Ageism, the ADEA, and the Ageless Debate Over Statutory Interpretation

Brett E. Cooper
NOTE

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DEBATE OVER STATUTORY
INTERPRETATION

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INTRODUCTION

During recent years, the Supreme Court has increasingly focused on the enigma of federalism.1 One aspect of this debate is the diminution of state citizens’ rights to seek redress against states, resulting from increasingly stringent judicial standards.2

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1 "Most observers agree that the leading contribution of the Rehnquist court to constitutional jurisprudence has been a series of decisions reining in federal intrusion on state authority." Theodore B. Olson, Aaaand They're Off! The Justices Go to Work, WALL ST. J., Oct. 4, 1999, at A43; see also Alden v. Maine, 527 U.S. 706, 711 (1999) (holding that Maine could not be sued by probation officers seeking redress in federal or state court); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 666, 690 (1999) (stating that Congress exceeded its constitutional authority when it authorized private suits against the states for patent infringement and Lanham Act violations); Printz v. United States, 521 U.S. 898, 935 (1997) (“Congress cannot compel the States to enact or enforce a federal regulatory program.”); New York v. United States, 505 U.S. 144, 149 (1992) (maintaining that Congress cannot commandeer a state’s legislative or executive branches to administer or enact federal regulations).

2 See Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) and announcing a stringent two-part test to be utilized when analyzing legislation that abrogates Eleventh Amendment sovereign immunity); see also City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (narrowing the Seminole Tribe two-part test by requiring “congruence and proportionality” between Fourteenth Amendment violations by the states and Congress’s chosen remedy). The judicial standards have been debated over the years. In earlier years, “[J]ustices William J. Brennan, Thurgood Marshall, Harry A. Blackmun and John Paul Stevens argued against the expansion of state sovereign immunity—mostly in dissent—and sought an 11th [sic] Amendment doctrine more closely limited to the text itself.” Bernard James, The States’ Rights
The debate on states' sovereign immunity is not new to the United States' political landscape. In fact, it has been ongoing since the framing of the Constitution. Indeed, shortly after the ratification of the Constitution, the states were given immunity from suit under the Eleventh Amendment. Over the years, the states both waived their immunity as to certain matters, and had some of their immunity withdrawn by Congress. This Note

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Cases Provoke Fire, NAT'L J., Aug. 16, 1999, at B10 (footnote omitted). The five member majority (Rehnquist, O'Connor, Scalia, Thomas, and Kennedy) of the current Term seem likely to allow Congress to abrogate immunity. See id.

3 Alexander Hamilton emphasized the importance of immunity of the sovereign from suit by its citizens in The Federalist Number 81:

It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.... [T]he exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention, it will remain with the States, and the danger intimated must be merely ideal.

Edelman v. Jordan, 415 U.S. 651, 661 n.9 (1974) (quoting THE FEDERALIST No. 81, at 487–88 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). As evidenced by the enactment of the Eleventh Amendment, the states wished to be immune from suit. See U.S. CONST. amend. XL “The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.” Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239 n.2 (1984); see also Seminole Tribe, 517 U.S. at 71 (reviewing the intentions of the framers of the Constitution with regard to state sovereign immunity); Laurie A. McCann, The ADEA and the Eleventh Amendment, 2 EMPLOYEE RTS. & EMPLOYMENT POLY J. 241, 242 (1998) (stating that the Supreme Court's decisions in Seminole Tribe and City of Boerne, provide further balance to the federal and state distribution of powers, the states cannot avoid liability in federal court).

4 The Eleventh Amendment to the United States Constitution states “[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 any one of the United States by Citizens of another State.” U.S. CONST. amend. XL The Supreme Court has read this Amendment to grant states immunity from suit unless there has been an express consent to suit or a valid abrogation of the state's immunity by Congress. See Atascadero State Hosp., 473 U.S. at 238. In addition, the Eleventh Amendment has been interpreted to preclude suits brought by a citizen against his own state. See Hans v. Louisiana, 134 U.S. 1, 15 (1890).

5 A waiver by a state to accept liability in federal court is beyond the protections of the Eleventh Amendment. See Clark v. Barnard, 108 U.S. 436, 447 (1883). Immunity from suit belonging to a state “is a personal privilege which it may waive at pleasure.” See id.; see also Hans, 134 U.S. at 17 (stating that “undoubtedly a State may be sued by its own consent”). This Note does not focus on whether there are states that have waived their sovereign immunity with regard to age discrimination. To the extent that many states have not waived such immunity, the circuit cases included herein discuss abrogation of sovereign immunity under the Enabling Clause of the Fourteenth Amendment.

6 Under the earlier ruling of Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989),
will address the abrogation of states’ immunity by Congress as enacted in the Age Discrimination in Employment Act (ADEA),\(^7\) and the subsequent Supreme Court holding that found this abrogation unconstitutional.\(^8\) Due to a lack of consensus among the circuit courts of appeal concerning whether the ADEA was a proper abrogation of the states’ sovereign immunity the Court granted certiorari to hear *Kimel v. State of Florida Board Of Regents.*\(^9\) Subsequently, the Supreme Court held that the ADEA was unenforceable against a state.\(^10\)

In deciding *Kimel*, the Supreme Court had to determine which of the circuit court decisions concerning the ADEA were properly decided.\(^11\) The Court ultimately employed judicial restraint and resolved the *Kimel* case without expressly creating a new, more stringent, constitutional precedent.\(^12\) Arguably, the *Kimel* decision, although based on existing case law, continues the Court’s campaign towards greater federalism. The negative effect on state employees seeking redress under the ADEA, however, is an unfortunate result of the Court’s most recent ruling. The Court will likely continue to find the abrogation standard is not met by a variety of statutes.

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10 See *Kimel*, 120 S. Ct. at 650.
11 See id. at 639.
12 The Court simply held that the ADEA did not fulfill the *Seminole Tribe* test because of a lack of clear language. See *Blanciak v. Allegheny Ludlum Corp.*, 77 F.3d 690, 696 (3d Cir. 1996) (“The statutory language of the ADEA simply does not evince an unmistakably clear intention to abrogate.”); *Humenansky v. Regents of the Univ. of Minn.*, 152 F.3d 822, 825 (8th Cir. 1998) (stating that the ADEA’s text does not reflect an unmistakably clear intent to abrogate), cert. denied, 120 S. Ct. 930 (2000). The decision that found the ADEA did not fulfill the *Seminole Tribe* test is less controversial because it did not set forth any new standards for Congress to follow, and would not have as many implications on other statutory schemes.
One difficulty the Court had in evaluating the ADEA was that a number of equally plausible arguments have been made both to uphold and to strike down the ADEA's abrogation of state immunity.\textsuperscript{13} Notwithstanding these arguments, the Court chose to decide the \textit{Kimel} case without explicitly setting any new standards. The \textit{Kimel} case presented the Court with an opportunity to once again take a stance on federalism. The Court did so implicitly, by holding the ADEA did not fulfill the current standard for abrogation under \textit{Seminole Tribe v. Florida}.\textsuperscript{14}

In deciding \textit{Kimel}, the Court decided not to expressly change the standards set by the judiciary for abrogating sovereign immunity under the Fourteenth Amendment, and used ordinary methods of statutory interpretation, such as the plain meaning rule.\textsuperscript{15} Applying the plain meaning rule to the ADEA presented the Court with some difficulty due to the persuasiveness of the arguments made by the circuit courts in defense of varying interpretations.\textsuperscript{16} Yet the Court did not stray from the plain

\textsuperscript{13} See infra notes 73-76, 120–23 and accompanying text.
\textsuperscript{14} 517 U.S. 44 (1996). The Court stated that in order to determine whether Congress has abrogated the states' immunity, a court must ask two questions: first, whether Congress has "unequivocally expressed its intent to abrogate the immunity," and second, whether Congress has acted "pursuant to a valid exercise of power." \textit{Id.} at 55 (citing \textit{Green v. Mansour}, 474 U.S. 64, 68 (1985)). The Court recently sidestepped the federalism issue in deciding a case concerning the abrogation of sovereign immunity under the Americans with Disabilities Act. \textit{See Olmstead v. L.C.}, 119 S. Ct. 2176, 2181 (1999) (stating that since the briefs presented to the Court did not present this issue, even though the issue was presented to the lower courts, it would not decide the matter). In the same Term, the Court did posit, however, that "the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment . . . [but] is a fundamental aspect of the sovereignty which [they] enjoyed before the ratification of the Constitution, and which they retain today." \textit{Alden v. Maine}, 119 S. Ct. 2240, 2246–47 (1999).

\textsuperscript{15} The definition of the plain meaning rule is "[a] rule that if a writing, or provision in a writing, appears to be unambiguous on its face, its meaning must be determined from the writing itself without resort to any extrinsic evidence." \textsc{Black's Law Dictionary} 1170 (7th ed. 1999). This principle is best described by Justice Day: "Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them." \textit{Caminetti v. United States}, 242 U.S. 470, 485–86 (1917).

\textsuperscript{16} The Eighth Circuit summed up two different interpretations in the \textit{Humenansky} decision. If we look only at § 626(c), the 1974 ADEA amendments are just like the 1966 FLSA amendments at issue in \textit{Employees—Congress now covered public employers but did not expressly allow them to be sued in federal court. On that basis, we would conclude no intent to abrogate, following
meaning rule. Justice O'Connor, writing for the majority, found that Congress had not acted within the power of Section 5 of the Fourteenth Amendment. This Note argues, however, that a true facial reading should have brought down a contrary decision.

This Note discusses the development of Eleventh Amendment abrogation under the Enabling Clause of the Fourteenth Amendment. Part I explores the Seminole Tribe decision and some other notable decisions that modified its holding. Part II delineates the reasoning of four circuit courts of appeals and their rationale for finding either that the ADEA

the reasoning in Employees as reinforced by the Court's later decisions in Atascadero and Dellmuth. On the other hand, if we look at the ADEA's enforcement scheme from the perspective of its cross-reference to the FLSA, Congress cured the abrogation deficiency found in Employees by amending § 216(b) at the same time § 630(b)(2) was amended to include States and other public employers.

Many commentators have coined the phrase "Scalian interpretation" to refer to the Court's reluctance to find any meaning within a statute other than the plain meaning of the words. See William N. Eskridge, Jr., Textualism, The Unknown Ideal?, 96 MICH. L. REV. 1509, 1512 (1998). Such literal interpretation can lead to obscure results, as was true in a case involving the employment status of a priest. In making its determination, the Supreme Court had to read the statute in conjunction with other materials to find that a priest was not covered by the statute. See Holy Trinity v. United States, 143 U.S. 457, 458, 472 (1892) (holding that a priest was not intended to be covered by the statute that criminalized employment of an "alien" to "perform labor or service of any kind").

A reading of the ADEA, including enacted amendments, brings a strictly "Scalian interpreter" to the conclusion that the ADEA fulfills the requirements for validly abrogating state immunity as set forth in Seminole Tribe. See Coger v. Board of Regents, 154 F.3d 296, 301 (6th Cir. 1998) (finding that the inclusion of the word "employer" in the 1974 amendment to the ADEA was sufficiently clear to fulfill the Seminole Tribe standard).

Seminole Tribe restated the two-prong test used to determine if a statute is proper legislation under the Fourteenth Amendment to validly abrogate sovereign immunity under the Eleventh Amendment. See Seminole Tribe v. Florida, 517 U.S. 44, 54–55 (1996). The Court also narrowed the constitutional basis permissible for abrogation of sovereign immunity to the Enabling Clause of the Fourteenth Amendment. See id.

See Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998); Coger, 154 F.3d 296; Kimel v. State of Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998), cert. granted, 119 S. Ct. 901 (1999); Humenansky, 152 F.3d 822.
properly abrogated state immunity or that it did not. In this section, opinions accompanying the Kimel decision will be explored. The analysis presented throughout this Note serves cumulatively to support the position that the ADEA should be valid legislation under Section 5 of the Fourteenth Amendment. Finally, Part III attempts to illuminate the path down which recent Supreme Court decisions seem to be leading. Part IV discusses the approach that the Court took in deciding the Kimel case. The open issue, likely to be vigorously debated, is whether the Kimel case has "raised the bar" for determining whether legislation validly abrogates state immunity. Future decisions concerning the validity of other statutes that abrogate state immunity will look to Kimel for guidance. The Court's decision is likely to be interpreted by many circuit courts in upcoming decisions.

I. UNEQUIVOCAL ABROGATION OF ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment provides the states with immunity from suits brought by citizens in federal courts based on either diversity jurisdiction or federal law. This immunity, however, is not absolute because Congress may legislate to abrogate the Eleventh Amendment.

22 The four cases are grouped into two sets. The first set of cases, Migneault and Coger, held that the ADEA properly abrogated sovereign immunity. The second set of cases, Kimel and Humenansky, held that the ADEA did not properly abrogate state immunity.

23 Although this discussion is contained within the section that deals with cases holding that the ADEA does not validly abrogate state immunity, it was placed in proximity to the discussion of the majority holding of the same decision.

24 Section 5 of the Fourteenth Amendment states: "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." See U.S. CONST. amend. XIV § 5.

25 See infra notes 222-39 and accompanying text.


27 See Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996); see also supra note 4 and accompanying text.

28 See Seminole Tribe, 517 U.S. at 56.
immunity may be abrogated by Congress provided it enacts legislation that: (1) provides a cause of action against the states that is remedial in nature, and (2) is for the purpose of enforcing the Fourteenth Amendment. Such legislation, which results in heightened liability for the states, has historically been disfavored. In *Seminole Tribe*, the Supreme Court established a two-part test to be fulfilled in order for legislation to successfully abrogate Eleventh Amendment immunity. A court must determine: (1) whether Congress has unequivocally expressed its intent to abrogate the states’ immunity; and (2) whether Congress has acted pursuant to a valid exercise of power under Section 5 of the Fourteenth Amendment.

The first prong of the test aims to determine whether Congress is “making its intention unmistakably clear in the language of the statute.” In *Seminole Tribe*, the Court found that the Indian Gaming Regulatory Act (IGRA) satisfied this prong due to the sheer number of references to the “state” in the remedial scheme of the legislation. In *Dellmuth v. Muth*, however, the Court specifically addressed the use of extrinsic legislative materials to determine congressional intent concerning the abrogation of Eleventh Amendment immunity. The Court reaffirmed the test set out in *Atascadero State Hospital v. Scanlon*, stating that it would “conclude Congress intended to abrogate sovereign immunity only if its intention is ‘unmistakably clear in the language of the statute.’” The Court held that “recourse to legislative history will be futile, because by definition the rule of *Atascadero* [requiring unmistakably clear language in the statute] will not be met.” Despite this position,
it seems some redeemable authority can be found in the legislative history if such history is extremely clear and persuasive concerning intent.

Many of the circuit courts addressed the need to interpret legislative materials and the 1974 Amendments to the ADEA. These amendments provide the requisite textual intent to abrogate the states' immunity. The clarity of the 1974 Amendments in showing the intent of Congress is brought into even sharper focus by the accompanying legislative materials.

Once there has been a satisfactory showing of congressional intent to abrogate states' immunity, the second prong of the Seminole Tribe test requires that the legislation be passed "pursuant to a valid exercise of power." The Court held that legislation passed under Section 5 of the Fourteenth Amendment is a valid exercise of power. The Court, however, ruled that legislation passed under the Commerce Clause could not validly abrogate the states' immunity, thus overruling Pennsylvania v. Union Gas Co. Interestingly, the Seminole

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See Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998); Coger v. Board of Regents, 154 F.3d 296 (6th Cir. 1998); Keeton v. University of Nev. Sys., 150 F.3d 1055 (9th Cir. 1998); Goshtasby v. Board of Trustees, 141 F.3d 761 (7th Cir. 1998).

See 29 U.S.C. § 630(b) (1994) ("The term 'employer' means a... State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State.").

See 118 CONG. REC. 7745, 7746 (1972).


Indubitably, the core of the Fourteenth Amendment is comprised of the Due Process and the Equal Protection Clauses. "[N]or shall any state deprive any person of life, liberty, or property, without due process; nor deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section 5 reads "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Thus, section 5 of the Fourteenth Amendment has been described as a "positive grant of legislative power" to Congress. City of Boerne v. Flores, 521 U.S. 507, 517 (1997) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). This power extends only to enforcement of the Fourteenth Amendment and as such has been characterized as remedial. See id. at 519 (citing South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)). Therefore, when Congress acts pursuant to its power in section 5, a critical inquiry to be made is whether the legislation is remedial, i.e., preventing and correcting unconstitutional behavior, or excessive such that it creates a substantive change in constitutional rights. See id.

See Seminole Tribe, 517 U.S. at 59.

491 U.S. 1 (1989) (holding that the Commerce Clause was a proper basis for abrogating state immunity). See Seminole Tribe, 517 U.S. at 66; see also supra note 6.
Tribe case did not specifically state that a statute must textually reference Section 5 when abrogating sovereign immunity. The lack of guidance on this matter by the Seminole Tribe Court necessarily suggests that Congress is not required to cite Section 5 in order to effectuate the abrogation of states’ immunity.\(^47\)

In EEOC v. Wyoming,\(^48\) the Court held that the ADEA was a valid exercise of congressional power under the Commerce Clause, but did not determine whether it was also a valid exercise of congressional power under Section 5.\(^49\) Moreover, the circuit courts which have found abrogation to exist have stated that the Supreme Court’s earlier holding in Pennhurst State School and Hospital v. Halderman\(^50\) does not require a recital of the words “Section 5” in order for the legislation to be a valid exercise of enforcement power under the Fourteenth Amendment.\(^51\) This second issue is critical to an analysis of the ADEA because the statute does not specifically mention the Fourteenth Amendment.\(^52\)

In order to understand the current state of the law, it is helpful to examine the factual background of the Seminole Tribe case. In a fractured opinion, the Court held that the IGRA did not abrogate the state’s immunity from a suit brought by the Seminole Indians against the state for failure to negotiate in good faith as required by federal law.\(^53\) Chief Justice Rehnquist, writing for the majority, applied the two-part test first

\(^{47}\) Throughout the years, the Supreme Court has resolutely adhered to the notion that “the constitutionality of action taken by Congress does not depend on the recitals of power which it undertakes to exercise.” Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948); see also EEOC v. Wyoming, 460 U.S. 226, 243–44 n.18 (1983) (“That does not mean... that Congress need anywhere recite the words ‘section 5’ or ‘Fourteenth Amendment’ or ‘equal protection.’”). This principle remains undisturbed by the decision in Seminole Tribe.

\(^{49}\) See id. at 243.
\(^{50}\) 451 U.S. 1, 15–17 (1981).
\(^{51}\) See Wyoming, 460 U.S. at 243–44 n.18; see, e.g, Goshtasby v. Board of Trustees, 141 F.3d 761, 768 (7th Cir. 1998) (“Despite the fact that Pennhurst... warned us to proceed cautiously before determining Congress’s intent... the rule remains that Congress need not use magic words to exercise its enforcement power under § 5 of the Fourteenth Amendment.”).
established by *Green v. Mansour* and found that the IGRA failed the second prong. Additionally, the *Seminole Tribe* Court compared the Indian Commerce Clause and the Interstate Commerce Clause and overruled *Pennsylvania v. Union Gas*. The Court held that it would not sustain abrogation of state immunity if the legislation was passed pursuant to the Commerce Clause. Justice Stevens, writing for the dissent, argued that if the holding in *Seminole Tribe* were taken to its logical conclusion, a vast array of federal actions would now be barred. Justice Stevens wrote that states would be immune from being sued for violations of federal copyright, bankruptcy, and antitrust laws. Clearly, this seems to be beyond the scope of state sovereign immunity envisioned by the founding fathers or the proponents of the Eleventh Amendment.

In *City of Boerne v. Flores*, the Supreme Court held that the power to legislate under Section 5 is not limitless and must be for the purpose of enforcing the other provisions of the Fourteenth Amendment. This principle was followed in *Coger v. Board of Regents of State of Tennessee*, where the Court acknowledged that Section 5 of the Fourteenth Amendment was

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54 474 U.S. 64 (1985). In *Mansour*, the Court pronounced: “States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity.” *Id.* at 68 (citing *Halderman*, 465 U.S. at 99).

55 See *Seminole Tribe*, 517 U.S. at 60–66 (overruling the reasoning in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), that without the power to abrogate state immunity under the Commerce Clause, the power to regulate interstate commerce would be incomplete).

56 See *id.* at 73 (“Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”).

57 See *id.* at 77–78 n.1 (Stevens, J., dissenting).

58 See *id.*


60 The Court noted that while the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. History and our case law support drawing the distinction, one apparent from the text of the Amendment.

*Id.* at 519–20.

61 154 F.3d 296 (6th Cir. 1998).
not specifically referred to in the text of the legislation, but found the legislative history of the ADEA showed that it was enacted under that provision.\(^6\)

II. CIRCUIT COURTS FINDING THE ADEA VALIDLY ABROGATES IMMUNITY

Several appellate courts that have considered the issue of whether the ADEA validly abrogates state immunity have determined that it, in fact, does.\(^6\) This section of the Note will focus on two decisions: *Migneault v. Peck*\(^6\) and *Coger v. Board of Regents of State of Tennessee*.\(^6\)

A. The Migneault Decision

The *Migneault* court followed the holding in *Seminole Tribe* and applied the two-prong test.\(^6\) The court found that the first prong of the test was satisfied based on *Hurd v. Pittsburg State University*,\(^6\) an earlier Tenth Circuit case that held the ADEA was a valid abrogation of Eleventh Amendment immunity because it contained an unequivocal expression of intent.\(^6\) The second prong of the test required the Tenth Circuit to reevaluate its precedent in light of the recent Supreme Court decision, *City of Boerne v. Flores*.\(^6\) In *City of Boerne*, the Court held that Congress, by enacting the Religious Freedom Restoration Act

\(^6\) The court stated that while it is important to be able to determine the power under which the legislation is passed, the fact that Congress did not expressly invoke section 5 of the Fourteenth Amendment should not be regarded as fatal to the abrogation of immunity. See *Coger*, 154 F.3d at 304. "As long as Congress possesses the authority, whether it also has the specific intent to legislate pursuant to that authority is irrelevant." *Id.* at 303 (citing *Doe v. University of Illinois*, 138 F.3d 653, 658–59 (7th Cir. 1998)).

\(^6\) See *Migneault v. Peck*, 158 F.3d 1131 (10th Cir. 1998); *Coger*, 154 F.3d at 299; *Keeton v. University of Nev. Sys.*, 150 F.3d 1055 (9th Cir. 1998); *Scott v. University of Miss.*, 148 F.3d 493 (5th Cir. 1998); *Goshtasby v. Board of Trustees*, 141 F.3d 761 (7th Cir. 1998); *Hurd v. Pittsburg State Univ.*, 109 F.3d 1540 (10th Cir. 1997); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983).

\(^6\) 158 F.3d 1131 (10th Cir. 1998).

\(^6\) 154 F.3d 296 (6th Cir. 1998).

\(^6\) See *Migneault*, 158 F.3d at 1135.

\(^6\) 109 F.3d 1540 (10th Cir. 1997).

\(^6\) See *Migneault*, 158 F.3d at 1136 (citing *Hurd*, 109 F.3d at 1546).

\(^6\) 591 U.S. 507, 520 (1997). In *Migneault*, the University asserted that *City of Boerne* represented superseding Supreme Court authority. Consequently, the court was compelled to leave the safe harbor of past precedent and reexamine whether Congress exceeded its authority under Section 5 of the Fourteenth Amendment in enacting the ADEA. See *Migneault*, 158 F.3d at 1136–37.
(RFRA), exceeded its authority under the Fourteenth Amendment because the Act was not remedial in nature.\textsuperscript{70} The RFRA prohibited state and federal governments from substantially burdening religious exercise, unless that action was the least restrictive means of furthering a “compelling government interest.”\textsuperscript{71} The majority concluded that Congress’s enactment of the RFRA would have modified the scope of the Free Exercise Clause, rather than merely enforcing it.\textsuperscript{72}

The Tenth Circuit was able to distinguish \textit{City of Boerne} because the RFRA’s legislative history lacked evidence of widespread religious discrimination that would warrant such sweeping legislation.\textsuperscript{73} In contrast, the ADEA’s legislative history contained a sufficient showing of age-based discrimination.\textsuperscript{74} It seems, however, the \textit{Migneault} court’s reliance on congressional findings that link the ADEA to Section 5 of the Fourteenth Amendment may be tenuous.\textsuperscript{75} Other circuit courts have also relied on congressional findings in holding that the ADEA is within the ambit of the Fourteenth Amendment.\textsuperscript{76}

The \textit{Migneault} court also addressed a claim that the ADEA was passed pursuant to the Commerce Clause.\textsuperscript{77} Some other

\textsuperscript{70} The Court explained that the legislative history of the Fourteenth Amendment confirms that legislation passed under Section 5 of the Fourteenth Amendment must be remedial in nature. \textit{See City of Boerne}, 521 U.S. at 520.

\textsuperscript{71} \textit{See id.} at 515–16 (“RFRA prohibits ‘[g]overnment’ from ‘substantially burden[ing]’ a person’s exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden ‘. . . is in furtherance of a compelling governmental interest . . .’”).

\textsuperscript{72} \textit{See id.} at 519 (“Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.”).

\textsuperscript{73} \textit{See id.} at 509 (“[The RFRA] is so out of proportion to [any] supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.”).

\textsuperscript{74} In \textit{Migneault}, the court distinguished the heavy-handed approach of the RFRA, which required strict scrutiny review and encompassed laws of general application, from the ADEA’s direct and specific attack on ageism. \textit{See Migneault}, 158 F.3d at 1137–38.

\textsuperscript{75} The court itself recognized this weakness by stating “[w]e recognize the legislative history does not provide specific or detailed evidence of discrimination.” \textit{Id.} at 1138.

\textsuperscript{76} \textit{See Blanckiak v. Allegheny Ludlum Corp.}, 77 F.3d 690, 695 (3d Cir. 1996) (stating that “virtually every court which has addressed the question has concluded that the ADEA was validly enacted pursuant to Congress’s power to enforce section five of the Fourteenth Amendment”).

\textsuperscript{77} \textit{See Migneault}, 158 F.3d at 1136 n.3 (noting that the circuit court had previously revisited an earlier decision, and found that Congress passed the ADEA under Section 5 of the Eleventh Amendment and therefore abrogated sovereign
circuits have found that the ADEA was enacted under Commerce powers, and not under the Fourteenth Amendment.\textsuperscript{78} These courts placed unjustified reliance on the Supreme Court's holding in \textit{EEOC v. Wyoming},\textsuperscript{79} in which a public employee who was forced to retire brought a suit alleging a violation of the ADEA.\textsuperscript{80} The Supreme Court had to rule on whether the ADEA violated the Tenth Amendment.\textsuperscript{81} In holding that the ADEA did not violate the Tenth Amendment, the Court stated that the constitutionality of the ADEA could have its roots in the Commerce Clause.\textsuperscript{82} Even if the ADEA had been enacted pursuant to the Commerce Clause, however, that need not be the exclusive authority to enact such legislation.\textsuperscript{83}

In \textit{Migneault}, the Tenth Circuit, finding no mention of the Fourteenth Amendment in the text of the ADEA, turned to the congressional record.\textsuperscript{84} In contrast to the RFRA considered in \textit{City of Boerne}, the court found that the reports of both the House of Representatives\textsuperscript{85} and the Senate\textsuperscript{86} indicated that the nature of the ADEA legislation was remedial. The reports posited that the purpose of the ADEA amendment was to expand the coverage of the act in order for additional employees to be protected from age discrimination.\textsuperscript{87} Specifically, the reports

\textsuperscript{78} See \textit{EEOC v. Wyoming}, 460 U.S. 226, 234 (1983) (noting that every federal court that had considered the question found that the ADEA was a valid exercise of congressional power, either under the Commerce Clause or under the Fourteenth Amendment).

\textsuperscript{79} 460 U.S. 226 (1983).

\textsuperscript{80} The Plaintiff alleged that mandatory retirement at age 55 was a violation of the ADEA. See \textit{id.} at 234–35.

\textsuperscript{81} The state asserted that a game warden was barred from bringing suit because legislation such as the ADEA cannot impinge on traditional state functions reserved by the Tenth Amendment. See \textit{id.} at 236.

\textsuperscript{82} See \textit{id.} at 243 (“The extension of the ADEA to cover state and local governments, both on its face and as applied in this case, was a valid exercise of Congress’s powers under the Commerce Clause.”).

\textsuperscript{83} See \textit{id.} at 243 n.18; see also \textit{Heart of Atlanta Motel, Inc. v. United States}, 379 U.S. 241, 286 (1964) (Douglas, J., concurring) (stating that while Congress “used the Commerce Clause to regulate racial segregation, it also used (and properly so) some of its power under § 5 of the Fourteenth Amendment”).

\textsuperscript{84} See \textit{Migneault v. Peck}, 158 F.3d 1131, 1138 (10th Cir. 1998) (concluding that the congressional findings and legislative history indicated that age discrimination was a common practice in the workplace).


\textsuperscript{86} See \textit{S. REP. NO. 93-690} (1974).

stated that the amendment would expand coverage of the ADEA to include "Federal, State and local government employees." If a state employee is to be protected from age discrimination in the workplace, the employee must be able to bring an action against the state. The reports concluded that the chief purpose of the amendment was to afford the same protection for older workers in federal, state, and local governments that the ADEA already afforded those in private employment.\(^8\)

Furthermore, the presidential message\(^8\) approving the legislation was another indication that the ADEA was passed pursuant to the Fourteenth Amendment.\(^9\) Legislation passed under the Enabling Clause of the Fourteenth Amendment must be remedial in nature.\(^9\) The ADEA satisfies this requirement by containing within its findings and purpose section,\(^9\) the statement that older persons are routinely discriminated against because of arbitrary age limitations placed on employment opportunities.\(^9\) This reference alone may be sufficient to satisfy the mandate that legislation passed under the Fourteenth Amendment be remedial. The remedial nature of the ADEA, however, is further evidenced by the limited scope of protection granted by the statute\(^9\)---a scope indicative of a statute seeking

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\(^8\) See H.R. REP. NO. 93-913, at 40-41; S. REP. NO. 93-690, at 56.

\(^9\) The legislative history of the ADEA embodies remarks made by President Nixon in 1972. See Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694, 699 (1st Cir. 1983). In addition to adding the word "ageism" to the political lexicon, President Nixon's comments defined age discrimination as an "evil" that would trigger the application of equal protection:

\[\text{Discrimination based on age—what some people call 'age-ism'—can be as great an evil in our society as discrimination based on race or religion or any other characteristic which ignores a person's unique status as an individual and treats him or her as a member of some arbitrarily-defined group . . . . [D]iscrimination based on age is cruel and self-defeating . . . .} \]

\textit{Id.}

\(^{90}\) The strong presidential message embodied in the House of Representatives and Senate Reports lends great insight to the problems that were facing older employees. See H.R. REP. NO. 93-913, at 40; S. REP. NO. 93-690, at 55.

\(^{91}\) See City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

\(^{92}\) See 29 U.S.C. § 621(a), (b) (1994).

\(^{93}\) "[T]he 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 . . . ." \textit{Id.} at § 621(a)(2).

\(^{94}\) The ADEA limits its protection to those employees that are at least 40 years of age. See 29 U.S.C. § 631(a) (1994). Furthermore, the statute recognizes that there are situations in which age may be a bona fide qualification for employment. See 29 U.S.C. § 623(f) (1994).
only to correct discrimination and not create substantive rights. Unlike the statute at issue in City of Boerne v. Flores, the ADEA is less substantive and seeks only to provide redress to those who have been discriminated against. It seems the Tenth Circuit properly determined that the ADEA was remedial in nature and thus within the scope of Enabling Clause authority. While Congress may have passed the ADEA under legislative powers associated with the Commerce Clause, the legislation can likewise be justified under the Enabling Clause of the Fourteenth Amendment. Hence, the Tenth Circuit properly held in Migneault that the defendant, a state university, could be subject to an age discrimination suit under the ADEA.

B. The Coger Decision

The Sixth Circuit likewise found that the ADEA properly abrogated state immunity. It explicitly found that "Congress intended to abrogate the states' Eleventh Amendment immunity from suit by its enactment of the 1974 amendments to the ADEA, and that it had the authority to do so pursuant to Section 5 of the Fourteenth Amendment." The suit involved seventeen faculty members of Memphis State University, who challenged the University's method of giving raises to older faculty members. The Sixth Circuit began its analysis with the first prong of the Seminole Tribe test—the requirement that intent to abrogate be "unmistakably clear." The University contended the ADEA's definition of "employer," which specifically included states, fell short of evincing an unmistakably clear intent to abrogate the state's

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95 Clearly, the ADEA was passed to ensure that discrimination based on age would no longer be seen as permissible. The Equal Protection Clause of the Fourteenth Amendment demands that non-suspect class groups be afforded protection as well. See infra note 113 and accompanying text.
97 See supra notes 85–88 and accompanying text.
98 See Coger v. Board of Regents, 154 F.3d 296, 299 (6th Cir. 1998) (finding that Congress unequivocally expressed its intention to abrogate the states' Eleventh Amendment immunity in ADEA suits).
99 Id. at 307.
100 See id. at 299.
101 Id. at 301–02 (reaching a conclusion based on the Supreme Court's treatment of the age-discrimination issue in the context of statutory schemes such as the IGRA in Seminole Tribe).
immunity.102 The circuit court agreed with the plaintiffs that the ADEA amendments of 1974 showed an unmistakably clear statement of intent to abrogate.103 As in Seminole Tribe,104 the court felt that the same use of language implicating the state as a defendant fulfilled the first prong.105

As for the second prong of Seminole Tribe, "whether Congress has acted 'pursuant to a valid exercise of power,'"106 the Sixth Circuit held that the ADEA amendments were passed under Section 5 of the Fourteenth Amendment.107 The court held that Seminole Tribe did not add a requirement that Congress must intentionally pass legislation under a particular power.108 The court again placed reliance on the congressional findings of the original enactment of the ADEA,109 determining that the statute was intended to remedy the problem of age

102 See id. at 301. Moreover, the University relied on the proposition in Dellmuth v. Muth, 491 U.S. 223 (1989), that the congressional intent must be made with "perfect confidence." Id. at 231.
103 See Coger, 154 F.3d at 301–02 (holding that "Congress made its intent to abrogate the states' immunity against ADEA suits eminently clear").
104 Seminole Tribe v. Florida, 517 U.S. 44 (1996). The statute at issue in Seminole Tribe was the IGRA. The Court in Seminole Tribe found an improper abrogation because the second prong of the two-prong test was not fulfilled. See supra notes 54–55 and accompanying text.
105 In Seminole Tribe, the Court found "[a]ny conceivable doubt as to the identity of the defendant in an action under § 2710(d)(7)(A)(i) is dispelled when one looks to the various provisions of § 2710(d)(7)(B), which describe the remedial scheme available to a tribe that files suit [against a state]." Seminole Tribe, 517 U.S. at 57. The Court concluded that "the numerous references to the 'State' in the text of §2710(d)(7)(B) make it indubitable that Congress intended through the Act to abrogate the States' sovereign immunity from suit." Id. Likewise, in examining Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), the Sixth Circuit was persuaded that the first prong could be fulfilled by a definition of "persons" covered by the statute. Id. at 7. Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the definition of "persons" includes states. See 42 U.S.C. § 9607(a) (1994); see also 42 U.S.C. § 9601(21) (1994) ("The term 'persons' means ... state ... "). Furthermore, under 42 U.S.C. § 9601(20)(D) (1994), states are treated in the same manner as non-governmental owner-operators.
106 Seminole Tribe, 517 U.S. at 55 (citations omitted).
108 See id. at 303 (considering Eleventh Amendment immunity with regard to intent and the ADA).
109 See 29 U.S.C. §§ 621(a)–(b) (1994) (declaring the purpose of the statute is "to prohibit arbitrary age discrimination in employment."); see also Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) (finding that Congress promulgated the ADEA because of concern that "older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes").
discrimination. In addition, the court was not persuaded that the failure to use the words “Section 5 of the Fourteenth Amendment” was fatal.

An alternative argument asserted by the University was that “the ADEA exceeds Congress’s Section 5 enforcement authority because age is not a suspect or quasi-suspect class.” The court held, however, that the fact that age is not a suspect classification does not eliminate the Equal Protection Clause as a source of authorization for Congress to prohibit age-based discrimination.

The University also argued that the ADEA is so expansive that it creates new substantive rights exceeding congressional authority as expressed by the Supreme Court in City of Boerne. The court held that the ADEA, unlike the RFRA, contained the requisite “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” To analyze the ADEA, the Sixth Circuit followed a proportionality inquiry recently constructed by the Fifth Circuit. The court determined that the ADEA was clearly proportional, because age discrimination was a problem detailed in the legislative findings that accompanied the ADEA, and the remedy sought in the legislation was not disproportionate to the “evil.” This court’s analysis should have been instructive

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110 See Coger, 154 F.3d at 304.
111 See id. (relying on EEOC v. Wyoming, 460 U.S. 226, 243–44 n.18 (1983)) (stating that Congress’s failure to invoke a specific authority for its legislation is not fatal).
112 Id. at 305.
113 See id.; see also City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985) (emphasizing that the Equal Protection Clause’s general requirement is that “all persons similarly situated should be treated alike”).
114 See Coger v. Board of Regents, 154 F.3d 296, 305 (6th Cir. 1998). In City of Boerne, the Supreme Court declared the Religious Freedom and Restoration Act (RFRA) unconstitutional. See City of Boerne v. Flores, 521 U.S. 507, 532 (1997) (finding that the RFRA is overbroad and therefore unconstitutional).
115 City of Boerne, 521 U.S. at 520; see also Coger, 154 F.3d at 306–07.
116 See Coolbaugh v. Louisiana, 136 F.3d 430, 435 (5th Cir. 1998) (“This proportionality inquiry has two primary facets: the extent of the threatened constitutional violations, and the scope of the steps provided in the legislation to remedy or prevent such violations.”).
117 This is particularly evidenced by the Presidential message that was delivered in 1972 by President Nixon. See supra note 89.
118 See Coger, 154 F.3d at 306–07. The Sixth Circuit found that “even after the City of Boerne, the fact that some ADEA provisions may exceed constitutional requirements does not render the statute so disproportionate to its purpose that it
to the Supreme Court in its review of the *Kimel* decision. Other circuit courts have used this traditionally accepted analysis to reach similar conclusions about the ADEA. The Sixth Circuit, searching only the ordinary meaning of the ADEA, was able to find both prongs of the *Seminole Tribe* two-part test fulfilled.\(^1\)

### III. CIRCUIT COURTS FINDING THE ADEA DOES NOT VALIDLY ABROGATE IMMUNITY

Other circuits have reached a contrary conclusion concerning the ADEA. Specifically, the Eighth and Eleventh Circuits have found that the Act does not abrogate states' sovereign immunity.\(^1\)^\(^2\)^\(^0\) Their analysis, however, was flawed, in that it failed to grant Congress the deference that it has been traditionally granted by the judiciary.\(^1\)^\(^2\)^\(^1\) Furthermore, the logic applied by these courts was, at best, tenuous.

#### A. The Humenansky Decision

In *Humenansky v. Regents of the University of Minnesota*,\(^1\)^\(^2\)^\(^2\) the Eighth Circuit held that the ADEA was not a proper abrogation of Eleventh Amendment immunity.\(^1\)^\(^2\)^\(^3\) The court contrasted the amendments of the ADEA with the amendments of the Fair Labor Standards Act (FLSA)\(^1\)^\(^2\)^\(^4\) and reached an anomalous result. The court based its decision on what it believed to be a failure to amend Section 626(c) of the ADEA with the same specificity as the FLSA.\(^1\)^\(^2\)^\(^5\) A strong dissent,
however, cited the 1974 amendment to the ADEA, which specifically allowed suits against the states.\textsuperscript{126} The dissent argued that the language of the amendment was sufficient to satisfy the congressional intent requirement set forth in \textit{Seminole Tribe}.\textsuperscript{127} In addition, the dissent stated that the second prong\textsuperscript{128} of the \textit{Seminole Tribe} test was fulfilled because Congress enacted the ADEA pursuant to Section 5 of the Fourteenth Amendment.\textsuperscript{129}

The court held that the University of Minnesota was immune under the Eleventh Amendment and that the ADEA had not abrogated such immunity.\textsuperscript{130} The analysis began with the first prong of the \textit{Seminole Tribe} test,\textsuperscript{131} but analytically, the court became entangled with what it termed a "hybrid enforcement mechanism."\textsuperscript{132} A "hybrid enforcement mechanism" occurs when one section of a statute determines who may seek redress under the statute and another section details the enforcement of the statute through another statute. The ADEA contains one section that authorizes suits under the statute and another section that details enforcement by cross-referencing the FLSA.\textsuperscript{133} The cross-referencing occurred between these two statutes because they were legislated at the same time and the enforcement provisions were only set out in the FLSA.

This cross-reference troubled the Eighth Circuit because an earlier decision by the Supreme Court held that a cross-referenced section did not display the sufficiently clear congressional intent required to abrogate sovereign immunity.\textsuperscript{134}

\begin{footnotes}
\item[126]See id. at 829. The dissent argued that there are "direct textual references to [the] 'state' . . . in the 1974 amendments." Id.
\item[127]See id. The dissent cited \textit{Seminole Tribe} and \textit{Dellmuth} in finding that the definitional change of "employer" to include the states clearly expressed Congress's intent to abrogate state immunity. See id.
\item[128]See supra notes 44–63 and accompanying text.
\item[129]See \textit{Humenansky}, 152 F.3d at 830. The dissent argued that the legislation was validly passed under Section 5 of the Fourteenth Amendment because the ADEA was enacted to enforce equal protection. See id.
\item[130]See id. at 824.
\item[131]See supra note 32 and accompanying text.
\item[132]\textit{Humenansky}, 152 F.3d at 824.
\item[133]See id. As the court noted, 29 U.S.C. §§ 626(b) and (c), provide relief obtainable under the ADEA. Section 626(b) cross-references to an enforcement statute, 29 U.S.C. § 216(b), under the FLSA that also provides relief.
\item[134]See \textit{Humenansky}, 152 F.3d at 824–25; see also \textit{Employees v. Missouri Public Health Dep't}, 411 U.S. 279, 285 (1973) (stating that absent an express provision, Congress may not take away a state's sovereign immunity and allow a citizen to sue
\end{footnotes}
Congress remedied the FLSA in 1974, by amending section 216(b) to allow suits against the states.\textsuperscript{135} Section 626(c) of the ADEA, however, was not amended to allow suits against the states.\textsuperscript{136} The court concluded that since section 626(c) was not amended, there could be no abrogation, despite the definitional changes in the ADEA.\textsuperscript{137} Statutory interpretation, however, leads to a different conclusion with regard to section 626(c).\textsuperscript{138} If the section at issue is read in conjunction with section 630(b), the definitional section, which the court seems to ignore, a wholly different result may be achieved, since section 630(b) as amended explicitly provides that a state may be an "employer" under the Act.\textsuperscript{139} A convincing argument could be made that based on the fact that the definitional section was changed, a

\textsuperscript{135} The Eighth Circuit found that this change in section 216(b) was sufficient to meet the first prong of \textit{Seminole Tribe}. See \textit{Humenansky}, 152 F.3d at 825. Section 216(b) states that "[a]ny employer who violates . . . this title shall be liable to the employee . . . An action to recover the liability . . . may be maintained against any employer (including a public agency) in any Federal or State court." 29 U.S.C. § 216(b) (1994).

\textsuperscript{136} See 29 U.S.C. § 626(c) (1994). The court's basic premise was that this section only contains a general authorization to enforce the ADEA. See \textit{Humenansky}, 152 F.3d at 825. The court specifically found, however, that some portion of the ADEA was covered by the amendment to section 216(b). Therefore, there was proper abrogation at least as it relates to section 626(b), which incorporates section 216(b). \textit{See id}. Section 626(c) reads as follows: “[a]ny 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.” 29 U.S.C. § 626(c) (1994).

\textsuperscript{137} The court was persuasive in stating “[t]here are only two rational answers to [the question why Congress failed to amend § 626(c)]—no intent to abrogate for the ADEA, or legislative oversight, which is not a proper basis for finding 'unmistakably clear' intent to abrogate in the statute's text.” \textit{Humenansky}, 152 F.3d at 825.

\textsuperscript{138} Congress's failure to change this section may not be an oversight on its part. Indeed, the general language coupled with the definitional changes in other sections of the ADEA could lead to an interpretation sufficient to meet the first prong of \textit{Seminole Tribe}. See 29 U.S.C. § 630(b) (1994).

\textsuperscript{139} Thus, if a person is within the class of persons able to bring a suit against the state, under section 630(b), seeking such suit in "any court of competent jurisdiction," under section 626(c), is not inconsistent with the requirements of \textit{Seminole Tribe}. It is true that the word "any" may have unwanted vagueness, but unmistakable authorization for suit is found in section 630(b) which states:

The term "employer" means a person engaged in an industry . . . . The term also means (1) any agent of such a person, and (2) 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, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

failure to change the applicability section is not fatal to the ADEA as applied to state employers. Proper abrogation under *Seminole* could be found if these sections are read together.

The Eighth Circuit also found that the ADEA failed to fulfill the second prong of the *Seminole Tribe* analysis, and was not within the ambit of Section 5 of the Fourteenth Amendment. The plaintiffs argued the ADEA is "'plainly adapted' to enforcing the Equal Protection Clause." However, the Eighth Circuit was not persuaded by the cautionary language the Supreme Court used in *Massachusetts Board of Retirement v. Murgia* that the problems of forced retirement are very serious and require close examination. The Eighth Circuit stated that "it seems likely that only a few isolated, egregiously irrational instances of age discrimination would violate the Equal Protection Clause." This is in stark contrast to the whole notion of "ageism" and the congressional reports, including section 630(b) of the ADEA. While it is true, as the court states, that there may be legitimate reasons for discrimination based on age, the ADEA would only permit such discriminatory practices if the rational basis test was fulfilled.

The Eighth Circuit further posited that the Supreme Court would not embrace an expansive view of congressional power under Section 5 of the Fourteenth Amendment. Analyzing Chief Justice Burger's dissent in *EEOC v. Wyoming*, the circuit court contended that the Constitution does not contain

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140 See *Humenansky*, 152 F.3d at 826.
141 See id.
142 Id. (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).
144 See id. at 317 n.11.
145 *Humenansky*, 152 F.3d at 827.
146 The legislative history and the presidential message strongly indicate that age discrimination is more than an occasional problem. See supra note 85-90 and accompanying text.
147 See *Humenansky*, 152 F.3d at 827 n.4.
148 That is, the discriminatory practice must be rationally related to a legitimate state interest. See *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991) (finding that under a rational basis test, the state's mandatory retirement was "a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform").
149 See *Humenansky*, 152 F.3d at 827.
150 460 U.S. 226, 251–65 (1983) (Burger, C.J., dissenting). The majority in *Wyoming* expressly declined to decide the issue of whether the ADEA was within congressional powers of Section 5. See id. at 243.
any protection for elderly people.\textsuperscript{151} Thus, the court stated that the ADEA "exceeds Congress's section 5 powers as defined in \textit{City of Boerne}."\textsuperscript{152} What the court, however, did not take into account is that there are other Supreme Court precedents that grant protection to non-suspect classes. In \textit{City of Cleburne v. Cleburne Living Center, Inc.},\textsuperscript{153} the Court declared an exclusionary zoning law, prohibiting housing for the mentally retarded, unconstitutional because it did not meet a rational basis review.\textsuperscript{154} Likewise in \textit{Romer v. Evans},\textsuperscript{155} the Court held that a state constitutional amendment, preventing the State of Colorado or any of its cities from granting homosexuals certain protections, was invalid under a rational basis review. In these two cases, the persons that were seeking protection under the Equal Protection Clause were not entitled to elevated protection as a suspect or quasi-suspect class, yet were still afforded protection under the rational basis standard.

The dissent argued that the ADEA fulfilled both prongs of the \textit{Seminole Tribe} decision.\textsuperscript{156} Regarding the first prong, the dissent found the 1974 amendments to the ADEA persuasive to show Congress's intent to abrogate states' sovereign immunity.\textsuperscript{157} The dissent also found the second prong of the analysis fulfilled by the ADEA.\textsuperscript{158} It argued that the ADEA corrects constitutional violations, as illustrated by the congressional announcement released with the statute\textsuperscript{159} and its legislative history.\textsuperscript{160}

\textsuperscript{151} See Humenansky, 152 F.3d at 827–28. The court interpreted the lack of mention of age, and the amount of references to the state sovereign powers in the Constitution, to find that age cannot be protected under the Constitution. \textit{See id.}

\textsuperscript{152} \textit{Id.} at 828. Recall that \textit{City of Boerne} declared the Religious Freedom and Restoration Act (RFRA) unconstitutional because it was "so out of proportion" to the problems that it was seeking to correct. \textit{See supra} notes 59–60 and accompanying text.

\textsuperscript{153} 473 U.S. 432 (1985).

\textsuperscript{154} The Court appeared to be applying the rational basis test with more vigor than it had done previously, however, the inquiry was still framed under the rational basis standard. \textit{See id.} at 447–50.

\textsuperscript{155} 517 U.S. 44 (1996).

\textsuperscript{156} See Humenansky, 152 F.3d at 828–31.

\textsuperscript{157} \textit{See id.} at 829. Indeed, this is the place that other circuit courts have found congressional intent. \textit{See Coger v. Board of Regents}, 154 F.3d 296, 306–07 (6th Cir. 1998).

\textsuperscript{158} See Humenansky, 152 F.3d at 829–31.

\textsuperscript{159} See 29 U.S.C. § 621 (1994). The statute declared "the purpose of this chapter [is] to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and
Additionally, there is a clear distinction between the ADEA and the RFRA.\textsuperscript{161} Unlike the majority opinion that found the ADEA similar to the RFRA, the dissent found more of a similarity between the ADEA and the Americans with Disabilities Act (ADA).\textsuperscript{162} The dissent cited a recent Eighth Circuit decision that held the ADA to be valid legislation under Section 5 of the Fourteenth Amendment.\textsuperscript{163} The dissent drew close analogies between the ADEA and the ADA, finding the ADEA within congressional power.\textsuperscript{164} This argument is persuasive because the statutes that the dissent found analogous both relate to physical characteristics of people. If a disability can be found to be within the ambit of Equal Protection, so too should age—a characteristic that likewise embodies certain physical and mental limitations.

The Eighth Circuit found that the ADEA did not properly abrogate immunity, and left the plaintiff without redress against his employer.\textsuperscript{165} As the dissent argued, the majority of the court failed to grant sufficient deference to Congress.\textsuperscript{166}

B. The Circuit Court Kimel Decision

Like the Eighth Circuit, the Eleventh Circuit held in \textit{Kimel v. State of Florida Board of Regents}\textsuperscript{167} that the ADEA could not pierce state immunity because of a failure on the part of workers find ways of meeting problems arising from the impact of age on employment." \textit{Id.}

\textsuperscript{161} See Humenansky, 152 F.3d at 830.
\textsuperscript{163} See Humenansky, 152 F.3d at 830–31. The dissent was referring to Autio \textit{v. AFSCME Local 3139}, 140 F.3d 802, 805 (8th Cir. 1998) (finding that "[u]nlike the RFRA struck down in Flores, the ADA is 'plainly adapted' as a remedial measure even though each individual violation of the ADA may not in and of itself be unconstitutional").
\textsuperscript{164} See Humenansky, 152 F.3d at 831.
\textsuperscript{165} See id. at 826.
\textsuperscript{166} See id. at 828–31. It is for Congress in the first instance to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference. Katzenbach \textit{v. Morgan}, 384 U.S. 641, 651 (1966).
\textsuperscript{167} 139 F.3d 1426 (11th Cir. 1998).
Congress to fulfill the prongs of the *Seminole Tribe* test. The Eleventh Circuit's decision is somewhat unlike the other circuit decisions discussed in this Note because of the fracture in the court's decision. This fracture was caused by Judge Edmondson's finding that the ADEA failed the first prong of the *Seminole Tribe* analysis, and Judge Cox's finding that the ADEA was not a proper exercise of power under Section 5 of the Fourteenth Amendment, thus causing the ADEA to fail the second prong of the *Seminole Tribe* analysis. Together their concurring and dissenting opinions, albeit on different grounds, stated that the ADEA did not validly abrogate sovereign immunity.

The Eleventh Circuit's analysis by Judge Edmondson began with a discussion of whether the ADEA contained unmistakable legislative intent. The court held that the ADEA did not contain such intent, and therefore it need not reach the second prong of the *Seminole Tribe* analysis. Relying on *Dellmuth v. Muth*, the court refused to "go beyond the text of the ADEA in deciding whether it contains the requisite, unmistakably clear statement of intent to abrogate." The court misinterpreted the Supreme Court's precedent. The *Dellmuth* decision stated that "[l]egislative history generally will be irrelevant" because if the

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168 The court stated that it would not review whether the ADEA was properly legislated under the Fourteenth Amendment, but would determine whether the ADEA contained the requisite language to demonstrate that Congress intended to abrogate immunity. See id. at 1430.

169 See id. at 1427.

170 See id. at 1433, 1444.

171 See id. at 1433.

172 See id. at 1428–33.

173 See id. at 1433 ("[T]he ADEA contains no unequivocally clear statement of such intent."). In the dissent, the second prong of the *Seminole Tribe* test is discussed at great length. See id. at 1436–45. Judge Edmondson stated that he did not want to decide whether the ADEA was validly passed pursuant to the Fourteenth Amendment. See id. at 1430. Judge Edmondson posited three reasons why the ADEA would not pass the second prong of the *Seminole Tribe* test: (1) the ADEA had been held by the Supreme Court to be passed under one statute, and therefore a court should be careful not to find it legislated under another constitutional power, (2) the two statutes were passed together in the same bill (ADEA and FLSA) therefore, it seems likely that Congress passed the statutes under the same power, and Congress explicitly declared this power as Commerce for the FLSA, and (3) age is a questionable ground for Congress to be legislating under the Fourteenth Amendment. See id. at 1430 n.8.


175 *Kimel*, 139 F.3d at 1430.
intent is clear in the language of the statute, "recourse to legislative history will be unnecessary." If, however, the language in the ADEA is not clear, then recourse to the legislative history is instructive. The findings of both the House and Senate contain very clear statements of the purpose of the ADEA. The statement in *Dellmuth* should not have precluded Judge Edmondson from looking to the legislative history.

Drawing a distinction between the ADEA and the IGRA, the court found that the ADEA had language that was indeed broader than the IGRA, thus shedding little light on whether a suit could be brought by an individual against a state in federal court. The general language of the statute, however, should satisfy the court. The statute specifically provides that states are employers for the purposes of the statute.

The court was troubled that the statute required the "fit[ting] together [of] various sections of the statute to create an expression from which one might infer an intent to abrogate." Thus, in reading the various sections of the ADEA, the abrogation never becomes "as clear as is the summer's sun." The court, however, missed the point. If an act is printed in many separate sections of United States Code, the legislative intent of the statute must necessarily be found in several sections of the Code. Therefore, a court needs to piece together portions of the Code to arrive at an interpretation of the statute.

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176 *Dellmuth*, 491 U.S. at 230.
177 See supra notes 84–90 and accompanying text (discussing the Tenth Circuit's reliance on House and Senate Reports in determining that the ADEA is within the scope of the Enabling Clause authority).
178 Recall this is the IGRA. See supra note 54 and accompanying text.
179 *Kimel*, 139 F.3d at 1431 n.9.
180 See id.
181 See 29 U.S.C. § 630 (1994) (stating that "employer" means "a State or political subdivision of a State.").
182 *Kimel*, 139 F.3d at 1431.
183 WILLIAM SHAKESPEARE, KING HENRY THE FIFTH act 1, sc. 2. The fact that the court resorts to William Shakespeare in support of its rationale portrays the court's zealoussness. See *Kimel*, 139 F.3d at 1431 n.10. Shakespeare's statement was made by Henry V as an excuse for his invasion of France, but it is questionable whether Henry V believed it. It is unclear why, with the quantity of case law handed down by the Supreme Court regarding the standard for abrogation, the Eleventh Circuit would have to turn to Shakespeare to make its point.
The court further attacked the ADEA by proving that there was no "unequivocal expression" in the statute. In Dellmuth, the Supreme Court suggested that a statute may eliminate sovereign immunity "without explicit reference to state sovereign immunity or the Eleventh Amendment." Thus, it seems the Eleventh Circuit interpreted Dellmuth too narrowly.

A citizen may have other remedies against a state besides a private suit. For instance, in Seminole Tribe, the Supreme Court stated that the federal government could sue a state in federal court and that an individual could sue a state officer in order to ensure that the officer's conduct complies with federal law. The Eleventh Circuit posited that a possible congressional intent for the 1974 amendments to the ADEA was to authorize such alternative remedies. This argument is not cogent. The cases that Seminole Tribe cites, namely Ex Parte Young and United States v. Texas, would apply to the ADEA without any congressional amendment to the statute at issue. By this reasoning, Congress's only purpose for amending the ADEA would have been to enable private age discrimination suits against states.

In contrast, the court found that the ADA contained language sufficient to meet the two-prong Seminole Tribe test. The court concluded that the express language of the ADA satisfied the first prong of Seminole Tribe. The statute's explicit reference to the constitutional power being exercised by Congress, though not dispositive, was a heavily weighted factor in the court's decision.

§§ 7401–7671 (1994) each contain multiple sections that when read together seem to give the full interpretation of the law.

185 Kimel, 139 F.3d at 1430.
188 See Kimel, 139 F.3d at 1432.
189 209 U.S. 123 (1908).
190 143 U.S. 621 (1892).
191 Indeed, this is part of the argument that the Court advanced in Seminole Tribe. See Seminole Tribe, 517 U.S. at 71.
192 See Kimel, 139 F.3d at 1433.
193 See id. The court found the words "[a] State shall not be immune under the eleventh amendment," under the statute met its standard of "unmistakably clear" intent. See Kimel, 139 F.3d at 1433. The court then noted that these "magic words" were not necessary. See id. at 1433 n.15.
C. The Circuit Court Kimel Dissent

In his dissent, Chief Judge Hatchett argued that both the ADEA and ADA validly abrogate states' sovereign immunity.194 The Chief Judge argued that “[a]lthough Judge Edmondson state[d] that [the court does] not require Congress to use any ‘magic words’... his opinion... requir[ed] exactly that.”195 Noting that several circuits have found the definitional change in the ADEA sufficient, the Chief Judge argued that “[t]he 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.”196 Notably, the Supreme Court has found definitional changes, similar to that in the ADEA, to be sufficient in the past.197 The dissent thus reasoned that the first prong of Seminole Tribe was fulfilled.

The second part of the Chief Judge’s analysis focused on Judge Cox’s reliance on City of Boerne.198 The Chief Judge argued that Judge Cox wrongly interpreted the City of Boerne holding, thus unconstitutionally limiting Congress.199 The ADEA is unlike the RFRA, because it does not profess to legislate a judicial standard of review.200 The ADEA is designed to protect elderly workers, a class that ought to be free from arbitrary or irrational discrimination. It is not a statute that mandates a standard of judicial review.201 The Chief Judge further argued that the ADEA can protect elderly workers even though the Supreme Court has not yet declared that constitutional violations have occurred.202 This conclusion

194 See id. at 1434 (Hatchett, C.J., dissenting).
195 Id. at 1435.
196 Id.
198 See Kimel, 139 F.3d at 1436.
199 See id. at 1437.
200 See id. In the RFRA, Congress included language that “prohibit[ed] ‘[g]overnment’ from ‘substantially burden[ing]’ a person’s exercise of religion even if the burden result[ed] from a rule of general applicability unless the government [could] demonstrate the burden ‘(1) [was] in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling governmental interest.’ ” Id. at 1436 n.7 (alteration in original) (quoting 42 U.S.C. § 2000bb-1 (1994)).
201 See Kimel, 139 F.3d at 1437.
202 See id. at 1438.
emerges from the rational-basis standard because it "reflects[s] the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." The dissent found the ADEA within the "wide latitude" of deference that should be given to Congress.

Moreover, the dissent argued that "[t]he ADEA is an appropriate, proportional remedial measure to address age discrimination." The most recent standard used to determine this part of the second prong is whether there is "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Facially, the ADEA contains findings of acts of age discrimination that have occurred. The statute itself contains a provision allowing age discrimination when justified by job classification. This is further evidence that the statute itself is proportional to the perceived issue of age discrimination and within the standards of the second prong of Seminole Tribe. The Chief Judge would have found that both the ADEA and ADA validly abrogate state immunity under the Fourteenth Amendment.

Judge Cox filed a third opinion in which he concurred in part and dissented in part. He wrote that Congress lacked the constitutional authority to abrogate the states' Eleventh Amendment immunity from suit under both the ADEA and the

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203 Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976). On a practical basis, if legislation such as the ADEA were found invalid, the legislative process would be stifled. Congress could not pass any legislation pursuant to the Enabling Clause of the Fourteenth Amendment and the clause would have no real meaning.

204 See Kimel, 139 F.3d at 1438; see also City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997) (stating that with regard to abrogation Congress should be given "wide latitude").

205 Kimel, 139 F.3d at 1439.

206 City of Boerne, 521 U.S. at 520.

207 See 29 U.S.C. § 621 (1994) (stating that discrimination had become a "common practice" that was unrelated to legitimate employment goals). In addition, the floor debate discussions in the years preceding 1974 are instructive. See 110 Cong. Rec. 2596-99, 9911-13, 13490-92 (1964); 118 Cong. Rec. 7745 (1972). The legislative history from 1974 is somewhat scant but there is reference to earlier history. See supra notes 85-90 and accompanying text.

208 See 29 U.S.C. § 623(f)(1) (1994). Employers can defend their employment decisions on the ground that there are "bona fide occupational qualification[s] reasonably necessary to the normal operation of the particular business." Id.

209 See Kimel, 139 F.3d at 1444.

210 See id.
The Judge did not want to decide the "thorny issue of Congress's intent" because of the "recently revisited... limits on [Fourteenth Amendment congressional] power." Thus, Judge Cox maintained, neither the ADEA nor the ADA fulfilled the second prong of *Seminole Tribe*. Citing *City of Boerne*, Judge Cox argued that "legislation enacted pursuant to § 5 must hew to the contours of Supreme Court-defined Fourteenth Amendment rights unless the legislation is a proportional response to a documented pattern of constitutional violation."

Finding that the ADEA was not a proper exercise of Congress's Enabling Clause powers, it seems Judge Cox properly analyzed the statute by determining whether the conduct could be regulated under the Fourteenth Amendment. Determining that age discrimination by government could be regulated under the Fourteenth Amendment, Judge Cox applied a rational-basis standard. Most legislation will pass this low level of scrutiny, but if the varying treatment of persons is sufficiently "unrelated to the achievement of any... legitimate purposes" the action will be found to be a violation of the Equal Protection Clause.

The Supreme Court has found that age discrimination is not a violation of the rational-basis standard on three separate occasions. In other contexts, however, the arbitrary firing of persons solely based on age would likely lack a rational basis. Judge Cox made light of this by stating "[t]o the spry octogenarian... a mandatory retirement age is arbitrary." It is this precise notion that justifies protection of the elderly via the Fourteenth Amendment. Judge Cox further argued that the ADEA was not enforcement legislation. He asserted that the ADEA subjected age discrimination to a more rigorous test than the rational-basis test, which is normally applied to violations of the Equal Protection Clause that do not involve a suspect

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211 See id.
212 Id. at 1445.
213 See id.
214 Id. at 1446.
216 *Gregory*, 501 U.S. at 471.
217 See id. at 473 (upholding mandatory retirement of judges at age 70); *Vance v. Bradley*, 440 U.S. 93, 94–95 (1979) (finding a policy requiring officers to retire at age 50 to meet the rational basis standard); *Murgia*, 427 U.S. at 316–17 (holding policy that requires police officers to retire at age 60 constitutional).
218 *Kimel*, 139 F.3d at 1447.
Those who have been fortunate to become advanced in years may not have the dexterity required for employment in the police force or judiciary. If such persons, however, do possess the necessary skills for their jobs even as they age, they should not be discriminated against solely because they are old. The Fourteenth Amendment, therefore, should protect the rights of such persons from curtailment by the States.

IV. THE SUPREME COURT DECIDES KIMEL

The Supreme Court granted certiorari to review the Kimel decision. Many scholars and spectators of the Court closely followed this case. In its last Term, the Supreme Court heard a trio of cases that were closely related to the Kimel decision, and held that the states were immune from suit under several statutes. These decisions underscore the Court’s reluctance to abrogate states’ sovereign immunity. More fundamentally, this

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219 See id. at 1448.
220 One could argue that police officers and judges are both professions that require physical strength. A police officer can be called upon to use physical strength to apprehend a criminal. To a lesser extent, a member of the judiciary is called upon to use physical strength in sitting long hours on the bench. This Note posits that there is an element of physical strength in both jobs and the jobs should not be treated differently by the courts.
221 Whether the term “age as a proxy,” as stated in Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993), is used or not, the firing of an older employee without regard to his or her skills is discrimination based on age.
225 Notably, the Court held that the Patent and Lanham Acts did not validly abrogate sovereign immunity. See Florida Prepaid, 119 S. Ct. at 2202; College Sav. Bank, 119 S. Ct. at 2233.
Note advances the theory that the Supreme Court will continue to narrow the ability of Congress to legislate pursuant to the Enabling Clause of the Fourteenth Amendment.

This trend began with the Seminole Tribe decision that was handed down in 1996. In Seminole Tribe, the Court overruled an earlier case that allowed abrogation of state immunity under the Commerce Clause, thereby limiting Congress to passing abrogating legislation under the Fourteenth Amendment. Just one year later, in City of Boerne v. Flores, the Court held it is the ultimate authority on the scope of Fourteenth Amendment rights. Last Term, Chief Justice Rehnquist furthered the Court's initiative toward a higher standard of judicial review in Florida Prepaid Postsecondary Education Expense Board v. College Saving Bank.

In Florida Prepaid, the Court found the Patent and Plant Variety Protection Remedy Clarification Act (PRA) did not validly abrogate state immunity because it failed the second prong of the Seminole Tribe test. The Court held that there was not enough of a substantial showing of the states' prior infringement of patents to demonstrate that the Act was "remedial" in nature. A review of the Act's legislative history did not disclose sufficient findings to satisfy the Court. Importantly, the Court seemed to again raise the bar with regard to the proper finding of abrogation under Seminole Tribe and City of Boerne.

227 See id. at 65–66 (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).
229 See id. at 524, 536.
230 See Florida Prepaid, 119 S. Ct. at 2199.
231 See id. at 2202.
232 See id. at 2207–11 (discussing possible avenues for upholding the Patent Act, but ultimately concluding that the Act fails the test).
233 See id. 2207–08. "The record at best offers scant support for Congress's conclusion that States were depriving patent owners of property without due process of law by pleading sovereign immunity in federal-court patent actions." Id. at 2210.
234 In fact, the Court cites the legislative records within its opinion. See id. at 2207. In particular, the House Subcommittee Report expressly acknowledges that there is no problem with patent infringement by states. See id. There are, however, at least eight instances of patent infringement by states within the past one hundred years. See id.
235 See id. at 2210–11.
The Court's recent position has continued in the current Term. The *Kimel* decision has proven the Court's reluctance to find legislation to properly abrogate state sovereign immunity under the Fourteenth Amendment. Justice O'Connor, writing for the majority, has led the Court in such a direction through *Kimel* by simply applying existing precedent. The Court did not expressly set a more stringent standard for Fourteenth Amendment legislation that abrogates state immunity. The Court held that the ADEA is not valid legislation because it lacks sufficient congruence and proportionality required under the second prong of the *Seminole Tribe* analysis. The Court did not create a new precedent by requiring "magic words." Future circuit court decisions will be guided by this Supreme Court decision. Unfortunately, the Court continued its assault on citizens' rights to sue states, by finding that the ADEA was unconstitutional. This is a continuation of the Court's tendency to limit the legislation that Congress may pass.

Due to the Court's finding that the ADEA is unconstitutional, a public employee cannot bring an action against their state employer for discrimination. In light of its holding regarding the ADEA, the Court can venture forth and attempt to nullify other statutes that abrogate sovereign immunity. Perhaps, the Court will find portions of the Civil Rights Act unconstitutional because they are not remedial. The deprivation of a person's civil rights is egregious and

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236 This involves applying the *Seminole Tribe* two-prong test in light of *City of Boerne* and *Florida Prepaid*. Justice O'Connor noted that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute," and that such statute must have congruence and proportionality between the injury to be prevented and the statutory remediation. *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 640 (2000) (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989)).

237 The Court recognized its own reapplication of the test to determine whether legislation validly abrogates sovereign immunity. In the preceding Term, the Court considered whether the Patent Remedy Act was valid legislation by using the same test. *See id.* at 649.

238 *See id.*

239 *See supra* note 195 and accompanying text.

240 *See 42 U.S.C. § 1983* (1994). This statute allows a private suit for damages to be brought against any person who, "under color of any statute" or other law, deprives the plaintiff of "any rights, privileges or immunities secured by the Constitution and laws." This provision is one of the best known federal protections for individuals, often used to bring suit against state and local officials who violate individuals' civil rights. The constitutional basis for this statute is the Enabling Clause of the Fourteenth Amendment. *See id.*
requires protection. Section 1983 clearly provides very general protection. The Court may determine that such broad protections are beyond the remedial scope of Section 5 of the Fourteenth Amendment. It would not be inconceivable for the Court to conclude that the Civil Rights Act is not remedial in purpose and that it fails the second prong of the *Seminole Tribe* analysis. Thus, it is arguable that the Court could find Section 1983 unconstitutional. This type of action would cause great problems for the United States. Hopefully, the Court will not take such action but it is not inconceivable given the current trend.

**CONCLUSION**

Congress may legislate pursuant to the Enabling Clause of the Fourteenth Amendment to effectively abrogate state immunity under the Eleventh Amendment. This Note supports the Age Discrimination in Employment Act as a valid exercise of congressional power under the Enabling Clause. Although some circuits have found that the ADEA is a valid exercise of power under the Fourteenth Amendment, the Supreme Court has determined that the Eleventh Circuit was correct in their decision of the *Kimel* case. Thus, the Supreme Court has demonstrated that the current Term has not departed from a course that will strike down congressional legislation that infringes on state immunity.

Due to the pervasiveness of age discrimination in the workplace, it seems desirable to have Congress pass legislation such as the ADEA to protect state workers and remedy past discriminatory practices. The United States has a tripartite system of government, with powers precariously balanced among the three branches. Should the Court continue to strike down statutes that abrogate state immunity, this balance may be irreparably shifted in a way that will harm persons, which Congress attempts to protect by way of the Fourteenth Amendment.

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241 The use of the word "any" implies broad protection. *See id.*