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NOTES

GARCIA REVISITED: THE AGE DISCRIMINATION IN EMPLOYMENT ACT'S APPLICATION TO APPOINTED STATE COURT JUDGES

INTRODUCTION

Congress [can]not act under its commerce power to infringe on certain fundamental aspects of state sovereignty that are essential to 'the States' separate and independent existence. . . . [A]nd I do not think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.¹

Justice Rehnquist's prediction in *Garcia v. San Antonio Metropolitan Transit Authority*² may be realized this spring when the Supreme Court considers *Gregory v. Ashcroft*.³ Federal circuit courts have been rigorously debating whether appointed state court judges are protected by the Age Discrimination in Employment Act ("ADEA").⁴ Both the Eighth Circuit, in *Gregory*, and the First Circuit, in *EEOC v. Massachusetts*, held that ADEA does not apply to appointed state court judges.⁵ In *EEOC v. Vermont*, however, the Second Circuit refused to follow suit and arrived at the opposite conclusion.⁶

Since it was amended in 1986,⁷ ADEA has purported to preempt provisions in state constitutions⁸ that mandate the retirement of state judges.⁹ This application of ADEA, however, "strikes very closely to the

1. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579-80 (1985) (Rehnquist, J., dissenting) (citations omitted). Chief Justice Burger and Justices O'Connor and Powell also dissented.

2. *Id.*

3. 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

4. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-34 (1988)). ADEA was enacted under the Commerce Clause, U.S. Const. art. I, § 8, cl.3. *See* 29 U.S.C. § 621(a)(4) (1988); *see also* *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (ADEA passed under Commerce Clause). Thus, principles of federalism may limit its application to the states. *See infra* notes 65-73 and accompanying text.

5. *See* *Gregory v. Ashcroft*, 898 F.2d 598, 604 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990); *EEOC v. Massachusetts*, 858 F.2d 52, 58 (1st Cir. 1988).

6. *See* *EEOC v. Vermont*, 904 F.2d 794, 800 (2d Cir. 1990).

7. The 1986 amendment outlawed mandatory retirement by eliminating the upper age limit in the statute. *See* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (codified as amended at 29 U.S.C. § 621 (1988)); *infra* notes 18 & 25 and accompanying text.

8. When a federal law clearly intends to displace a state constitution or law, the state law is preempted. *See* *Maryland v. Louisiana*, 451 U.S. 725, 746-47 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 413 (1973); *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952).

9. Thirty-five states and the District of Columbia have either constitutional provisions or laws mandating the retirement of at least some judges over age seventy or sev-

heart of state sovereignty" because it infringes on the states' traditional right to structure their own judiciaries.¹⁰ Despite the federalism issues involved, the debate has focused almost exclusively on whether appointed state court judges are policymakers within the meaning of an exemption clause in ADEA.¹¹

While the Second Circuit permitted ADEA to infringe on a state's ability to structure its own judiciary without a critical discussion of *Garcia*,¹² the Supreme Court could seize its opportunity to overrule this case. *Garcia*, which embodies the Court's current approach to federalism, held that judicial review of commerce statutes is generally unnecessary to protect state sovereignty.¹³ Applying ADEA to state judges is consistent with congressional intent¹⁴ and provides the Court with an opportunity to discuss whether such application violates federalism principles.¹⁵ When the Supreme Court considers *Gregory*, therefore, it may decide to reject *Garcia* and reassume¹⁶ its constitutional responsibility to protect a state right that is "essential to 'the states' separate and independent existence.'" ¹⁷

Part I of this Note provides a background of the ADEA debate, examines the conflicting interpretations of the policymaking exception, and argues that the relevant legislative history mandates that judges should not be viewed as policymakers under the exception. Part II describes the federalism problems inherent in applying ADEA to appointed state court judges. This section explores the historical debate over substantive limits on the Commerce Clause and analyzes the Supreme Court's current approach to federalism under *Garcia*. The Note concludes that ADEA should be applied to state judges, but that the important state sovereignty right implicated merits a reevaluation of *Garcia* and a reassertion of judicial review of conflicts between federalism and the commerce clause.

enty-five. See ABA Comm. on State Judicial Salaries, Survey of State Judicial Fringe Benefits 7-16 (1989).

10. See *Massachusetts*, 858 F.2d at 54; *infra* note 27 and accompanying text.

11. Viewing judges as policymakers may be problematic because such a view is contrary to some definitions of judging. See, e.g., R. Bork, *The Tempting of America* 149 (1990) ("The role of a judge . . . is to find the meaning of a text."). See generally, E. Sergeant, *Justice Touched With Fire*, in *Mr. Justice Holmes* 206-07 (F. Frankfurter ed. 1931) (Holmes states his job is only to apply the law). But see Frank, *Law & the Modern Mind* 121 (1930) (judges routinely make policy by creating new common law). For text of exemption clause, see *infra* note 29.

12. See *infra* note 62 and accompanying text.

13. See *infra* notes 79-86 and accompanying text.

14. See *infra* notes 57-61 and accompanying text.

15. See *infra* notes 27 & 62 and accompanying text.

16. See *infra* notes 110-12 and accompanying text.

17. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 579 (1985) (Rehnquist, J., dissenting) (citations omitted).

I. THE ADEA DEBATE

A. *The Evolution of the Age Discrimination in Employment Act and its Recurring Clash with State Sovereignty*

ADEA prohibits employers from discriminating on the basis of age¹⁸ unless age is a bona fide occupational qualification.¹⁹ In 1974, Congress amended ADEA to apply to the states.²⁰ For the following nine years, federal courts debated whether ADEA's regulation of state employment practices was constitutional.²¹ This debate was resolved when the

18. Originally, ADEA only protected workers between the ages of forty and sixty-four. See Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607 (codified as amended at 29 U.S.C. § 631(a) (1988)). In 1978, Congress amended ADEA to protect workers between the ages of forty and sixty-nine. See Equal Employment Opportunity Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189.

19. See 29 U.S.C. § 623(f)(1) (1988). Courts have refused, however, to consider whether age is a bona fide occupational qualification for judges. See *Apkin v. Treasurer and Receiver General*, 401 Mass. 427, 430 n.5, 517 N.E.2d 141, 143 n.5 (1988). If judges are considered policymakers, Equal Employment Opportunity Commission (EEOC) regulations that establish criteria for determining whether a person is employed in a bona fide executive or high policymaking decision may apply. See 29 C.F.R. §§ 1625.12 (d)-(e) (1990); 29 C.F.R. § 541 (1990).

20. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, 59. This amendment expanded the definition of "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, and any interstate agency." 29 U.S.C. § 630(b) (1988).

21. The courts disagreed on whether ADEA violated federalism principles and whether it was passed under the Commerce Clause, section five of the fourteenth amendment, or both. Compare *Carpenter v. Pennsylvania Liquor Control Bd.*, 508 F. Supp. 148, 149 (E.D. Pa. 1981) (ADEA passed under fourteenth amendment); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977) (same); *Remmick v. Barnes County*, 435 F. Supp. 914, 916 (D.N.D. 1977) (same) with *Kenny v. Valley County School Dist.*, 543 F. Supp. 1194, 1198-99 (D. Mont. 1982) (ADEA enacted under Commerce Clause); *McCroan v. Bailey*, 543 F. Supp. 1201, 1204 (S.D. Ga. 1982) (same); *Campbell v. Connelie*, 542 F. Supp. 275, 280 (N.D.N.Y. 1982) (same); *Bleakley v. Jekyll Island-State Park Auth.*, 536 F. Supp. 236, 239 (S.D. Ga. 1982) (same); *Taylor v. Montana Dep't of Fish & Game*, 523 F. Supp. 514, 514 (D. Mont. 1981) (ADEA passed under Commerce Clause, but unconstitutional if applied to state employees engaged in purely governmental functions) and *Usery v. Board of Ed. of Salt Lake City*, 421 F. Supp. 718, 721 (D. Utah 1976) (ADEA valid under both fourteenth amendment and Commerce Clause).

If ADEA were passed under the fourteenth amendment, the tenth amendment and state sovereignty interests would be no bar to its application to the states. See *EEOC v. Wyoming*, 460 U.S. 226, 259 (1983) (Burger, C.J., dissenting); see also *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (state sovereignty significantly limited by fourteenth amendment); *Ex parte Virginia*, 100 U.S. 339, 345 (1879) (fourteenth amendment intended to limit the power of the states and enlarge the power of Congress).

No Supreme Court decision has ever held that classifications based on age are suspect and thus worthy of a high standard of review under either the equal protection clause or the due process clause of the fourteenth amendment. See *Wyoming*, 460 U.S. at 260; see also *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (mandatory retirement of Foreign Service officers does not violate fourteenth amendment); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976) (mandatory retirement of state police examined under rational basis standard because government employment is not fundamental right and those who are mandatorily retired are not suspect class).

It is interesting, therefore, that the Supreme Court granted certiorari in *Gregory* on an equal protection issue. Respondent, the Honorable John D. Ashcroft, argues that Mis-

Supreme Court concluded, in *EEOC v. Wyoming*, that ADEA's application to "state and local governments . . . was a valid exercise of Congress' powers under the Commerce Clause."²² Although the *Wyoming* Court recognized substantive constitutional limitations on Congress's commerce power, it held that ADEA's application to state game wardens was not sufficiently intrusive to invoke these limitations.²³ The Court reasoned that such an application did not impair Wyoming's ability to structure its integral operations or threaten its separate and independent existence.²⁴

When *Wyoming* was decided, ADEA did not yet cover appointed state court judges, but in 1986, Congress amended ADEA to protect all workers over the age of thirty-nine.²⁵ This amendment gave state judges age seventy and above standing to challenge state laws mandating their retirement.²⁶ Applying ADEA to state judges, however, necessarily impairs a state's ability to determine the tenure of its judiciary.²⁷

souri's mandatory retirement rule is constitutionally deficient under *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), because the state rule relies " ' ' on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. ' ' " Respondent's Petition for Writ of Certiorari at 7, *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir.) (quoting Appellant's Brief at 16-17 (quoting *Cleburne*, 473 U.S. at 446), *cert. granted*, 111 S. Ct. 507 (1990)). The circuit court in *Gregory* rejected this argument, however. *See Gregory*, 898 F.2d at 606; *see also Trafflet v. Thompson*, 594 F.2d 623, 627, 629 (7th Cir.) (it is rational to treat judges differently from other state officials), *cert. denied*, 444 U.S. 906 (1979); *Diamond v. Cuomo*, 70 N.Y.2d 338, 342, 520 N.Y.S.2d 732, 733, 514 N.E.2d 1356, 1357 (1987) (mandatory retirement of elected judges but not appointed ones does not violate equal protection), *appeal dismissed*, 486 U.S. 1028; *Maresca v. Cuomo*, 64 N.Y.2d 242, 249-251, 485 N.Y.S.2d 724, 727-28, 475 N.E.2d 95, 98-99 (1984) (mandatory retirement of judges does not violate equal protection clause), *appeal dismissed*, 474 U.S. 802; *Stout v. Pennsylvania ex rel. Preate*, 521 Pa. 571, 588-89, 559 A.2d 489, 498 (1989) (age classification is rational and equal protection not violated by distinction between appointed and elected judges). *But see Sabo v. Casey*, No. 90-7945 (E.D. Pa. Feb. 14, 1991) (1991 U.S. Dist. LEXIS 1947) (striking down state retirement rule for judges as violation of equal protection).

22. *Wyoming*, 460 U.S. at 243. The *Wyoming* Court refused to decide whether ADEA's application to the states is a valid exercise of Congress's power under section five of the fourteenth amendment. *See id.*; *supra* note 21.

23. *See Wyoming*, 460 U.S. at 239.

24. *See id.*

25. In 1983, only state employees between the ages of forty and sixty-nine were protected. *See supra* note 18 and accompanying text. Most states that have mandatory retirement rules for some of their judges set the retirement age at seventy or seventy-five. *See supra* note 9. The 1986 amendments to ADEA, therefore, brought judges into the protected age group. *See supra* note 7.

26. Mandatory retirement of persons covered by ADEA is a prima facie violation. *See EEOC v. Illinois*, 721 F. Supp. 156, 157 (N.D. Ill. 1989). Assuming that appointed state court judges are protected by ADEA, state laws mandating their retirement violate ADEA and thus are preempted. *See generally Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 752 (7th Cir.) (ADEA amendments prevail over conflicting state law), *cert. denied*, 464 U.S. 992 (1983); *see supra* note 8 and accompanying text.

27. Courts that have considered whether ADEA applies to state court judges have equated a state's ability to set the retirement age of its judges with its ability to determine their tenure, which is an essential aspect of states' sovereign existence. *See, e.g., Gregory v. Ashcroft*, 898 F.2d 598, 600 (8th Cir.) (ADEA's application to state judges would

The recent ADEA cases have not discussed *Wyoming* or the federalism issues involved.²⁸ Instead, these cases have concentrated on the meaning of ADEA's exemption for state officials ("exemption clause").²⁹ Appointed state court judges are exempted from coverage only if they are deemed policymakers within the meaning of the policymaking exception.³⁰

B. *Elusive Intent?—Conflicting Interpretations of the Policymaking Exception*

1. The First and Eighth Circuits' Interpretation of the Policymaking Exception

Both *EEOC v. Massachusetts*³¹ and *Gregory v. Ashcroft*³² held that appointed state court judges are exempt from coverage under ADEA. Both courts relied on the legislative history of the policymaking exception,³³ focusing specifically on a statement issued by Congress to explain the meaning of the exemption clause. The statement reads:

It is the intention of the conferees to exempt elected officials and mem-

significantly intrude on a traditionally sensitive state sovereignty right), *cert. granted*, 111 S. Ct. 507 (1990); *EEOC v. Massachusetts*, 858 F.2d 52, 54 (1st Cir. 1988) ("[T]he tenure of state judges is a question of exceeding importance to each state, and a question traditionally left to be answered by each state."); *EEOC v. Illinois*, 721 F. Supp. 156, 159 (N.D. Ill. 1989) (citing *Massachusetts*, 858 F.2d at 54) (tenure of state judiciary is traditional state sovereignty right); *Apkin v. Treasurer and Receiver General*, 401 Mass. 427, 431, 517 N.E.2d 141, 143 (1988) (ADEA's application to state judges would violate state sovereignty right).

28. The circuit courts' failure to address federalism issues is consistent with the doctrine of constitutional avoidance. This doctrine provides that courts should first ascertain "whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 278, 348 (1936) (Brandeis, J., concurring) (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

29. In pertinent part, ADEA exempts from coverage

any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level [hereinafter "policymaking exception"] or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.

29 U.S.C. § 630(f) (1988).

30. Because appointed state court judges are not on the personal staff of, nor legal advisors to, an elected officer, they can fall only under the policymaking exception. *See supra* note 29.

31. 858 F.2d 52 (1st Cir. 1988).

32. 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990).

33. ADEA's policymaking exception was "derived in *haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978); *see also Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (citations omitted) (substantive provisions of Title VII and ADEA are identical). The debate over the policymaking exception in Title VII "is relevant, therefore, to the scope of the 'employee' definition in ADEA." *Massachusetts*, 858 F.2d at 55; *see also Gregory*, 898 F.2d at 602 (legislative history of Title VII is relevant to ADEA); *EEOC v. Vermont*, 904 F.2d 794, 798 (2d Cir. 1990) (ADEA was patterned after Title VII and its identical definition of "employee" justifies looking to legislative history of Title VII to determine meaning in ADEA).

bers of their personal staffs, and persons appointed by such elected officials as advisors or to policymaking positions at the highest levels of the departments or agencies of State or local governments, such as cabinet officers, and persons with comparable responsibilities at the local level. It is the conferees [sic] intent that this exemption shall be construed narrowly.³⁴

Both courts concluded that judges fell within the meaning of this explanatory statement. The First Circuit viewed the statement as providing for two types of policymakers, those who are advisors and those who need not be advisors.³⁵ Adopting an equally tenuous interpretation, the Eighth Circuit explained that judges are implicitly included within the statement because the state judiciary is an agency of state government.³⁶

The First Circuit also used the congressional debate to support its holding in *Massachusetts*.³⁷ The court noted that Senator Ervin, author of the exemption clause, wanted to prevent federal law from infringing upon the states' ability to select state officials.³⁸ The court surmised that the senator's opening remarks set the context of the congressional debate to include officials from all three branches of state government.³⁹

Neither the First nor the Eighth Circuit found the legislative history to be dispositive⁴⁰ and thus went on to examine the definition of judging to

34. Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for American Workers, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 2179, 2180.

35. See *Massachusetts*, 858 F.2d at 56.

36. See *Gregory*, 898 F.2d at 602-03. The court also stated that "[t]he term 'government' in this country traditionally has implied the tripartite of the executive, legislative, and judicial branches." *Id.* at 602. Both courts' conclusions arguably stretch the meaning of the statement because it does not, on its face, set out two types of policymakers, nor is the judiciary an agency of state government.

37. See *Massachusetts*, 858 F.2d at 55 (citing 118 Cong. Rec. 1837 (1972)).

38. See *EEOC v. Massachusetts*, 858 F.2d 52, 55 (1st Cir. 1988) (citing 118 Cong. Rec. 4096 (1972)). Senator Ervin stated that state sovereignty principles would be violated if Title VII usurped power from the "Governor of his State, or the people . . . [regarding] whom they can elect Governor, or Supreme Court Justice, or State legislator, or what officials shall be selected to advise the Governor as to his constitutional and legal duties." 118 Cong. Rec. 4096 (1972); see also 118 Cong. Rec. 4483 (1972) (Comments by Senator Ervin) (tenth amendment protects state right to select its officers and employees).

39. See *Massachusetts*, 858 F.2d at 55 (citing 118 Cong. Rec. 1837 (1972)).

40. See *Gregory v. Ashcroft*, 898 F.2d 598, 600 (8th Cir.), cert. granted, 111 S. Ct. 507 (1990); *EEOC v. Massachusetts*, 858 F.2d 52, 53 (1st Cir. 1988). Both the First and Eighth Circuits applied a "clear intent" test. In *Massachusetts*, the court held that it is improper to apply ADEA to appointed state court judges when Congress did not clearly intend to overrule "the clear intent of the people of a state in an area intimately and fundamentally related to that state's self-governance." *Massachusetts*, 858 F.2d at 53. Similarly, the court in *Gregory* held that it is improper to interpret ADEA "as conflicting with the Missouri Constitution unless" Congress clearly expresses an intention to protect state judges from age discrimination. See *Gregory*, 898 F.2d at 600; see also *Apkin v. Treasurer and Receiver General*, 401 Mass. 427, 431, 517 N.E.2d 141, 143-46 (1988) (no clear intent to protect appointed judges under ADEA). But see *Schlitz v. Virginia*, 681 F. Supp. 330, 333 (E.D. Va. 1988) (Congress clearly intended to protect appointed state judges from age discrimination), *rev'd on other grounds*, 854 F.2d 43 (4th Cir.).

determine whether it involves policymaking.⁴¹ Both courts reasoned that because judges make policy by filling the "interstices of authority found in constitutions, statutes, and precedents," judges are policymakers within the meaning of the exception.⁴² The court in *Gregory* further noted that judges are policymakers because they establish specific rules of decision upon which other branches of the government, the professional community and the public rely.⁴³ Lastly, both courts concluded that states have rational reasons to mandate the retirement of judges. These reasons include a desire to facilitate the appointment of more minorities and women to the bench.⁴⁴

2. The Second Circuit's Interpretation of the Policymaking Exception

Unlike the First and Eighth Circuits, the Second Circuit held, in *EEOC v. Vermont*, that Congress clearly intended appointed state court judges to enjoy ADEA's protection.⁴⁵ The Second Circuit interpreted the legislative history, and the explanatory statement⁴⁶ in particular, according to its plain meaning.⁴⁷ Because the statement contains no refer-

41. See *Gregory*, 898 F.2d at 601; *Massachusetts*, 858 F.2d at 55. The court in *Stillians v. Iowa* outlined three factors relevant to determining whether a person is a policymaker within the meaning of ADEA: "1) whether the [appointee] has discretionary, rather than solely administrative powers, 2) whether the [appointee] serves at the pleasure of the appointing authority and 3) whether the [appointee] formulates policy." *Stillians*, 843 F.2d 276, 278-79 (8th Cir. 1988) (citations omitted). *Gregory* held that the *Stillians* factors are not exhaustive, however, and stated that Congress's purpose behind the policymaking exception "was to give '[s]tate governors . . . broad discretion to fill policymaking positions' " with the most qualified persons " 'without fear of being sued [for age discrimination] by disappointed office seekers.' " *Gregory*, 898 F.2d at 604 (quoting *Stillians*, 843 F.2d at 279)).

42. *EEOC v. Massachusetts*, 680 F. Supp. 455, 462 (D. Mass. 1988), *aff'd*, 858 F.2d 52, 55 (1st Cir. 1990); see also *Gregory v. Ashcroft*, 898 F.2d 598, 601 (8th Cir.) (judges make policy), *cert. granted*, 111 S. Ct. 507 (1990).

43. See *Gregory*, 898 F.2d at 601.

44. According to the First and Eighth Circuits, mandatory retirement of judges eliminates the tedious and painful task of supervising and removing older judges of failing competence and reduces delay in the administration of justice caused by death or illness of older judges. See *Gregory*, 898 F.2d at 605; *Massachusetts*, 858 F.2d at 57-58. Mandatory retirement also enables a state to appoint more minorities and women to the judiciary, thus making it more representative of society in age, race and gender. See *Gregory*, 898 F.2d at 606; *Massachusetts*, 858 F.2d at 57-58; see also *Apkin*, 401 Mass. at 435-36, 517 N.E.2d 141, 146 (mandatory retirement enables state to create a judiciary more representative of society by appointing more women and minorities); *Sabo v. Casey*, No. 90-7945 (E.D. Pa. Feb. 14, 1991) (1991 U.S. Dist. LEXIS 1947) (same); *Cf. N.Y. Times*, Feb. 22, 1991, at A29, col. 1 (arguing the judiciary should reflect the diversity of our population); Harper, *What Color Justice? Harper Calls For Change*, *Manhattan Lawyer*, Jan./Feb. 1991, at 42 (stressing need for judiciary to be more representative of minorities); *N.Y. Times*, Feb. 15, 1991, at B1, col. 4 (discussing dearth of minority judges in federal courts). *But see Stout v. Pennsylvania ex rel. Preate*, 521 Pa. 571, 588, 559 A.2d 489, 505-06 (1989) (ironically, Pennsylvania's mandatory retirement law decreased number of women in the judiciary, because Judge Stout is female).

45. See *EEOC v. Vermont*, 904 F.2d 794, 797-98 (2d Cir. 1990).

46. See *supra* note 34.

47. See *Vermont*, 904 F.2d at 800.

ences to judges and expressly mandates a narrow construction of the exemption clause, the *Vermont* court held that only executive policymakers at the highest levels of local government are excluded from ADEA's coverage.⁴⁸

The Second Circuit also pointed to statements in the congressional debate that narrowed Senator Ervin's proposed exemption to include only officials from the executive branch.⁴⁹ The court focused on statements by Senator Williams, who explained that the final draft of the exemption clause included only those appointees "who are in a close personal relationship and an immediate relationship" with their appointing officer.⁵⁰ Because judges have no immediate relationship to their appointing officers, the court reasoned that Congress did not intend to exclude them from coverage under ADEA.⁵¹

After examining the legislative history of the policymaking exception, the Second Circuit considered whether judges can be viewed as policymakers.⁵² Conceding that judges sometimes engage in interstitial policymaking, the court nonetheless held that "[t]he principal business of the courts is the resolution of disputes."⁵³ The Second Circuit also responded to the First and Eighth Circuits by suggesting that there can be no rational justification for mandatory retirement of state judges.⁵⁴

Finally, the Second Circuit noted that the language and structure of the exemption clause dictate that the policymaking exception "share basic characteristics of the categories that surrounded it."⁵⁵ Thus, policymakers under the exemption clause, it reasoned, are people who work closely with their appointing officer.⁵⁶

48. *See id.*

49. *See id.* at 798-800.

50. *Id.* at 799 (citing 118 Cong. Rec. 4492-93 (1972)). The *Vermont* court also noted that Senator Javits suggested narrowing the scope of the "adviser" exemption to include only the "higher officials in a policymaking or policy advising capacity." *See id.* at 799 (citing 118 Cong. Rec. 4097, 4493 (1972)).

51. *See id.* at 800.

52. *See id.*

53. *Id.* Even when a statute is unclear on a matter, the *Vermont* court stated that judges must "fathom the nature and contours of policies established by the legislative and executive branches rather than to create or fashion new policy." *Id.*

It has been noted, however, that states that elect their judges have decided to make them policymakers, responsive to the voters, while states with an appointed bench have chosen to insulate their judges from the political process. *See* Brief of the EEOC as *Amicus Curiae* at 9 n.7, *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990). *But see Gregory*, 898 F.2d at 603 n.5 (rejecting distinction between elected and appointed judges).

54. *See EEOC v. Vermont*, 904 F.2d 794, 802 (2d Cir. 1990). The court intimated that mandatory retirement must not be used as a tool to resolve problems of supervising and removing older judges because the very purpose of ADEA is to prohibit such arbitrary age classifications, relying instead on individualized evaluation of older workers. *See id.* *But see* note 44 and accompanying text.

55. *Vermont*, 904 F.2d at 798.

56. *See id.*

3. Congress Intended Appointed State Court Judges to be Protected from Age Discrimination

The legislative history of the policymaking exception indicates that Congress intended ADEA to protect as many state employees as possible from arbitrary age discrimination.⁵⁷ The explanatory statement's order to construe the exemption clause narrowly demonstrates Congress's desire to prevent courts from excluding too many state officials from ADEA's protection.⁵⁸ Moreover, the relevant congressional debate demonstrates that few government officials were exempted from coverage.⁵⁹ Even Senator Ervin conceded that he could not "persuade the Senate to adopt" a more expansive exclusion.⁶⁰

Unlike the Second Circuit, the First and Eighth Circuits did not consider the full course of the congressional debate. Their interpretation of the policymaking exception's legislative history seems to have been guided by an underlying belief that applying ADEA to appointed state court judges intrudes upon state sovereignty.⁶¹

Although acknowledging that federalism issues were involved, the Second Circuit found that *Garcia* precludes judicial review of these issues when there is no proof that the political process involved in enacting ADEA was defective.⁶² A discussion of *Garcia* is absent from the First and Eighth Circuit opinions. These courts may well have deliberately avoided a critical analysis of the *Garcia* approach to federalism, instead

57. Too broad an exemption would be "at variance with or in violation of the thrust, the scope, or the purposes of [the] legislation." See 118 Cong. Rec. 4493 (1972) (statement by Senator Williams).

58. See Joint Explanatory Statement of Managers at the Conference on H.R. 1746 to Further Promote Equal Employment Opportunities for American Workers, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 2179, 2180; see also EEOC v. Vermont, 904 F.2d 794, 800 (2d Cir. 1990) (direction that exemption clause be construed narrowly supports excluding judges from clause). Additionally, the placement of the policymaking exception between two exceptions for appointees who work closely with their appointing official implies that it applies solely to people who work closely with their appointing officer. See *Vermont*, 904 F.2d at 798; *supra* notes 55-56 and accompanying text.

59. See 118 Cong. Rec. 4096-97, 4483-93 (1972). State judges were mentioned only once in the course of the debate, when Senator Ervin first proposed the exemption clause. See *id.* at 4096. On the final day of the debate, Senator Williams and Senator Ervin agreed that the exemption clause applied only to appointees who are cabinet officers and immediate legal advisors to a Governor. See 118 Cong. Rec. 4493 (1972).

60. *Id.*

61. Indeed, the First Circuit stated that ADEA's application to the states must strike a "delicate balance between the protection of employees from age discrimination, and the protection of a state's—and its people's—ability to independently govern itself." EEOC v. Massachusetts, 858 F.2d 52, 56-57 (1st Cir. 1988). Similarly, the Eighth Circuit held that "the tenure of state judges is a matter of considerable importance to a state," and that ADEA's application to state judges would "significantly intrude[]" on state sovereignty. Gregory v. Ashcroft, 898 F.2d 598, 600 (8th Cir.), cert. granted, 111 S. Ct. 507 (1990).

62. See EEOC v. Vermont, 904 F.2d 794, 802 (2d Cir. 1990). For a discussion of *Garcia*, see *infra* notes 79-95 and accompanying text.

engaging in result-oriented statutory interpretation.⁶³

II. JUDICIAL REVIEW OF CONFLICTS BETWEEN FEDERALISM AND THE COMMERCE POWER

A. *A Historical Introduction*

The conflict between federalism and the Commerce Clause has its roots in the United States Constitution, which established our federal system of government and granted Congress enumerated and limited powers.⁶⁴ Under Article I, section 8, Congress has the power to "regulate Commerce . . . among the several States,"⁶⁵ but this power is limited by other substantive provisions in the Constitution.⁶⁶ The primary limitation on the commerce power is the tenth amendment, which recognizes the separate and independent existence of the states.⁶⁷

Because the tenth amendment is couched in negative language, federal courts have found that limitations on Congress are implicit in its enumerated powers.⁶⁸ Nevertheless, the spirit of the tenth amendment mandates that states retain their integrity as separate and independent units within the federal system.⁶⁹ In addition, the federal system is designed so that "neither government may destroy the other nor curtail in any substantial

63. The First and Eighth Circuits' approach arguably adheres to the doctrine of constitutional avoidance. See *supra* note 28 and accompanying text.

64. The Federalist No. 44, at 256 (J. Madison) (G. Smith ed. 1901).

65. See U.S. Const. art I, § 8, cl.3.

66. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 570 (1985) (Powell, J., dissenting) ("Under the Constitution, the sphere of the proposed government extended to jurisdiction of 'certain enumerated objects only, . . . leav[ing] to the several States a residuary and inviolable sovereignty over all other objects.'") (quoting The Federalist No. 39, at 256 (J. Madison) (J. Cooke ed. 1961); *Younger v. Harris*, 401 U.S. 37, 44 (1971) (in federal system, federal government must not interfere with legitimate state activities); *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71, 76 (1868) (Constitution recognizes "the necessary existence of the States, and, within their proper spheres, the independent authority of the States"); The Federalist No. 44, at 254 (J. Madison) (G. Smith ed. 1901) ("State governments may be regarded as constituent and essential parts of the federal government; while the latter is nowise essential to the . . . organization of the former").

67. The tenth amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

68. See *Garcia*, 469 U.S. at 582 (O'Connor, J., dissenting); *Roth v. United States*, 354 U.S. 476, 493 (1957); *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 96 (1947); *United States v. Darby*, 312 U.S. 100, 123-24 (1941); *Jersey Central Power and Light Co. v. Township of Lacey*, 772 F.2d 1103, 1110 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013; see also The Federalist No. 45, at 258 (J. Madison) (G. Smith ed. 1901) (text of Constitution protects state sovereignty by specifically defining Congress's few and limited powers).

69. See *Garcia*, 469 U.S. at 585 (O'Connor, J., dissenting) (citing *Fry v. U.S.*, 421 U.S. 542, 547 n.7 (1975)). The Constitution was designed to limit the power of the federal government. See *id.* at 582; see also Redish & Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. Rev. 1, 4-5 (1987) (Constitution's "textual provisions designed to preserve a balance within the federal system" and provide guidance in judicial review); The Federalist No. 45, at 257 (J. Madison) (G.

manner the exercise of its powers."⁷⁰

While recognizing that federalism principles impose limitations on the commerce power, the Supreme Court has refused to define the nature and content of those limitations because of the "elusiveness of objective criteria for 'fundamental' elements of state sovereignty."⁷¹ As a result, the Court's approach to conflicts between federalism and the Commerce Clause has swung from periods of careful scrutiny of federal laws passed under the Commerce Clause⁷² to periods of extreme deference⁷³ to

Smith ed. 1901) (text of Constitution adequately protects state autonomy because Congress's powers are limited).

The text of the Constitution does not provide for judicial deference to Congress when reviewing laws passed under the Commerce Clause. See Redish & Drizin, *supra*, at 45. The Constitution's federalism provisions are not "merely advisory;" they must be read in conjunction with the commerce power and the tension between them must be resolved to preserve the federal balance. See *id.* at 40-41.

70. *Metcalf & Eddy v. Mitchell*, 269 U.S. 514, 523 (1926); see *supra* note 66.

71. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 548 (1985).

72. The Supreme Court first used its power of review to restrict the commerce power during the period between 1888 and 1936. See J. Nowak, R. Rotunda & J. Young, *Constitutional Law* § 4.5 (3d ed. 1986); see, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 275-76 (1918) (Congress has no power to regulate production of goods within a state by regulating interstate shipment), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (Sherman Antitrust Act could not be applied to intrastate monopoly acquisition of sugar refineries because regulation of manufacturing was state power); see also Skover, "Phoenix Rising" and *Federalism Analysis*, 13 *Hastings Const. L.Q.* 271, 279 (1986) (between 1887 and 1937, Court limited scope of Congress's commerce power); Redish & Drizin, *supra* note 69, at 2 (Court substantially intervened to protect state sovereignty interests against federal encroachment under Commerce Clause).

The Court again restricted Congress's power under the Commerce Clause during the period between 1976 and 1985 by using a balancing test developed in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Under this approach, the Court considered whether the challenged federal law regulated the states as states, whether the law addressed matters that were indisputably attributes of state sovereignty and directly impaired a state's ability to structure integral operations in areas of traditional functions, and whether the federal interest in having the law outweighed any infringement on state sovereignty. See *id.* at 289-90. For applications of this test, see *EEOC v. Wyoming*, 460 U.S. 226, 237-39 (1983); *United Transport. Union v. Long Island R.R.*, 455 U.S. 678, 685 (1982); *FERC v. Mississippi*, 456 U.S. 742, 764-65 (1982).

73. The Supreme Court permitted more expansive commerce laws during two periods of its history. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), is the landmark case illustrating the Court's earliest treatment of the Commerce Clause. In this case, Chief Justice Marshall defined the Commerce Clause as broad enough to be exercised within a state. See *id.* at 195. According to Marshall, only activities "completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government" are protected from the reach of the commerce power. See *id.* at 195.

Between 1937 and 1976, the Court again adopted a broad view of the commerce power, substantially deferring to Congress when reviewing laws passed under the Commerce Clause. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (valid exercise of commerce power to prohibit discrimination in small hotel under Civil Rights Act of 1964); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (Congress, under powers of Commerce Clause, may regulate customer serving policies of restaurant under Civil Rights Act of 1964); *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (upholding federal law regulating individual farmers' wheat production for home consumption on

Congress.

*Garcia*⁷⁴ represents the Court's current approach to federalism. *Garcia* expressly overruled *National League of Cities v. Usery*,⁷⁵ which held that applying the Fair Labor Standards Act ("FLSA")⁷⁶ to the states was unconstitutional because it directly impaired a state's ability to structure integral operations in areas of traditional state functions.⁷⁷ *Garcia* rejected this "integral operations" reasoning as unworkable.⁷⁸

B. *The Garcia Approach*

In *Garcia*, the Court held that applying the FLSA to the states was constitutional.⁷⁹ Although the Court acknowledged that states "occupy a special" and specific sovereign existence in our federal system, it refused to define substantive limitations on the Commerce Clause or to identify a sphere of state sovereignty immune from that power.⁸⁰ The majority stated that a "rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional' . . . leads to inconsistent results at the same time that it disserves principles of democratic self-governance."⁸¹ Such a rule, the Court reasoned, invites unelected judges to "make decisions about which state policies [and activities] it favors and which ones it dislikes."⁸²

In addition, the *Garcia* Court precluded judicial review of federalism-

basis of potential cumulative effect on interstate commerce); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942) (upholding federal regulation of intrastate production and sale of milk); *United States v. Darby*, 312 U.S. 100, 124-26 (1941) (application of Fair Labor Standards Act's hour and wage regulations to employees engaged in production of goods for interstate commerce upheld); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (National Labor Relations Act's regulation of intrastate activities upheld). See generally Skover, *supra* note 72, at 283 (Court substantially deferred to Congress in reviewing laws passed under the Commerce Clause); Redish & Drizin, *supra* note 69, at 2 (same); Lieberman, *Modern Federalism: Altered States*, 20 Urb. Law. 285, 287-88 (1988) (same).

74. *Garcia*, 469 U.S. at 528.

75. 426 U.S. 833 (1976), overruled by *Garcia*, 469 U.S. 528.

76. 29 U.S.C. §§ 201-219 (1988).

77. See *National League*, 426 U.S. at 845-52. The Court in *National League* held that it was unconstitutional to apply the FLSA to state employers because states' independent and separate existences are threatened if the federal government deprives states of the power to determine the wages and hours of state employees. See *id.* at 851. After *National League*, the Court began to use a balancing test to determine whether a federal law violated the Constitution's federalism provisions. See *supra* note 72.

78. See *Garcia*, 469 U.S. at 545-47.

79. See *id.* at 555-56.

80. See *id.* at 547-48. Indeed, the narrow majority doubted that courts "can identify principled constitutional limitations on the scope of Congress's Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty." *Id.* at 548.

81. *Id.* at 546-47.

82. See *id.* at 546. Justice Powell's dissent noted, however, that our democratic tradition envisions the states as "laboratories for social and economic experiment." He argued that leaving the states at the mercy of Congress, "without recourse to judicial review," undermines this democratic tradition. See *id.* at 567-68 n.13 (Powell, J., dissenting).

Commerce Clause issues absent proof of a defect in the political process.⁸³ State sovereignty, it stated, is protected by "procedural safeguards inherent in the structure of the federal system."⁸⁴ While conceding that the structure of the federal system has changed since its inception,⁸⁵ the Court nevertheless found that the political process still protects state autonomy.⁸⁶

Justice Blackmun's majority opinion in *Garcia* spawned vehement dissents.⁸⁷ Justice Powell argued that five unelected justices had reduced the tenth amendment to "meaningless rhetoric"⁸⁸ by rejecting 200 years of precedent regarding "the constitutional status of federalism."⁸⁹ He contended that federal courts can determine which areas of state activity are immune from the Commerce Clause by using the balancing test⁹⁰ that the Court developed after *National League*.⁹¹

Justice O'Connor similarly criticized the majority's refusal to define and enforce affirmative limits on the commerce power.⁹² Federalism

83. *See id.* at 554.

84. *Id.* at 552. The Court held that Congress is better situated to protect state interests. *See id.*

85. The Court noted that the adoption of the seventeenth amendment in 1913 significantly altered "the influence of the States in the federal political process." *See id.* at 554. The seventeenth amendment provides for popular election of Senators, who were previously selected by state legislatures. *See U.S. Const. amend. XVII.*

86. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985).

87. *See supra* note 1.

88. Justice Powell detailed the creation of our federal system and disputed Justice Blackmun's contention that judicial enforcement of the tenth amendment is an unsound principle. *See Garcia*, 469 U.S. at 570-79 (Powell, J., dissenting). Not only is judicial enforcement of the tenth amendment essential to maintaining our federal system, he stated, but it is the Court's constitutional responsibility. *See id.* at 579. Justice Powell argued that the Framers intended the tenth amendment to preserve the status of the states as coordinate elements in our federal union and to prevent them from being relegated to trivial factors in the "'shifting economic arrangements' of our country." *Id.* at 574.

89. *See id.* at 560 (Powell, J., dissenting). Justice Powell criticized the majority for abandoning its responsibility of judicial review, noting that the Court had never before held that states can protect themselves through the electoral process. *See id.* at 567 n.12 (Powell, J., dissenting).

90. The balancing test considers "the strength of the federal interest in the challenged legislation and the impact of exempting the States from its reach." *Id.* at 563 n.5 (Powell, J., dissenting). For a discussion of the development and application of this test, *see supra* notes 72 & 77.

91. *See Garcia*, 469 U.S. at 562-63 (Powell, J., dissenting). Justice Powell stated that judicial review of conflicts between federalism and the commerce power is necessary because Congress alone cannot adequately protect state interests. *See id.* at 565-67 (Powell, J., dissenting). Neither the states' success at getting federal funding nor the presence of representatives in Congress from each state, he argued, is sufficient proof that the political process protects state sovereignty. *See id.* at 566-67. Powell reasoned that changes in the federal structure have made Congress "particularly *insensitive*" to state interests. *See id.* at 565 n.9. He noted, for example, that the weakening of local political parties and the rise of national media have shifted Congress's attention from state to national concerns. *See id.*

92. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 587 (1985) (O'Connor, J., dissenting). Although it is difficult to "craft bright lines" defining areas of

principles embodied in the text and history of the Constitution, she argued, require the Court to use its power of review to prevent Congress from upsetting the balance of power between the states and the federal government that is essential to the "efficiency and vitality" of our nation.⁹³ Justice O'Connor also stated that the political process cannot protect state sovereignty because of changes in the national political process that have accentuated Congress's "underdeveloped capacity for self-restraint."⁹⁴

In a one-paragraph dissent, Justice Rehnquist also vigorously disagreed with *Garcia's* approach to federalism and joined in both Justices Powell and O'Connor's dissents. *National League* should be affirmed, he argued, because federalism principles prohibit Congress from acting under its "commerce power to infringe on certain fundamental aspects of state sovereignty that are essential to 'the States' separate and independent existence.'"⁹⁵

C. *The Problem with Garcia and its Relevance to the ADEA Cases*

States whose mandatory retirement laws have been challenged argue that ADEA's application to state judges infringes on their right to structure their judiciaries.⁹⁶ Although courts have resolved these cases on statutory grounds, implicit in the opinions is the view that such application of ADEA would impermissibly interfere with an important state sovereignty right.⁹⁷ History, federal courts' procedural rules and case law also demonstrate that the ability of states to structure their judiciaries is a traditional and important state right.

When the Framers established the Supreme Court, they recognized the independent authority of existing state courts.⁹⁸ Alexander Hamilton

state sovereignty that are immune from the Commerce Clause, Justice O'Connor stated that it is the Court's responsibility to reconcile the conflicts between federalism and the commerce power. *See id.* at 588-89.

93. *See id.* at 584-87 (O'Connor, J., dissenting).

94. *See id.* at 584-588 (O'Connor, J., dissenting). Justice O'Connor agreed with Justice Powell that Congress focused on national rather than state issues. *See id.* at 584; *supra* note 91.

95. *Id.* at 579-80 (Rehnquist, J., dissenting).

96. *See supra* notes 27 & 44 and accompanying text.

97. The *Gregory* court, for example, stated that ADEA's application to state judges would significantly intrude on a traditionally sensitive state sovereignty right. *See Gregory v. Ashcroft*, 898 F.2d 598, 600 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990). Similarly, the *Massachusetts* court argued that a state's ability to determine the tenure of state judges is an intimate and fundamental aspect of self-governance and state autonomy. *See EEOC v. Massachusetts*, 858 F.2d 52, 53 (1st Cir. 1988); *see also EEOC v. Illinois*, 721 F. Supp. 156, 159 (N.D. Ill. 1989) (state's ability to determine the tenure of its own judiciary is a right close to the heart of state sovereignty); *Apkin v. Treasurer and Receiver Gen.*, 401 Mass. 427, 431, 517 N.E.2d 141, 143 (1988) (fundamental state sovereignty right invaded by ADEA's application to state judges).

98. Although the records of the Constitutional Convention contain little comment on the judiciary, one of the reasons for creating one Supreme Court and no lower courts was that many of the Framers believed that cases could and should be tried in state courts.

wrote that "the State courts will retain the jurisdiction they now have, unless it appears to be taken away in one of the enumerated modes."⁹⁹ Moreover, the Full Faith and Credit Clause of the Constitution was drafted explicitly recognizing the integrity and separate existence of state courts.¹⁰⁰ After the Constitution was ratified, Congress continued to show deference to state courts and laws by enacting the Judiciary Act of 1789.¹⁰¹

Procedural rules such as Federal Rule of Civil Procedure 12(h)(3), which requires a federal court to dismiss an action "[w]henver it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter,"¹⁰² and the abstention doctrine, which is

See M. Farrand, *The Framing of the Constitution of the United States* 154-55 (1913); *see also* C. Tansill, *Debates in the Federal Convention of 1787 as reported by James Madison*, in *Documents Illustrative of the Formation of the Union of the American States* 404-05 (H. Doc. No. 398, 69th Cong., 1st Sess. 1927) (statements by Pierce Butler and Luther Martin that lower courts should not be established in the Constitution because they are an unnecessary interference in state court authority). *See generally* C. Wright, *Law of Federal Courts* § 1, at 2 (4th ed. 1983) (discussing creation of federal judiciary by Framers); C. Warren, *The Making of the Constitution* 534-44 (1928) (same); R. Bernstein & K. Rice, *Are We To Be A Nation? The Making of the Constitution* 170-71, 174-75 (1987) (same).

99. *The Federalist* No. 82, at 454 (A. Hamilton) (G. Smith ed. 1901); *see also* *The Federalist* No. 78, at 433 (A. Hamilton) (G. Smith ed. 1901) (acknowledging competence of state courts).

100. The clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const. art. IV, § 1. The clause serves "to insure comity and courtesy among the states 'to help fuse into one Nation a collection of independent, sovereign states.'" J. Nowak, R. Rotunda & J. Young, *Constitutional Law* § 9.6, at 303 (3d ed. 1986) (quoting *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)). This clause requires the courts of one state to respect and enforce the decisions of courts from sister states. *See id.* at 304. Cooperation among all state courts contributes to the Union and acknowledges the power of individual state governments. The clause's express recognition of the valid and separate existence of state judiciaries underscores their importance to state sovereignty. The states' ability to structure their judiciaries is, therefore, closely related to their sovereign existence.

101. Judiciary Act of 1789, 1 Stat. 73. Rather than granting the Supreme Court the full power allowed by the Constitution, the Act limited its appellate jurisdiction. *See id.* § 13, at 81. Implicit in this limitation on federal court jurisdiction is the recognition that state courts are competent to adjudicate most issues. *See supra* note 98. In addition, it provided that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law." Judiciary Act of 1789 § 34, 1 Stat. 73, 92 (codified as amended 28 U.S.C. § 1652 (1988)). This section of the Act is known as the Rules of Decision Act and explicitly defers to state laws by mandating their use.

102. Fed. R. Civ. P. 12(h)(3). This rule is based on the concept of limited jurisdiction, which presumes that federal courts lack jurisdiction until the party seeking review proves its authority to invoke such review. *See* *McMicken v. Webb*, 36 U.S. (11 Peters) 25, 32 (1837); *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799); C. Wright, *supra* note 98, § 7, at 23. Although a harsh rule for parties seeking to adjudicate their claims in federal court, it is justified "by the delicate problems of federal-state relations that are involved." C. Wright, *supra* note 98, § 7, at 23. *But see* Morse, *Judicial Self-Denial and Judicial Activism: The Personality of the Original Jurisdiction of the District Courts*, 3 *Clev.-Marshall St. L. Rev.* 101, 101 (1954) (criticizing doctrine of limited jurisdiction as waste of time, effort and money).

invoked "to avoid needless conflict with the administration by a state of its own affairs,"¹⁰³ similarly recognize the validity of independent state courts.

Federal case law also suggests that a state's ability to structure and maintain its own government is essential to state autonomy in our federal system.¹⁰⁴ Lastly, many commentators have argued that the states' right to structure their own government is so traditional and important that Congress would not purport to abrogate it.¹⁰⁵ Thus, even the most restrictive view of a traditional state function would include a state's ability to create its own court system.¹⁰⁶

Because the ability of the states to determine the structure of their judiciaries is crucial to their separate and independent existence, ADEA's application to appointed state court judges intrudes on a realm of activity traditionally and peculiarly left to the states. "[I]n light of the significant intrusion into [this] properly state-dominated affair[],"¹⁰⁷ judicial review seems particularly necessary. *Garcia*, however, precludes judicial review of its application to state judges¹⁰⁸ because there was no

103. C. Wright, *supra* note 98, § 52, at 303. This doctrine requires a federal court to decline jurisdiction or to postpone its exercise even though diversity jurisdiction requirements are satisfied. *See id.* at 302-03; *see also* Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341, 349 (1951) (should invoke doctrine when an "adequate state court review of an administrative order based upon predominantly local factors [wa]s available to appellee"); *Burford v. Sun Oil Co.*, 319 U.S. 315, 332-34 (1943) (doctrine should have been applied because state courts better equipped to resolve issues involving state laws).

104. In *Coyle v. Smith*, for example, the Court held that the power of a state to "locate its own seat of government and to determine when and how it shall be changed from one place to another . . . [is] essentially and peculiarly [a] state power[]." *Coyle*, 221 U.S. 559, 565 (1911). Similarly, in *Texas v. White*, the Court described the states as separate political communities that organize their own government. *See White*, 74 U.S. (7 Wall.) 700, 725 (1868).

Justice Rehnquist cited both *Coyle* and *White* in his majority opinion in *National League* as precedent for the principle that the commerce power is limited by federalism concerns. *See National League of Cities v. Usery*, 426 U.S. 833, 844-45 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Justice Rehnquist relied more on historical precedent and case law than on the tenth amendment as a limit on Congress's commerce power. *See id.* at 844. Indeed, the tenth amendment is mentioned only once in the *National League* opinion. *See id.* at 842.

105. *See* Tribe, *Unraveling National League of Cities: The New Federalism & Affirmative Rights to Essential Government Services*, 90 Harv. L. Rev. 1065, 1070 (1977); Van Alstyne, *The Second Death of Federalism*, 83 Mich. L. Rev. 1709, 1716-17 (1985); Field, *Garcia v. San Antonio Metro. Transit Authority: The Demise of a Misguided Doctrine*, 99 Harv. L. Rev. 84, 105 (1985).

106. "[O]ne thinks of the power to determine the basic structure of state government— . . . to fix the terms of office for state officials, for example—as a state prerogative which ought to be immune from federal intrusion." Tribe, *supra* note 105, at 1070; *see also* Field, *supra* note 105, at 105 (organization of government is state sovereignty interest immune from reach of Commerce Clause); Van Alstyne, *supra* note 105, at 1716-17 (ability of state to create and structure its own court system is traditional state function).

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

108. *See supra* notes 83-86 and accompanying text.

defect in the process of enacting ADEA or any of its amendments.¹⁰⁹

The ADEA cases, therefore, provide a new battleground for *Garcia's* critics, especially those who criticized its limits on judicial review. *Garcia's* renunciation of the review power¹¹⁰ is contrary to both historical precedent¹¹¹ and the text of the Constitution.¹¹² Since *Marbury v. Madison*,¹¹³ the well-established role of the courts is " 'to say what the law is' with respect to the constitutionality of [federal statutes]." ¹¹⁴ Further, no provision in the Constitution authorizes the Court to treat state sovereignty rights differently from other rights by denying them the protection of judicial review.¹¹⁵ Withholding review of conflicts between federalism and the commerce clause "interpolates a different sort of clause in article III" of the Constitution that would nullify the role of states in the federal system.¹¹⁶

109. See *EEOC v. Vermont*, 904 F.2d 794, 802 (2d Cir. 1990); *Schlitz v. Virginia*, 681 F. Supp. 330, 332 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988).

110. The dissenters in *Garcia* criticized the majority for abdicating judicial review. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (joined by Justices Powell and Rehnquist); see also Van Alstyne, *supra* note 105, at 1724 ("*Garcia* proposes the piecemeal repeal of judicial review"); Comment, *State Autonomy After Garcia: Will the Political Process Protect States' Interests?*, 71 Iowa L. Rev. 1527, 1539 (1986) (*Garcia* abdicated judicial review).

The majority in *Garcia*, however, stated that it did construe both the tenth amendment and the commerce power to reach its decision. See *Garcia*, 469 U.S. at 547-48. The Court stated that except for the limitations on Congress implicit in the "delegated nature of Congress' Article I powers," state sovereignty is protected by the "structure of the Federal Government itself." *Id.* Any substantive restraint on the commerce power, it reasoned, must be justified by a failure of the political process and must be tailored to address that process "rather than to dictate a 'sacred province of state autonomy.'" *Id.* at 554. *Garcia*, therefore, can be viewed as a decision that construes the Constitution as fixing "the principle locus of tenth amendment adjudication in Congress." Van Alstyne, *supra* note 105, at 1720; see also Field, *supra* note 105, at 114 (*Garcia* Court "promised substantial deference to judgments of Congress" rather than forsaking "review of questions concerning the 'rights of States' ") (citations omitted).

111. *Garcia's* abdication of judicial review "radically depart[ed] from long-settled constitutional values and ignore[d] the [historical] role" of the review power in our federal system. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 561 (1985) (Powell, J., dissenting); see *id.* at 587 (O'Connor, J., dissenting); Field, *supra* note 105, at 101-02; Redish & Drizin, *supra* note 69, at 35-37; Freilich, Greenhagen & Lamkin, *The Demise of the Tenth Amendment: An Analysis of Supreme Court Decisions Affecting Constitutional Federalism*, 17 Urb. Law. 651, 661 (1985).

112. See, e.g., Redish & Drizin, *supra* note 69, at 34-35 (text of the Constitution contemplates judicial review of federalism issues); *supra* note 69 (same).

113. 5 U.S. (1 Cranch) 137 (1803).

114. *Garcia*, 469 U.S. at 567 (Powell, J., dissenting); see also *id.* at 581 (O'Connor, J., dissenting) ("this Court cannot abdicate its constitutional responsibility to oversee the Federal Government's compliance with its duty to respect the legitimate interests of the States"); Field, *supra* note 105, at 101-02 (one of the Court's functions is to balance federalism rights against rights of Congress under Commerce Clause); Tribe, *supra* note 105, at 1071 (Court must prevent Congress "from acting in ways that would leave a state formally intact but functionally a gutted shell").

115. See Van Alstyne, *supra* note 105, at 1730; Redish & Drizin, *supra* note 69, at 35-37.

116. Van Alstyne, *supra* note 105, at 1726.

Should the Supreme Court follow the *Garcia* approach and hold that ADEA applies to appointed state court judges, a traditional and important state sovereignty right will be abrogated without judicial scrutiny.¹¹⁷ The paucity of legislative history regarding the policymaking exception indicates that Congress failed to consider how ADEA's application to state judges would impair states' ability to structure their own judicial systems.¹¹⁸ Except for Senator Ervin's brief reference to judges, the congressional debate focused on government officials in the executive branch.¹¹⁹ By enacting the exemption clause, Congress acknowledged that ADEA's application to certain government officials impermissibly infringed on state sovereignty.¹²⁰ Congress did not, however, discuss its application to appointed state court judges, and seems to have overlooked the infringement on state sovereignty inherent therein.

The ADEA example illustrates that the political process does not always protect state sovereignty. Congress should not be "the sole judge[] of the limits of [its] own power"¹²¹ because the nationalization of the political process prevents adequate consideration of states' rights.¹²² Not only did the adoption of the seventeenth amendment decrease states' control over the election of senators,¹²³ but the Voting Rights Act's¹²⁴ regulation of state election processes similarly decreased states' control over the election of other state officials.¹²⁵ The increasing influence of national interest groups on congressional votes and of national political parties in general has also led Congress to focus on national rather than state concerns.¹²⁶ Lastly, states' interests are not always easy to recog-

117. This was the result in *Vermont*. See *supra* note 62 and accompanying text.

118. See generally 118 Cong. Rec. 4096-97, 4483-93 (Feb. 16 & 17, 1972) (Congressional debate shows no consideration of ADEA's application to appointed state court judges); see *supra* note 59 and accompanying text.

119. See *supra* notes 57-60 and accompanying text.

120. See 118 Cong. Rec. 4483 (1972). Senator Ervin proposed that Congress adopt an exception for certain government officials precisely because he was concerned about states' rights. He stated, "I know of no way in which Congress can more effectively destroy the States than for Congress to take[] away from the community . . . the right to elect their own officials and select their own employees." *Id.*

121. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 567 (1985) (Powell, J., dissenting).

122. See Freilich, Greenhagen & Lamkin, *supra* note 111, at 661; Tribe, *supra* note 105, at 1071-72; Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of Atascadero State Hosp. v. Scanlon*, 74 Geo. L.J. 363, 375 (1985); Comment, *supra*, note 110, at 1550; Comment, *Garcia v. San Antonio Metropolitan Transit Authority and the Manifest Destiny of Congressional Power* [hereinafter "*Manifest Destiny of Congressional Power*"], 8 Harv. J.L. & Pub. Pol'y 745, 760-61 (1985); *supra* notes 91 & 94.

123. See *supra* note 85 and accompanying text.

124. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1973 (1988)).

125. See Freilich, Greenhagen & Lamkin, *supra* note 118, at 661; Comment, *Manifest Destiny of Congressional Power*, *supra* note 122, at 760-61.

126. See Freilich, Greenhagen & Lamkin, *supra*, note 111, at 661; Tribe, *supra* note 105, at 1071-72; Brown, *supra* note 122, at 375; Comment, *Manifest Destiny of Congressional Power*, *supra* note 122, at 760-61; Comment, *supra* note 110, at 1551.

nize.¹²⁷ Judicial review of conflicts between federalism and the Commerce Clause, therefore, seems appropriate "in those rare instances in which Congress, despite the political safeguards of federalism, takes action that would effectively eviscerate a state's government and leave it an empty vessel."¹²⁸

*Gregory*¹²⁹ presents an occasion for the Court to define a discrete area of state activity immune from the Commerce Clause: a state's ability to determine the structure of its own government. Declaring this area of state sovereignty immune from the commerce power would be consistent with *Garcia*'s suggestion that substantive limits on the Commerce Clause do exist.¹³⁰ Such a declaration, however, would necessitate resuming judicial review of federalism issues. The Court could still substantially defer to Congress by reasserting review of federalism conflicts only when Congress appears to have overlooked a traditional right essential to the separate and independent existence of the states. Because such a right is jeopardized in *Gregory*, judicial review of ADEA's application to state judges is imperative.

CONCLUSION

ADEA's legislative history reveals that appointed state court judges are not properly viewed as policymakers within the meaning of the exception. If ADEA is interpreted correctly, however, the states' fundamental right to determine the structure of their judiciaries is abrogated because *Garcia* prohibits judicial review of ADEA's application to state judges. When the Supreme Court considers *Gregory* this spring, it will have an occasion to reassess *Garcia* should it hold that state judges are not policymakers exempt from ADEA. In light of the important state right at issue and of Justices Rehnquist and O'Connor's strong dissents in *Garcia*, *carpe diem* may well be the battle cry of the new majority.¹³¹

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127. See Tribe, *supra* note 105, at 1072. Congress's failure to consider states' interests in determining the tenure of their judges may indicate that this interest was difficult to recognize when the exemption clause was enacted. See *supra* notes 57-60 and accompanying text.

128. Tribe, *supra* note 105, at 1072; see also Field, *supra* note 105, at 105 (Court's approach to federalism should confine protected state activities to a small area, such as the organization of state and local governments).

129. *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir.), cert. granted, 111 S. Ct. 507 (1990).

130. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-48 (1985).

131. Since *Garcia* was decided in 1985, Justices Burger, Powell and Brennan have stepped down from the bench. At least two conservative, "states' rights" advocates, Justices Scalia and Kennedy, have filled their posts.

