "could not have made its desire to override the states' sovereign immunity [any] clearer."[199] Because the ADEA (1) already has a textual expression of its intent to subject the states to private suits, (2) contains no language contradictory to this expression of intent, and (3) incorporates the FLSA procedures which specifically provide for suits against public employers in federal court, the *Humenansky* court erred in demanding that the ADEA's abrogation language possess a

196. *See Dellmuth*, 491 U.S. at 232.

197. *See* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 283-85 (1973).

198. *See id.* In *Employees*, the court held that the 1966 FLSA contained no sufficient manifestation of intent to abrogate. The court reasoned that "disallowance of suits by state employees and remitting them to relief through the Secretary of Labor may explain why Congress was silent as to waiver of sovereign immunity of the States. For suits by the United States against a State are not barred by the Constitution." *Id.* at 286.

The Court's uncertainty as to congressional intent did not seem to arise from the fact that federal claims can be brought in state court. Since federal law claims can generally be brought in either federal or state court, and since the Eleventh Amendment does not prohibit suits against the states in state court, the Supreme Court could conceivably find ambiguity in the abrogation language of most statutes that refer to state defendants but do not expressly refer to sovereign immunity or the Eleventh Amendment. Authorizing suits by private citizens against the states would not require abrogation of the Eleventh Amendment because individuals could still sue a state in state court. Thus, the states-as-defendants language would not be rendered meaningless in the absence of Eleventh Amendment abrogation.

199. *Kimel*, 139 F.3d at 1435 (quoting Davidson v. Board of Governors of State Colleges & Univ. for W. Ill. Univ., 920 F.2d 441, 443 (7th Cir. 1990)).

textual (rather than cross-referenced) enforcement provision that authorizes suits in federal court against the states.

B. Questioning Congressional Authority to Abrogate Eleventh Amendment Immunity

The *Humenansky* court also incorrectly concluded that the ADEA fails to meet the authority prong of Eleventh Amendment abrogation. To strip the states of their sovereign immunity to federal court suits, Congress must manifest an unmistakably clear intent to do so, and enact the relevant legislation pursuant to the proper authority—Section 5 of the Fourteenth Amendment.[200] If faced with the authority issue, the Supreme Court should reject the *Humenansky* court's conclusion that the ADEA was not enacted under a proper exercise of Fourteenth Amendment authority.

1. Testing the validity of Fourteenth Amendment legislation

In *Katzenbach v. Morgan,*[201] the Supreme Court reiterated the three-part test for determining whether Congress appropriately enacted certain legislation under its Fourteenth Amendment, Section 5 enforcement power. First, a court must determine whether a statute "may be regarded as an enactment to enforce the Equal Protection Clause."[202] Second, a court must determine whether the statute "is plainly adapted" to enforce the Equal Protection Clause.[203] Third, a court must determine whether the statute is consistent with, and "not prohibited by . . . 'the letter and spirit of the Constitution.' "[204]

"Recently, the Supreme Court supplemented the [*Katzenbach*] analysis by directing courts to examine whether the statute creates new constitutional rights through legislation or only deters and remedies constitutional violations."[205] In *Boerne,* the Supreme Court applied this expanded test in its

200. *See generally* Seminole Tribe v. Florida, 517 U.S. 44 (1996); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

201. 384 U.S. 641 (1966).

202. *Id. at 651.*

203. *Id.*

204. *Id.*

205. Humenansky v. Board of Regents of the Univ. of Minn., 152 F.3d 822, 830 (8th Cir. 1998) (citing City of Boerne v. Flores, 521 U.S. 507, 518 (1997)), *petition for cert. filed*, 67 U.S.L.W. 3504 (U.S. Feb. 1, 1999) (No. 98-1235).

analysis of the Religious Freedom Restoration Act.[206] The RFRA prohibited government interference with an individual's exercise of religion unless the interference was in "furtherance of a compelling governmental interest, and [was] the least restrictive means of furthering that . . . interest."[207] The Supreme Court held that, by enacting the RFRA, Congress created substantive Constitutional law, thereby exceeding its Section 5 power to *enforce* the provisions of the Fourteenth Amendment.[208] The Court emphasized the fact that Section 5 does not give Congress authority to determine what constitutes a constitutional violation.[209]

2. Limits to congressional power to create rights beyond constitutionally-created rights

As the *Humenansky* court acknowledged, the Section 5 enforcement power does include the authority to create some rights that exceed constitutionally-guaranteed rights.[210] For example, in order to combat racial discrimination in voting, the Supreme Court sustained provisions of the Voting Rights Act which prohibited literacy tests from being administered as a prerequisite to voting rights.[211] However, while sustaining these provisions "despite the facial constitutionality of the tests," the Court explained that such extensions of rights cannot be out of proportion to their purported remedial or preventative objective.[212]

In contrast to its decision regarding the Voting Rights Act, the United States Supreme Court held in *Boerne* that the RFRA, with its "compelling government interest" and "least restrictive means" requirements, was out of proportion to Congress's object of prohibiting religious discrimination.[213] The Supreme Court also held that the RFRA contradicted principles of federal-state separation and balance of powers by prohibiting state laws that place incidental burdens on religion that are

206. *See* City of Boerne v. Flores, 521 U.S. 507, 507 (1997).
207. 42 U.S.C. § 2000bb-1 (1994).
208. *See Boerne*, 521 U.S. at 532-37.
209. *See id.*
210. *See id.*
211. *See id.* at 518.
212. *Id.* at 532-37.
213. *See id.*

not animus or hostility based.[214]

Applying *Boerne*, the *Humenansky* court concluded that the ADEA does not constitute valid Fourteenth Amendment legislation.[215] The court argued that age is not a protected class that rises to the level of judicially-recognized classes, and that, by restricting nearly all age-discrimination, the ADEA exceeds the protections offered by the Fourteenth Amendment.[216]

3. The constitutionality of age discrimination

The *Humenansky* court noted the Supreme Court has upheld employment policies that set mandatory retirement ages,[217] and that Congress itself has enacted mandatory retirement legislation which would arguably violate its own Age Discrimination Act.[218] Employment decisions, the Eighth Circuit argued, are only unconstitutional if they are the product of intentional discrimination that fails to comport with the requirements of equal protection.[219] Employment actions motivated by a rational purpose do not violate the Equal Protection Clause.[220] Judge Loken noted, "[G]iven the many economic and social factors that may justify adverse employment action based upon age . . . , it seems likely that only a few isolated, egregiously irrational instances of age discrimination would violate the Equal Protection Clause."[221]

Supreme Court dictum addressing this issue lends some support to the Eighth Circuit's position. In *EEOC v. Wyoming*,[222] four dissenting justices concluded that the ADEA could not have been enacted under Congress's Section 5 authority.[223]

214. *See id.*

215. *See* Humenansky v. Board of Regents of the Univ. of Minn., 152 F.3d 822, 826 (8th Cir. 1998), *petition for cert. filed*, 67 U.S.L.W. 3504 (U.S. Feb. 1, 1999) (No. 98-1235).

216. *See id.* at 826-28.

217. *See, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314-15 (1976) (upholding mandatory retirement age for state police officers).

218. *See* EEOC v. Wyoming, 460 U.S. 226, 262-63 (1983) (Burger, C.J., dissenting) (rejecting "the power of Congress to impose the Age Act on the states when Congress, in the same year that the Age Act was extended to the states, passed mandatory retirement legislation . . . for law enforcement officers and firefighters") (citations omitted).

219. *See Humenansky*, 152 F.3d at 827.

220. *See id.*

221. *Id.* (footnote omitted).

222. 460 U.S. 226 (1983).

223. *See id.* at 263.

Writing for the dissent, Justice Burger argued,

> There is no hint in the . . . Constitution . . . that every classification based on age is outlawed. Yet there is much in the Constitution and the relevant Amendments to indicate that states retain sovereign powers not expressly surrendered, and these surely include the power to choose the employees they feel are best able to serve . . . .
>
> And even were we to assume, *arguendo*, that Congress could redefine the Fourteenth Amendment, I would still reject the power of Congress to impose the Age Act on the states when Congress, in the same year that the Age Act was extended to the states, passed mandatory retirement legislation of its own . . . for law enforcement officers and firefighters.[224]

The overwhelming majority of federal circuit courts, however, have rejected these arguments, holding that the ADEA is valid Fourteenth Amendment legislation.

4. Is the ADEA "plainly adapted" to enforcing the Equal Protection Clause?

Congress' power to legislate under Section 5 of the Fourteenth Amendment is not limited to legislation that protects suspect classifications such as race or gender,[225] and the structure of the ADEA and its legislative history provides substantial evidence that the ADEA was intended to prevent Equal Protection Clause violations.[226] Congress stated in the preamble to the ADEA:

> (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs; the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons; . . . .
>
> . . . .

224. *Id.* (citations omitted).

225. *See, e.g.*, Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1437 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 902 (1999).

226. *See, e.g.*, Scott v. University of Miss., 148 F.3d 493, 501 (5th Cir. 1998).

> It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.[227]

In addition, the legislative history of the 1974 Amendment provides evidence that "Congress subsequently established that these same conditions existed in the public sector."[228] As Judge Bataillon reasoned in the *Humenansky* dissent,

> [T]he text of the ADEA . . . directly addresse[s] the arbitrary discrimination older employees face in the workplace. . . . [T]he documented existence of age-based discrimination in private and public employment induced Congress to intrude not only upon the interests of private employers but also upon state interests through the enactment of the 1974 amendments. In light of the well-documented need for equal protection of older workers, I believe the ADEA is plainly adapted to the end of providing older workers equal protection under the law.[229]

Furthermore, *Boerne* does not invalidate the ADEA as Fourteenth Amendment legislation because, unlike the RFRA's limitations on governments, the restrictions imposed by the ADEA are proportional to the injuries Congress sought to prevent.[230] The Act is intended "to prohibit arbitrary age discrimination in employment."[231] The Act addresses the problem by requiring that employment decisions be based on merit. However, employers may still use age as a criterion in their employment decisions if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ."[232] Thus, the ADEA is much less re-

227. 29 U.S.C. § 621(a)-(b) (1994).

228. Goshtasby v. Board of Trustees, 141 F.3d 761, 772 (7th Cir. 1988) (citations omitted).

229. Humenansky v. Board of Regents of the Univ. of Minn., 152 F.3d 822, 831 (8th Cir. 1998) (Battaillon, J., dissenting), *petition for cert. filed*, 67 U.S.L.W. 3504 (U.S. Feb. 1, 1999) (No. 98-1235).

230. *See* Coolbaugh v. Louisiana, 136 F.3d 430, 437 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 58 (1998).

231. 29 U.S.C. § 621(b).

232. Scott v. University of Miss., 148 F.3d 493, 503 (5th Cir. 1998). *See also* Western Air Lines, Inc. v. Criswell, 472 U.S. 400, 422-23 (1985) ("Unless an employer can establish a substantial basis for believing that all or nearly all employees above an age

strictive of government action than the RFRA's "compelling government interest" and "least restrictive means" test, and does not fail under the proportionality limitation to Congress's Section 5 power articulated in *Boerne.*

V. CONCLUSION

As the history of the Eleventh Amendment illustrates, the tide of Eleventh Amendment immunity has ebbed and flowed over the past two centuries. *Seminole Tribe* and *Boerne* represent the latest major shift in Eleventh Amendment jurisprudence. Under *Seminole Tribe,* Congress can no longer abrogate sovereign immunity through Commerce Clause legislation, leaving Congress's Section 5 power under the Fourteenth Amendment as the only source of authority by which Congress may impinge on the states' Eleventh Amendment protections.[233] Shortly after *Seminole Tribe, Boerne* extended the *Katzenbach* analysis, establishing a more stringent test for determining the validity of Fourteenth Amendment legislation.[234] Despite this shift towards broader state immunity, the Supreme Court, if faced with the issue, should hold that states are not immune from ADEA suits.

There has been much disagreement regarding the type of language that constitutes an "unmistakably clear" expression of congressional intent to abrogate immunity. But prior Supreme Court decisions regarding the intent issue provide a rough framework for analyzing abrogation language. Clearly, a general authorization for suit is inadequate as an expression of congressional intent. On the other hand, language that refers explicitly to the Eleventh Amendment or sovereign immunity will usually suffice. If the level of clarity lies somewhere between these two extremes, abrogation is usually effective if the text refers to states or public agencies within the portion of the text that defines the class of potential defendants. Under *Employees*, Congress may also be required to refer to the states in the statute's enforcement provision, but this requirement is likely to be imposed only when language within the statute

lack the qualifications required for the position, the age selected for mandatory retirement less than [seventy] must be an age at which it is highly impractical for the employer to [ensure] by individual testing that its employees will have the necessary qualifications for the job").

233. *See generally* Seminole Tribe v. Florida, 517 U.S. 44 (1996).

234. *See* City of Boerne v. Flores, 521 U.S. 507, 532-37 (1997).

creates substantial ambiguity regarding Congress's intent despite other references to the states.[235]

Not only does the ADEA include the states within the class of potential defendants, it incorporates the provision of the FLSA which specifically authorizes federal court suits against public agencies. Thus, contrary to the *Humenansky* court's conclusion, the ADEA effectively expresses Congress's intent to subject the states to suit in federal court.

The Supreme Court should also reject the Eighth Circuit's position on the authority issue and conclude that Congress enacted the ADEA pursuant to the proper immunity-stripping authority. The Age Act is plainly adapted to Congress's purpose of prohibiting arbitrary employment decisions on the basis of age, and, in light of the pervasiveness of this type of discrimination, is not "so 'sweeping' that the statute cannot be seen as proportional to the evil Congress sought to address."[236]

By taking *Boerne* too far in its authority analysis, and by scrutinizing congressional intent even more rigidly than the *Atascadero* standard requires, the Eighth Circuit erred in holding that the ADEA does not effectively abrogate the states' Eleventh Amendment immunity from ADEA suits.

Eric Hunter

235. *See* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 285 (1973).

236. Coolbaugh v. Louisiana, 136 F.3d 430, 437 (5th Cir. 1998).