THE SUPREME COURT'S DECISION TO BAR AGE DISCRIMINATION LAW SUITS AGAINST STATES IN FEDERAL COURTS

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I. INTRODUCTION

Consider this scenario: In the early spring of 2000, Dr. Smith, a 55-year-old male, and Dr. Jones, a 35-year-old male, are associate professors in the same department at a major state university. Both have submitted promotion packets to their department chairperson for promotion to full professor. The criteria at the university for promotion and merit pay increases includes teaching performance, research productivity, and service to the university community. Although both have been tenured for eight years and have been associate professors for the last four years, Dr. Smith's record is clearly superior to that of Dr. Jones. Dr. Smith's teaching evaluations place him in the top ten percent of his department while Dr. Jones is considered a mediocre teacher. Smith has published three refereed articles in top tier journals over the past four years while Jones has published only one refereed article in a lower level journal. Their service contributions are equal. When the promotion list is announced, everyone in the department is shocked to learn that Jones is promoted to full professor with a ten

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percent merit pay increase while Smith is turned down and receives no pay increase.

Professor Smith cannot understand why he was turned down for full professor while Jones was promoted until two colleagues inform him that they had overheard a conversation between the dean and department chair. The dean had explained that in order for the department to be approved for a new Ph.D. program, the chair would have to figure out a way to get rid of the older faculty so that younger research oriented faculty could be hired. The dean further stated that it was his opinion that Jones had "real potential." Both colleagues were willing to sign affidavits and/or testify in Dr. Smith's behalf.

With this information in hand, Dr. Smith is convinced that he has a valid claim in federal court under the Age Discrimination in Employment Act of 1967, as amended in 1974 (ADEA).[1] Dr. Smith is astounded to learn from his attorney that the U.S. Supreme Court has just decided a landmark case, *Kimel v. Florida Board of Regents*,[2] on January 11, 2000 that bars Dr. Smith from bringing his age discrimination lawsuit in the federal court system. Further, Dr. Smith's only possible remedy within his state court system will be dismissed if his state does not have an age discrimination law on the books.

This paper will discuss the ramifications of the *Kimel* decision in which the Supreme Court ruled that state employees over the age of 40 cannot go into federal court to sue on the basis of age discrimination even though there has been a federal law prohibiting such discrimination in existence since 1967.[3] In a 5-4 vote, the Court concluded that Congress exceeded its authority in permitting such age discrimination claims against the states to be filed in the federal courts under the Act.[4] The ruling dismissed three separate federal cases from Florida and Alabama that had been consolidated as part of the *Kimel* case.

Justice Sandra Day O'Connor, who wrote the opinion for the majority, stated that this federal law (ADEA) passed under the authority of the Fourteenth Amendment's equal protection guarantee cannot override states' Eleventh Amendment immunity, which protects states from being sued in federal court.[5] Justice O'Connor went on to state that Congress does not have the power to enforce the Fourteenth Amendment's equal protection guarantee when attempting to safeguard

[1] Age Discrimination in Employment Act, 29 U.S.C. § 621 (1999).
[2] Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000).
[3] *Id.*
[4] *Id.* at 637.
[5] *Id.* at 642-43.

employees of state and local governments against age bias claims committed by the states and/or municipalities.[6]

The majority opinion of the Court concluded that all state employees who have been discriminated against because of their age can still sue in their state courts even though they are now barred from the protection of the federal courts.[7] But there are two states, Alabama and South Dakota, which do not have any age discrimination laws on the books that would allow employees to sue their state government employers.[8] In addition, other states could rescind their anti-bias statutes or limit damages in these lawsuits. Therefore, because of the *Kimel* decision, many litigants over the age of forty may not have a forum in which to exercise their age bias claims.[9]

It is the purpose of this article to examine this most important Supreme Court decision. First, the article will trace the historical development and purpose of the Age Discrimination in Employment Act of 1967 and its 1974 amendment that extended protection to state employees. Next, the article will review the Supreme Court decision concerning the three companion cases that were consolidated as part of the *Kimel* case. Finally, the article will analyze the potential negative impact that the decision will have on plaintiffs seeking redress against state or municipal employers for age discrimination claims.

II. HISTORICAL DEVELOPMENT AND PURPOSE OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

Fifty years ago Congress started the process of prohibiting age discrimination in employment.[10] This process was prompted by Congress' concern that older workers were being deprived of employment opportunities on the basis of "inaccurate and stigmatizing stereotypes."[11] Congress was seeking to prevent disparate treatment of older workers when the motivation of the employer's action was based solely on age.[12]

[6] *Id.* at 648.

[7] *Id.* at 648-49.

[8] *Id.* at 650.

[9] Richard Carelli, "Justices reject age-bias claims," Charlotte Observer, Jan. 12, 2000 at 6A.

[10] EEOC v. Wyoming, 460 U.S. 226, 234 (1983).

[11] Hazen Paper Company v. Biggins, 507 U.S. 604, 610 (1993) (emphasis added), (holding that an employer's interference with the vesting of pension benefits (which vest upon a certain number of years of service) does not necessarily violate the ADEA if the employer was motivated by factors other than age).

[12] *Id.* at 610.

Age discrimination amendments were initially considered for inclusion in Title VII of the Civil Rights Act of 1964.[13] Congress concluded, however, that further research should be compiled before enacting legislation. A provision was included in Title VII directing the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected . . . ."[14]

The report of the Secretary of Labor concluded that many employers adopted age limitations that had a negative effect upon older workers.[15] The age discrimination practiced by employers was based on stereotypes which were not supported by facts.[16] The report further found that the performance of older workers generally matched their younger counterparts.[17] The report went on to state that arbitrary age discrimination deprived the economy of the productivity of millions of people while creating substantially increased federal costs to pay for additional unemployment and social security benefits.[18] The report finally stated that older employees sustained economic costs and psychological injury because of the loss of gainful employment.[19]

The Age Discrimination in Employment Act of 1967[20] was the culmination of research conducted in the 1950s and early 1960s. In the beginning of the Act, Congress set forth statements of findings explaining why older workers are discriminated against because of arbitrary age limitations.[21] First, older workers find that retaining their jobs is more difficult and after they are terminated, they experience even more difficulty in obtaining new employment because of their age.[22] Second, establishing arbitrary age limits has become a common practice among employers, all to the disadvantage of older workers.[23] Third, the unemployment of the elderly is growing substantially, causing numerous severe financial and psychological problems.[24]

[13] *Wyoming*, 460 U.S. at 229.

[14] *Id.* at 230 (citing Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (1965), Legislative History 16-41).

[15] *Id.* at 230-31. The various research endeavors utilized to yield these conclusions are cited in EEOC v. Wyoming, 460 U.S. 226, 230.

[16] *Id.* at 231.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621.

[21] 29 U.S.C. § 621.

[22] § 621(1).

[23] § 621(2).

[24] § 621(3).

Finally, commerce and the free flow of goods in commerce are diminished.[25]

Congress concluded that the purposes of the Act are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."[26]

The Act makes it unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with [the ADEA].[27]

In its original form, the ADEA did not cover public sector employees, whether state or federal, from age discrimination. A 1973 Senate committee found this gap in coverage to be serious and commented that government managers, like corporate managers, also create an environment where young is sometimes better than old.[28] Therefore, in 1974 an ADEA amendment modified the definition of 'employer' to include state and local governments.[29] Protection for federal employees was incorporated in a separate portion of the Act.[30] This section created an independent enforcement mechanism with jurisdiction in the hands of the Civil Service Commission.[31]

As stated in the Act,[32] employees between forty and sixty-five years of age are protected under the ADEA from age-based employment discrimination. In 1978, Congress increased the maximum age from 65 to 70 years and removed the upper limit with respect to federal

[25] § 621(4).
[26] *Id.*
[27] 29 U.S.C. § 623(a).
[28] *Wyoming*, 460 U.S. at 233 (quoting Senate Special Committee on Aging, Improving the Age Discrimination Law, 93d Cong., 1st Sess., 14 (Comm. Print 1973)).
[29] 29 U.S.C. § 630(b).
[30] § 633(a).
[31] *Wyoming*, 460 U.S. at 233.
[32] § 631(a).

workers.[33] Subsequently, in 1986 Congress eliminated the upper age limit entirely and thereby protected all employees over the age of forty from age-based employment discrimination.[34]

If violations of the ADEA occur, the injured party may "bring a civil action *in any court of competent jurisdiction* for such legal or equitable relief as will effectuate the purposes of [the ADEA]."[35] This section explicitly incorporates Section 216 of the Fair Labor Standards Act of 1938, which grants individuals the ability to maintain actions "against an employer in any federal or state court of competent jurisdiction . . . ."[36] However, suits against the federal government are only to be brought in federal district court.[37]

Once the suit is instituted, an individual may prove age discrimination through the use of either the burden shifting approach or direct evidence. Because direct evidence of an employer's discriminatory intent is so extraordinarily hard to obtain, the burden shifting approach is more commonly utilized.[38] Under this approach, in order to show a *prima facie* case of age discrimination, the Plaintiff must assert the following: membership in a protected age group, satisfactory job performance, an adverse employment action (such as termination of employment), and that "substantially younger, similarly-situated employees were treated more favorably."[39] Upon this showing, the burden of proof will shift to the defendant/employer, who then is responsible for proving that there was no disparate treatment with regard to the employee's age.[40]

Prior to a 1981 federal district court decision,[41] every federal court that considered the constitutionality of the 1974 extension of the Act to protect state and local workers, upheld the extension as an exercise of Congress' power under either the Commerce Clause or Section 5's equal opportunity provision of the Fourteenth Amendment.[42] In the past several years there have been a number of cases in which the Supreme Court has limited Congress' ability to legislate with regard to state

[33] 92 Stat 189.

[34] *See e.g.*, Age Discrimination in Employment Act Amendment of 1986, 100 Stat 3342.

[35] 29 U.S.C. § 623(c)(1) (emphasis added).

[36] *Kimel*, 120 S. Ct. at 639 (citing 29 U.S.C. § 626(b)).

[37] § 633(a).

[38] Chiaramonte v. Fashion Bed Group, Inc., 129 F.3d 391, 396 (1997) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

[39] *Id.* at 398.

[40] *Id.*

[41] EEOC v. Wyoming, 460 U.S. 226 (1983).

[42] *Wyoming*, 460 U.S. at 234.

actions.[43] The most recent attack has been on the Age Discrimination in Employment Act of 1967 (ADEA).

On January 11, 2000, the Supreme Court determined in *Kimel v. Florida Board of Regents*[44] that the ADEA was not enacted under Congress' Section 5 power of the Fourteenth Amendment[45] and therefore, cannot break the barrier of the States' Eleventh Amendment[46] immunity from suit.[47] As a result of the *Kimel* decision, states can no longer be sued in federal or state court under the ADEA without an explicit waiver of their Eleventh Amendment sovereign immunity protection.[48] It is important to grasp the factual dispute and procedural history of the three companion cases consolidated by the U.S. Circuit Court of Appeals under the umbrella of the *Kimel* case.

III. DECISION BY SUPREME COURT TO LIMIT CONGRESS' POWER TO ABROGATE STATES' ELEVENTH AMENDMENT IMMUNITY FROM SUIT

Three otherwise unrelated lawsuits were consolidated by the U.S. Circuit Court of Appeals with regard to whether the Eleventh Amendment bars suits against a State based upon the Age Discrimination in Employment Act of 1967. In the first companion case, *Kimel v. Florida Board of Regents*,[49] Daniel J. Kimel and other current and former faculty and librarians of Florida State University and Florida International University filed suit in 1995 in the United States District Court for the Northern District of Florida. The plaintiffs, all over age forty, "alleged that the Florida Board of Regents refused to require the two state universities to allocate funds to provide previously agreed upon market adjustments to the salaries of eligible university employees."[50] In so refusing, Kimel argued the Florida Board of Regents was in direct violation of the Age Discrimination in Employment Act of 1967. The District Court denied the Florida Board of Regents motion to dismiss on the grounds of its Eleventh Amendment immunity right. In doing so,

[43] Carelli, *supra* note 9.

[44] Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000).

[45] Section 5 of the Fourteenth Amendment to the United States Constitution provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV, § 5.

[46] The Eleventh Amendment to the United States Constitution provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend XI.

[47] *Id.* at 642-43.

[48] Erwin Chemerinsky, *Ability to Sue State Governments Narrowed*, TRIAL, Dec. 1999, at 72.

[49] Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000).

[50] *Id.* at 636.

the district court stated "that the ADEA is a proper exercise of congressional authority under the Fourteenth Amendment."[51] The State appealed to the U.S. Circuit Court of Appeals for the Eleventh Circuit where the federal appellate court consolidated it with two other appealed cases.[52]

In the second companion case, *MacPherson v. University of Montevallo*,[53] Roderick MacPherson and Marvin Narz filed suit in 1994 in the U.S. District Court for the Northern District of Alabama. Their suit alleged that the University of Montevallo "discriminated against them on the basis of their age,[54] that it had retaliated against them for filing discrimination charges with the Equal Employment Opportunities Commission (EEOC), and that its College of Business, [where] they were associate professors, employed an evaluation system that had a disparate impact on older faculty members."[55] As an instrumentality of the State of Alabama, the University of Montevallo filed a motion to dismiss the suit for lack of subject matter jurisdiction, contending the suit was barred by the Eleventh Amendment. The U.S. Federal District Court granted this motion on September 9, 1996. In holding that the ADEA did not abrogate the States' Eleventh Amendment immunity from suit, the Court noted that while the ADEA contained a clear statement of Congress' intent to abrogate the State's Eleventh Amendment immunity, Congress did not do so under its Fourteenth Amendment Section 5 enforcement power.[56] The plaintiffs appealed this decision to the U.S. Circuit Court of Appeals for the Eleventh Circuit where it was consolidated with *Kimel*.[57]

In the third companion case, *Dickson v. Florida Department of Corrections*,[58] Wellington Dickson, who was over forty years of age, filed suit in 1996 in the U.S. District Court for the Northern District of Florida. This suit alleged that the Florida Department of Corrections "failed to promote him because of his age and because he had filed grievances with respect to the alleged acts of discrimination."[59] As in the previous cases, the defendant filed a motion to dismiss on grounds

[51] *Id.* at 636 (citing No. TCA 95-401-MMP (ND Fla., May 17, 1996), App. to Pet. for Cert. in No. 98-796, pp. 57a.-62a.).

[52] *Id.* at 631.

[53] MacPherson v. University of Montevallo, 938 F.Supp. 785 (N.D. Ala. 1996).

[54] MacPherson and Narz were 57 and 58 years of age, respectively, at the time suit was filed against the University. *Kimel*, 120 S. Ct. at 636.

[55] *Kimel*, 120 S. Ct. at 636.

[56] *Id.* at 636 (citing MacPherson v. University of Montevallo, 938 F.Supp. 785 (N.D.Ala. 1996)).

[57] Kimel v. State of Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998).

[58] Dickson v. Florida Dept. of Corrections, No. 5:9cv207-RH (ND Fla., Nov. 5, 1996), App. to Pet. for Cert. in No. 98-796, pp. 72a-76a.

[59] *Kimel*, 120 S. Ct. at 637.

that the case was barred by Eleventh Amendment immunity to suit. This motion was denied on November 5, 1996. The District Court stated that "Congress unequivocally expressed its intent to abrogate the States' Eleventh Amendment immunity in the ADEA and that Congress had authority to do so under section 5 of the Fourteenth Amendment."[60] The defendant appealed to the U.S. Circuit Court of Appeals for the Eleventh Circuit where the case also was consolidated with *Kimel*.[61]

The Court of Appeals, in a divided panel opinion, held that the ADEA did not abrogate the States' Eleventh Amendment Immunity.[62] The United States Supreme Court granted *certiorari* in order to resolve a conflict among the Circuit Courts of Appeals with regard to whether the ADEA abrogates the States' Eleventh Amendment immunity.[63]

Justice Sandra Day O'Connor, writing the opinion for the majority, started out by stating that while the ADEA contained "an unmistakably clear" statement of Congress' intent to abrogate States' immunity, the abrogation exceeded Congress' authority under the Equal Protection Clause (Section 5) of the Fourteenth Amendment. Justice O'Connor then discussed the States' Eleventh Amendment immunity from suit.[64] Justice O'Connor stated that even though the Eleventh Amendment does not precisely specify that suits filed in federal court against a state by citizens of that state are forbidden, the Supreme Court for over one hundred years has made it clear that the Constitution does not provide for federal jurisdiction over suits against non-consenting states.[65] In the *Kimel* case, the Supreme Court set a test to determine whether Congress had effectively abrogated the States' Eleventh Amendment Immunity from suit in Federal court:

> First, Congress must unequivocally express its intent to abrogate the States' Eleventh Amendment Immunity. Second, if Congress was clear, it must be determined whether Congress acted pursuant to a valid grant of constitutional authority, namely section 5 of the Fourteenth Amendment.[66]

[60] *Id.* at 637 (citing Dickson v. Florida Dept. of Corrections, No. 5:9cv207-RH (ND Fla., Nov. 5, 1996)).

[61] Kimel v. State of Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998).

[62] *Kimel*, 120 S. Ct. at 637 (citing Kimel v. State Board of Regents, 139 F.3d 1426, 1433 (11th Cir. Fla.) (1998) (emphasis added)).

[63] *Kimel*, 120 S. Ct. at 634.

[64] The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI.

[65] *Kimel*, 120 S. Ct. at 638.

[66] *Kimel*, 120 S. Ct. at 638 (citing Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55).

After reviewing the two-prong test enunciated in *Seminole Tribe of Florida*,[67] Justice O'Connor discussed each part of the test in detail.

The Court addressed the first part of the test concerning unequivocal intent and determined that Congress' intent was, in fact, unmistakably clear. The Court held that the ADEA stated that the Act shall be enforced in accordance with Section 216 which clearly permits suits by individuals against states[68] by providing that an individual is authorized to "maintain actions for backpay 'against any employer . . . in any federal or state court of competent jurisdiction . . . ."[69]

The Court of Appeals had trouble with this method of interpretation, holding that there was not a clear abrogation of the Eleventh Amendment because nowhere within the ADEA was Congress' intent to abrogate *specifically stated*. Without specific mention of the Eleventh Amendment, the Court of Appeals was unwilling to find abrogation within the statute.[70] The United States Supreme Court was not quite so stringent in holding that, "[r]ead as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees."[71]

The United States Supreme Court then addressed the second part of the test; namely, whether Congress acted pursuant to a valid grant of constitutional authority within the scope of Section 5 of the Fourteenth Amendment.[72] The Supreme Court went on to state that Congress can abrogate the State's immunity to suit by individuals only by legislation which is appropriate under Section 5 of the Fourteenth Amendment.[73] To be considered appropriate under Congress' Section 5 enforcement power, Congress must enact legislation to "remedy and deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[74] The Court held that Congress obtains an affirmative grant of power from Section 5 of the Fourteenth Amendment and "must first 'determin[e] whether and what legislation

[67] Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114 (U.S. Fla. 1996).

[68] *Id.* at 639 (citing 29 U.S.C. § 626(b)).

[69] *Id.*

[70] Kimel v. State Board of Regents, 139 F.3d at 1431.

[71] *Kimel*, 120 S. Ct. at 639.

[72] *Id.* at 642-49.

[73] Section 5 of the Fourteenth Amendment states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend XIV, § 5. Section 1 of the Fourteenth Amendment states: "... no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States...." U.S. Const. amend. XIV, § 1.

[74] *Kimel*, 120 S. Ct. at 633 (citing City of Boerne v. Flores, 521 U.S. 507, 518 (1997)).

is needed to secure the guarantees of the Fourteenth Amendment; and its conclusions are entitled to much deference.'"[75] In applying the 'congruence and proportionality' test as elucidated in *City of Boerne*,[76] the Supreme Court "concludes that the ADEA is not 'appropriate legislation' under section 5 of the Fourteenth Amendment."[77] The Court stated that the ADEA's substantive requirements, as established for state and local governments, are excessive when viewed in light of any unconstitutional conduct that could possibly be the target of the Act.[78]

According to the Court, "[o]lder persons . . . unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'"[79] "Old age does *not* define a *discrete* and *insular* minority because all persons, if they live out their normal life spans, will experience it."[80] The Court went on to aver that "[m]easured against the rational basis standard of our equal protection jurisprudence, the ADEA plainly imposes substantially higher burdens on state employers . . . [elevating] the requirements . . . [to] a level akin to out heightened scrutiny cases under the Equal Protection Clause."[81]

The Court held that states are free to establish discriminatory practices based upon age, so long as discrimination is "related to a legitimate state interest."[82] In so holding, the Court noted that it could find no legislative history attesting to the fact that Congress held, as its basis in enacting such legislation, a founded concern for the occurrence of unconstitutional behavior on the part of the state and local governments.

Finally, Justice O'Connor stated that this decision "does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers."[83] She explained that "[s]tate employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union."[84] In a footnote after this statement,

[75] *Kimel*, 120 S. Ct. at 643 (citing Boerne, 521 U.S. at 536 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966))).

[76] City of Boerne v. Flores, 117 S. Ct. 2157 (U.S. Tex. 1997).

[77] *Kimel*, 120 S. Ct. at 644.

[78] *Id.*

[79] *Kimel*, 120 S. Ct. at 644 (citing Massachusetts Board of Regents v. Murgia, 427 U.S. 307, 313 (1976) (quoting San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973))).

[80] *Kimel*, 120 S. Ct. at 644 (emphasis added).

[81] *Kimel*, 120 S. Ct. at 656.

[82] *Id.* at 645.

[83] *Id.* at 648.

[84] *Id.* at 649.

the Court listed the appropriate available statutes in 48 states, leaving no remedy for state employees in Alabama and South Dakota.[85]

Justice Stevens, Ginsburg, Breyer, and Souter all agreed with the majority that Congress unmistakably stated its intent to abrogate the Eleventh Amendment with the enactment of the ADEA. However, these justices wrote separate dissenting opinions to take the majority to task for its protection of the States. Justice Stevens noted that "[t]he Framers designed important structural safeguards to ensure that when the National Government enacted substantive law (and provided for its enforcement), the normal operation of the legislative process itself would adequately defend states' interests from undue infringement."[86] Justice Stevens went on to explain that each State in the Union is granted equal representation through the Senate, each State electing its own Senators to office, and the House of Representatives comprised of representatives that were duly elected by "voters in the several states."[87]

Justice Stevens further noted:

> Whenever Congress passes a statute, it does so against the background of state law already in place; the propriety of taking national action is thus measured by the metric of the existing state norms that Congress seeks to supplement or supplant. By having such a system in place, the federal laws are shaped by state interests. It is quite evident, therefore, that the Framers did not view this Court as the ultimate guardian of the States' interests in protecting their own sovereignty from impairment by 'burdensome' federal laws. When Congress is clear with regard to federalism concerns, it is not the place of the judiciary to step in and override that clarity. [O]nce Congress has made its policy choice, the sovereignty concerns of the several States are satisfied . . . .[88]

Judges Thomas and Kennedy wrote separately to concur with the majority opinion with one exception. They dissented from the majority's holding that Congress had made clear its intent to abrogate the Eleventh Amendment with respect to the ADEA. Justice Thomas stated that the statute must be read in light of its 'sequence of events' and that congressional abrogation of a state's Eleventh Amendment immunity should be found within one section or in statutory provisions that were enacted at the same time. Since the ADEA does not follow such a pattern there is no clear statement of abrogation.[89] The

[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at 650.
[89] *Id.* at 652.

majority, however, finds this argument illogical stating that they "will not infer ambiguity from the sequence in which a clear textual statement is added to a statute."[90] The majority reasoned that Congress understood the consequences of its actions when it amended the ADEA in 1974 and clearly stated its intent to abrogate the states' Eleventh Amendment immunity.[91] However, in the end, this intent was not enough, and the Court held that Congress had exceeded its authority under Section 5 of the Fourteenth Amendment and accordingly upheld the states' immunity to suit.

III. DETRIMENTAL EFFECTS OF THE *KIMEL* DECISION

The *Kimel* decision solidified the Eleventh Amendment's protection of state sovereign immunity rights by barring age discrimination lawsuits in the federal district court system. By eroding the enforcement provision of the Fourteenth Amendment's Equal Protection Clause abrogating states' Eleventh Amendment immunity rights, the Supreme Court could be opening the door to other forms of discriminatory behavior exercised by state and/or municipal employers.

From a series of recent United States Supreme Court decisions (all of which had 5-4 rulings), state governments have been increasingly immunized from suits based on federalism concerns.[92] The Supreme Court appears to be trying to limit discrimination claims in the federal court system because of the astronomical increase in job bias cases filed in recent years.[93] Michael J. Sniffen observed that "private lawsuits alleging discrimination in the workplace more than tripled during the 1990s . . . ."[94] In an eight-year period from 1990 to 1998 job bias lawsuits swelled from 6,936 to 21,540.[95] This increase is primarily due to Congress' expansion in civil rights laws over the past decade. Accounting for approximately sixty-five percent of the increase in civil rights cases are employment cases alleging employer discrimination in hiring, promotion, firing, or pay privileges because of a person's race, color, religion, sex, national origin, age, disability, or exercise of legal rights.[96]

Although the Supreme Court decisions in this area appear to be fair, leaving these job bias claims viable in a plaintiff's respective state court,

[90] *Id.* at 640.

[91] *Id.*

[92] Erwin Chemerinsky, *Ability to Sue State Governments Narrowed*, TRIAL, Dec. 1999, at 72.

[93] Michael J. Sniffen, "Private Job Bias Lawsuits Tripled in 1990s," Mecklenburg Times, Jan. 21, 2000, at 1.

[94] *Id.*

[95] *Id.*

[96] *Id.*

the Court's limitation on Congress' power will set back the rights and opportunities of all minorities, including those based upon religion, race, gender, age, and national origin. There may be states that do not have adequate protective statutes in place. If there is no statute to address a plaintiff's claim within his or her state, then there is no remedy for that plaintiff, and the form of discrimination suffered by each victim will continue to go unchecked because the State is immune to Congress' intervention in that area.

In June 1999, the Supreme Court held that "sovereign immunity protects state governments from being sued in state courts without their consent."[97] In an opinion written by Justice Kennedy and joined by Rehnquist, C.J., and Justices O'Connor, Scalia, and Thomas, the Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject non-consenting states to private suits for damages in state courts."[98] Although the Constitution does not specifically authorize immunity for state governments from state court suits, the Court held that "there is a broader principle of sovereign immunity."[99]

For a state to be subject to suit in federal court, Congress must have enacted the law under Section 5 of the Fourteenth Amendment. Laws adopted under anything other than Section 5, such as the Commerce Clause, will not abrogate the States' Eleventh Amendment immunity from suit.[100]

In *Kimel v. Florida Board of Regents*, Justice O'Connor pointed out that state age discrimination laws are the sole protection for individuals contemplating suit against a state government employer. However, as can readily be shown, not every State of the Union has an age discrimination statute that covers State employees. For instance, Alabama is without such a statute. The legislature in Alabama enacted the Alabama Act prohibiting age discrimination in employment, which became effective on August 1, 1997.[101] While this Act is modeled after the ADEA and expressly adopts all of the ADEA's remedies, defenses, and statutes of limitations, ADEA precedents are not binding upon the Alabama Court system. Section 14 of the Alabama Constitution of 1901 "states that 'the State of Alabama shall never be made a defendant in any court of law or equity.'" Section 14 withholds from the state

[97] The case which brought about this holding is Alden v. Maine, 119 S. Ct. 2240 (1999).

[98] *Alden*, 110 S. Ct. at 2246 (emphasis added).

[99] Chemerinsky, *supra* note 76, at 72.

[100] After *Seminole Tribe*, "no other congressional power may be used to authorize suits against state governments." *Id.*

[101] John W. Sheffield & Brian R. Bostick, *A Practitioner's Guide to the Alabama Age Discrimination Act of 1997*, 59 ALA. L. REV. 108 (1998).

legislature, or any other state authority, the power to give consent to a suit against the state.[102]

The Supreme Court, in *Kimel*, effectively removed any remedial measures that were once available to MacPherson and Narz, who were trying to sue the University of Montevallo under the ADEA. Without the ADEA, these plaintiffs will have no remedy under which to bring their claim of discrimination. However, this "will not provide a reason to penetrate the 'almost invincible' wall of the state's immunity law, as established by the [State] Constitution."[103] Additionally, because there is no longer a forum in the federal court system for state or local employees who have been discriminated against because of their age, there is now an incentive for all states to eliminate current anti-discrimination statutes based on age.

Just a week after the *Kimel* decision, the United States Supreme Court, in a surprising move, ordered two appellate courts to review their rulings that held that states and their agencies must abide by a 1963 federal law requiring state employees to give men and women equal pay for equal work.[104] The Supreme Court stated that the two rulings from Illinois and New York should be reconsidered in light of the *Kimel* ruling which held that state employees are not protected by the federal ADEA law banning age bias against states.[105] The Supreme Court's order is surprising because the Court clearly stated in the *Kimel* decision that age discrimination does not rise to the same level of judicial scrutiny as issues such as race and gender discrimination.[106]

In the first case,[107] female professors, as part of a class action lawsuit filed in a federal district court claimed that Illinois State University violated the federal Equal Pay Act by paying its female

[102] *Id.* at 111 (citing Dunn Construction Co. v. State Board of Adjustments, 234 Ala. 372, 376 (1937).

[103] *Id.* at 111 (citing Hutchinson v. Board of Trustees of University of Alabama, 288 Ala. 20, 24 (1971)).

[104] Richard Carelli, "In surprising move, court orders restudy of Equal Pay Act's scope," Mecklenburg Times, Jan. 21, 2000, at 1.

[105] *See*, Illinois State University v. Varner, 120 S.Ct. 928 (2000) and State University of New York, College at New Paltz v. Anderson, 120 S.Ct. 929 (2000).

[106] *Kimel*, 120 S. Ct. at 644-45.

[107] Varner v. Illinois State University, 150 F.3d 706 (7th Cir. Ill. 1998), *cert. granted*, 120 S. Ct. 928 (2000). Although the lawsuit, filed by Iris Varner, Paula Pomerenke, and Teresa Palmer, professors at Illinois State University, alleged Illinois State University violated federal anti-bias law (Title VII of the Civil Rights Act of 1964) the issue on appeal centers on the ability of these plaintiffs to sue a state employer in federal court under the Equal Pay Act. The United States Supreme Court vacated and remanded this case to the Seventh Circuit Court of Appeals for consideration in light of Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000).

professors less than their male counterparts.[108] The State of Illinois contended that when the Equal Pay Act applies to state employees it violates the State's Eleventh Amendment immunity from being sued in federal court.[109] The Seventh Circuit Court of Appeals rejected the university's argument that the state could not be sued because not only did Congress intend to nullify Illinois' Eleventh Amendment immunity, it also had the authority to do so under Section 5 of the Fourteenth Amendment.[110]

In the second case,[111] a female tenured associate professor at the State University of New York at New Paltz, sued the university for violating the Equal Pay Act. The U.S. Court of Appeals for the Second Circuit ruled against the school by holding that the female employee could invoke the federal law because Congress indeed had nullified New York's Eleventh Amendment immunity in such cases.[112]

The United States Supreme Court's directive that the Second and the Seventh U.S. Circuit Courts of Appeals re-study their opinions that the federal Equal Pay Act can be invoked in federal court to nullify Illinois' and New York's Eleventh Amendment immunities is surprising. The Supreme Court had emphasized in *Kimel* that age bias is not subject to as rigorous a level of judicial scrutiny as race and gender bias.[113] Yet within one week after the *Kimel* decision, the Supreme Court is now asking appellate courts to rethink their positions relating to sexual discrimination lawsuits based on the Equal Pay Act.

IV. CONCLUSION

It is the opinion of the author that the *Kimel* decision is destined to become a landmark case for several reasons. First, there are numerous older state employees who may not have redress against their state employers when they have been discriminated against in pay increase, promotion, and termination decisions based upon age. Without federal jurisdiction, states will have more incentive to utilize the doctrine of sovereign immunity as a basis of rescinding current age discrimination laws or to pass new laws restricting damages in age discrimination law

[108] *Id.* at 707-08.
[109] *Id.* at 708.
[110] *Id.* at 714-17.
[111] Anderson v. State University of New York, 169 F.3d 117 (2d Cir. N.Y. 1999), *cert. granted*, 120 S. Ct. 929 (2000). The United States Supreme Court has vacated and remanded this case for consideration in light of Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000).
[112] *Id.* at 121.
[113] *Kimel*, 120 S. Ct. at 644-45.

suits against itself as an employer. The problem is exacerbated because medical technology is expanding the productive years of older employees.

Second, the *Kimel* decision appears to be the impetus for the Supreme Court's surprising recent decision ordering two federal appellate courts to reconsider their decisions requiring the states of New York and Illinois to abide by the federal Equal Pay Act of 1963, mandating equal pay for equal work. In its directive issued to the two appellate courts only one week after *Kimel*, the United States Supreme Court stated that those rulings should be reconsidered in light of the *Kimel* decision. Therefore, it appears that the Supreme Court will deny state employees, who are claiming gender-based discrimination against their state employers, access to the federal courts.

Finally, these decisions could lead to other supreme court decisions denying state employees access to the federal courts for other discriminatory remedies against their state employers. One must consider what other civil rights legislation, protecting minority state employees from discriminatory practices committed by their state employers, will become vulnerable and challenged by the United States Supreme Court in light of the *Kimel* decision.