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Mandatory Retirement for Missouri Judges

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Notes

Mandatory Retirement for Missouri Judges

Gregory v. Ashcroft[1]

I. INTRODUCTION

When an employee is forced from employment on a basis other than performance it seems to offend the concept of fairness. In the cases involving the mandatory retirement of state court judges, however, the harsh result for the affected judges must be balanced against society's interest in a competent judiciary. Although advancing age usually does not render a judge incompetent, the approach of legislators and voters has been to err on the side of caution, basing the mandatory retirement mechanism on the arbitrary factor of age. When these two interests collide, the result changes the balance between individual rights and societal interests.

II. FACTS

Four Missouri state court judges filed suit in the Federal Court for the Eastern District of Missouri, disputing the mandatory retirement provision of the Missouri Constitution,[2] which requires their retirement at age seventy.[3] At

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

2. MO. CONST. art. 5, § 26(1) ("All judges other than municipal judges shall retire at the age of seventy years, except as provided in the schedule to this article, under a retirement plan provided by law.") Section twenty-five establishes the rules concerning Missouri state court judges. According to Section 25(a) of the Missouri Constitution,

> [w]henever a vacancy shall occur in the office of judge of any of the following courts of this state, to wit: The supreme court, the court of appeals, or in the office of circuit or associate circuit judge within the city of St. Louis and Jackson county, the governor shall fill such vacancy by appointing one of three persons possessing the qualifications for such office, who shall be nominated and whose names shall be submitted to the governor by a nonpartisan judicial commission established and organized as hereinafter provided. If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy.

Id. § 25(a). Judges are then subject to retention elections after a full year of service ("a term ending December thirty-first following the next general election after the expiration of twelve months in the office" *Id.* § 25(c)(1)). To continue in office the

trial, Judge Ellis Gregory, Jr., Judge Anthony P. Nugent, Jr., and Judge Douglas W. Greene claimed that "the mandatory retirement provision violates the federal Age Discrimination in Employment Act ("ADEA")."[4] Judge Flake L. McHaney joined the three judges in alleging a violation of the Equal Protection clause of the Fourteenth Amendment.[5]

The district court granted the state's motion to dismiss.[6] The district court held that because Missouri's appointed judges are employees "on a policymaking level," they are exempted from the ADEA's definition of "employee,"[7] and thus not protected by the act. The district court also found "that the mandatory retirement provision does not violate the Equal Protection Clause because there is a rational basis for the distinction between judges and other state officials to whom no mandatory retirement age applies."[8]

The district court's dismissal was affirmed by the United States Court of Appeals for the Eighth Circuit.[9] On writ of certiorari the Supreme Court of the United States affirmed. The Supreme Court of the United States held that a state court judge must comply with a state constitutional provision calling for mandatory retirement at the age of seventy years.[10]

III. LEGAL BACKGROUND

A. *The ADEA Analysis*

The ADEA prohibits discrimination against employees based on their age.[11] Since enacting the legislation in 1967, Congress has expanded the statute's scope.[12] Presently, the ADEA protects all employees age forty or

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judge must file to succeed himself sixty days before the last general election prior to the expiration of the judge's term. *Id. See A First Step Toward Judicial Reform*, 26 J. of MO. BAR 341 (1970) for thoughts on the purpose behind the statute.

3. *Gregory*, 111 S. Ct. at 2398.

4. Gregory v. Ashcroft, 898 F.2d 598, 599 (8th Cir. 1990).

5. *Id.*

6. *Gregory*, 111 S. Ct. at 2398.

7. *Id.* (quoting 29 U.S.C. §§ 621-624 (1986)).

8. *Id.*

9. *Id.*

10. *Id.* at 2408.

11. 29 U.S.C. §§ 621-634 (1988).

12. Congress amended the original ADEA on three occasions: 1974, 1978, and 1986.

The original ADEA did not protect those over sixty-five years of age. 1967 U.S.C.C.A.N. 658. In 1978 the statute was amended to raise the age limit to seventy. 1978 U.S.C.C.A.N. 189. The age limit was eliminated by the 1986 amendment. 1986

over whose employers employ more than twenty people.[13] The ADEA also covers state and municipal employees.[14] The ADEA excepts certain employers from compliance with its provisions prohibiting age discrimination.[15] Extending the ADEA to the states was held valid under Congress' Commerce Clause power.[16] To state a claim under the ADEA, the claimant must show that the employer violated the ADEA's broad age discrimination provisions,[17] that the claimant is a protected "employee" under the ADEA,[18] and that the employer is included in the ADEA's definition of "employer."[19]

The Missouri judges challenged article five, section twenty-five of the Missouri Constitution, which provides that "[a]ll judges other than municipal judges shall retire at the age of seventy years."[20] Like all state employees, the four Missouri judges would normally be subject to the provisions of the ADEA.

Several courts have dealt with the question of whether the ADEA applies to state judges.[21] Because all courts have agreed that elected judges fall under the "persons elected to public office" exception to the ADEA, the narrow issue is whether appointed judges are covered by the act.[22] Therefore, discussion often centers on the ADEA provision that excepts from the definition of

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U.S.C.C.A.N. 3342. (codified as amended at 29 U.S.C. § 631(a) (1988)).

The original ADEA definition of "employers" only applied to employers of fifty or more persons and did not apply to states as employers. 1967 U.S.C.C.A.N. 658, 662. The 1974 amendment to the ADEA, however, extended its provisions to states and lowered the number of employees from fifty to twenty. 1974 U.S.C.C.A.N. 58. (codified as amended at 29 U.S.C. § 630 (1988)).

13. 29 U.S.C. § 630(b) (1988).

14. *Id.*

15. The ADEA allows behavior that may be discriminatory when age is part of a bona fide employee benefit plan or when age is a bona fide occupational requirement. 29 U.S.C. § 623(f) (1988).

16. EEOC v. Wyoming, 460 U.S. 226, 243 (1983).

17. 29 U.S.C. § 623 (1988).

18. *Id.* § 630(f).

19. *Id.* § 630(b).

20. *Gregory*, 111 S. Ct. at 2398 (quoting MO. CONST. art V, § 26).

21. *See* EEOC v. Massachusetts, 858 F.2d. 52 (1st Cir. 1988) (ADEA not applicable to appointed state court judges); EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989) (same); Apkin v. Treasurer and Receiver General, 517 N.E.2d 141 (Mass. 1988) (same); *In re* Stout, 559 A.2d 489 (Pa. 1989) (same); *but see* EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990), *aff'g*, 717 F. Supp. 261 (D. Vt. 1989); Schlitz v. Virginia, 641 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988) (upholding application of the ADEA to appointed state judges).

22. *Id.*

employees those employees who are "appointee[s] on a policymaking level."[23] Cases discussing this provision deal with federalism and statutory construction problems concerning the applicability of the ADEA to appointed state court judges.

The first question, which involves federalism, is whether the Supremacy Clause of the United States Constitution, when applied to state mandatory retirement systems, requires that the ADEA preempt contrary state law.[24] The standard of review in this area requires a "clear statement of intent" to preempt state law.[25] The courts interpreting the ADEA agreed that "a clear statement" of congressional intent was required for the ADEA to preempt state law.[26]

In *Apkin v. Treasurer & Receiver General,*[27] judge Benjamin Apkin challenged Massachusetts's mandatory retirement of state judges at seventy years of age.[28] The Massachusetts Supreme Court in *Apkin* found nothing in the ADEA that showed Congress intended the ADEA to apply to judges, so it found no preemptive effect.[29] The United States Court of Appeals for the First Circuit also found that there was no congressional intent to preempt state law.[30] The court noted that a state's sovereignty should not be abridged by the federal government unless there is a mandate from Congress.[31]

One commentator has attacked the "clear statement" interpretation, however, because the ADEA's broad anti-discriminatory scope puts the federal law in sharp conflict with state mandatory retirement provisions. There is no need to find a "clear statement" of intent to preempt because of the obvious clash between the federal and state law.[32] When state law conflicts with

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23. 29 U.S.C. § 630(f) (1988).

24. U.S. CONST. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

25. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) (This case adopted the "clear statement rule" in a case involving a state's Eleventh Amendment immunity from suit in Federal court. The Court held that Congress could abrogate the immunity "only by making its intention unmistakably clear in the language of the statute.").

26. *See* EEOC v. Massachusetts, 858 F.2d 52, 54 (1st Cir. 1988); EEOC v. Illinois, 721 F. Supp. 156, 159 (N.D. Ill. 1989); Apkin v. Treasurer and Receiver General, 517 N.E.2d 141, 142-43 (Mass. 1988).

27. 517 N.E.2d 141 (Mass. 1988).

28. *Apkin,* 517 N.E.2d at 145.

29. *Id.* at 144-45.

30. EEOC v. Massachusetts, 858 F.2d 52, 53 (1st Cir. 1988).

31. *Id.* at 53; *see also* EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989).

32. Alan L. Bushlow, *Mandatory Retirement of State-Appointed Judges under the Age Discrimination in Employment Act,* 76 CORNELL L. REV. 476, 493 (1991).

federal law, the federal law prevails, although the necessity of finding a "clear statement" of intent to preempt seems contrary to the basic rules of federalism that would seemingly allow the federal law to control when contrary to state law. While some commentators attempt to find evidence of a "clear statement,"[33] this evidence is slight, and in any event, appears unnecessary.

The second question involves statutory construction arguments and their influence on *Gregory*. The "plain meaning rule" requires a court to limit its inquiry to the text of the statute when its language makes the meaning clear.[34] In *EEOC v. Massachusetts* the court of appeals thought that the ADEA's exemption of "appointees on the policymaking level" included appointed state judges.[35] The court reasoned that while the judicial branch does not make the same types of policy decisions as the executive or legislative branches, the exercise of judicial power does require "the same kind of decision-making and the same kind of forward thinking that is required of 'appointees on the policymaking level' in those other two branches of government."[36] Thus, the court held that appointed state court judges were not covered by the ADEA.[37]

The Pennsylvania Supreme Court in *In re Stout*[38] also resolved a dispute concerning whether Pennsylvania's appointed judges were covered by the ADEA by invoking the "plain-meaning rule."[39] The *Stout* court found that appointed judges were not protected employees, relying not only on the judge's "policymaking" decisions, but also on the judge's administrative duties over the Pennsylvania state judiciary.[40]

The United States Court of Appeals for the Second Circuit in *EEOC v. Vermont*,[41] however, applied the plain-meaning rule and reached the opposite

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33. The legislative history of the ADEA shows that Congress intended the Act to be broad in scope with limited exceptions. H.R. CONF. REP. NO. 899, 92d Cong., 2d Sess. 15-16 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2179-80.

34. *See* Caminetti v. United States, 242 U.S. 470, 485 (1917) ("Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.") (citation omitted).

35. 858 F.2d 52, 55 (1st Cir. 1988). The court stated that "if Congress did not specifically consider applying ADEA to judges, and the exception by its terms and its goals appears to apply to judges, we will so construe it. The absence of any mention of judges in the legislative debate, therefore, does not help the appellant's case." *Id.*

36. *Id.*

37. *Id.* at 56.

38. 559 A.2d 489 (Pa. 1989).

39. *Id.* at 495-96.

40. *Id.* at 495-96.

41. 904 F.2d 794 (2d Cir. 1990).

result.[42] The court stated that "the principal business of the courts is the resolution of disputes."[43] The Second Circuit found that the role of the court was not "policymaking," even though the courts occasionally make policy.[44] Thus, philosophical viewpoints concerning the actual and proper role of courts in determining disputes are central to the application of the plain-meaning rule to the ADEA's "policymaking" exception.

The "rule against absurd results"[45] also has been applied to resolve cases involving the ADEA's application to appointed state court judges.[46] The *Apkin* court found that excluding elected judges from ADEA protection and including appointed judges within ADEA protection was an irrational distinction.[47] The distinction between elected and appointed state court judges was deemed "nonsensical" in *EEOC v. Massachusetts*.[48] The district court in *EEOC v. Illinois* also held that there was "no principled basis" to distinguish between elected and appointed judges.[49]

Other courts, however, have found that the distinction between elected and appointed judges is reasonable. The Second Circuit held in *EEOC v. Vermont* that Congress "presumably" knew that some states elected judges and some states appointed judges and it could have specified whether they were employees.[50] The court also stated that Congress chose to "except only elected officials and a narrowly defined group of appointees, leaving all other appointees covered by the Act."[51] The court added that "any perceived imprudence . . . is a matter to be addressed by Congress."[52]

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42. *Id.* at 800.

43. *Id.*

44. *Id.* ("Though such a judicial decision may thus state or clarify policy, any such statement or clarification is merely ancillary to the resolution of a particular controversy between parties."); *accord* Schlitz v. Virginia, 681 F. Supp. 330, 333 (E.D. Va. 1988).

45. *See* American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982) ("Statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible.").

46. *See* EEOC v. Massachusetts, 858 F.2d 52, 57 (1st Cir. 1988); EEOC v. Illinois, 721 F. Supp. 156, 159 (N.D. Ill. 1989); Apkin v. Treasurer and Receiver General of Massachusetts, 517 N.E.2d 141, 146 (Mass. 1988).

47. *Apkin*, 517 N.E.2d at 145.

48. EEOC v. Massachusetts, 858 F.2d at 51.

49. EEOC v. Illinois, 721 F. Supp. at 159.

50. EEOC v. Vermont, 904 F.2d at 801; *accord* Schlitz v. Virginia, 681 F. Supp. 330, 334 (E.D. Va. 1988).

51. EEOC v. Vermont, 904 F.2d at 802.

52. EEOC v. Vermont, 904 F.2d at 802.

The legislative history of the ADEA, though limited, has been used in interpreting the ADEA's applicability to appointed state court judges.[53] The First Circuit in *EEOC v. Massachusetts* and the Second Circuit in *EEOC v. Vermont* examined the legislative history of the ADEA, again reaching opposite conclusions.[54] Because the question is whether appointed state judges are considered "employees" under the ADEA, the discussion revolves around the interpretation of the exceptions to the definition of "employee."

There is no mention of judges in any of the legislative discussions or debates surrounding the adoption of the ADEA.[55] The courts, however, have looked to the legislative history of Title VII of the Civil Rights Act of 1964,[56] and have given it weight in determining the legislative intent of those who enacted the ADEA.[57] One indication of the purpose of that statute is the Committee Report for the EEOC, which states that the exceptions were posited to

> exempt elected officials and members of their personal staffs, and persons appointed by such elected officials as advisers or to policymaking positions at the highest levels of the departments or agencies of the State or local governments, such as cabinet officers, and persons of comparable responsibilities at the local level.[58]

This excerpt seems to support the argument that the exceptions to the ADEA do not include judges, because they were never mentioned in the Committee Report.

The record of the exchange between Senator Williams and Senator Ervin is also significant. It shows that Senator Ervin's proposed amendment[59] was

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53. Because of the inherent ambiguities in interpreting legislative history the plain meaning and absurd result tests are usually more reliable. Public policies supporting the statute usually are examined before the legislative history test is applied.

54. *See* EEOC v. Massachusetts, 858 F.2d at 56; EEOC v. Vermont, 904 F.2d at 800.

55. *See* H.R. REP. No. 756, 99th Cong., 2d Sess. 1 (1986), *reprinted in* 1986 U.S.C.C.A.N 5628; S. REP. No. 467, 98th Cong., 2d Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2974; H.R. CONF. REP. No. 950, 95th Cong., 2d Sess. 1 (1978) *reprinted in* 1978 U.S.C.C.A.N. 528; S. REP. No. 493, 95th Cong., 1st Sess. 1 (1978) *reprinted in* 1978 U.S.C.C.A.N. 504; H.R. REP. No. 805, 90th Cong., 1st Sess. 1 (1967), *reprinted in* 1967 U.S.C.C.A.N. 2213.

56. 42 U.S.C. §§ 701, 2000e(f) (1965) (amended 1977).

57. *See* Lorilland Inc. v. Pons, 434 U.S. 575, 584 (1978); *see also* Oscar Meyer & Co. v. Evans, 441 U.S. 750, 756 (1979).

58. H.R. CONF. REP. No. 899, 92d Cong., 2d Sess. 15-16, *reprinted in* 1972 U.S.C.C.A.N. 2137, 2179-80.

59. 118 Cong. Rec. 1183 (1972) ("The term 'employee' as set forth in the original

expanded (on the proposal of Senator Williams) to exclude "any person chosen by such officer to be a personal assistant."[60] However, because Senator Javits was concerned that the proposed amendment would exclude "lawyers . . . stenographers, subpoena servers, researchers, and so forth,"[61] the Conference Committee used the phrase "appointee on the policymaking level."[62] The committee also stated that "[i]t is the conferees[']' intent that this exemption shall be construed narrowly."[63] Thus, the legislative history points to a limited application of the "appointees on the policymaking level" exception.

Contrary to the evidence discussed above, however, in applying the rules of statutory construction, the majority of courts decided that appointed state court judges are not protected by the ADEA.[64] Some courts, however, have found that the ADEA was applicable to state judges based on different interpretations of the statute.[65] *Gregory* resolved a split in the circuits over the applicability of the ADEA to appointed state court judges.

B. The Equal Protection Analysis

Because the Supreme Court of the United States decided that age is not a suspect classification under the Equal Protection Clause of the Fourteenth Amendment, and there is no "fundamental interest" in serving as a state judge, the statute is subject to only "rational basis" review.[66] In dispensing with prior cases involving state court judges challenging mandatory retirement provisions, each case was decided on the basis of the ADEA claim and not through an equal protection analysis.

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act of 1964 and as modified in the pending bill shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such person to advise him in respect to the exercise of the constitutional or legal powers of his office.").

60. *Id.* at 4493.

61. *Id.* at 4097.

62. S. CONF. REP. NO. 681, 92d Cong., 2d Sess. 15-16 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2179-80; *see supra* note 56 and accompanying text.

63. S. CONF. REP. NO. 681, 92d Cong., 2d Sess. 15-16 (1972), reprinted in 1972 U.S.C.C.A.N. 2137, 2179-80; *see supra* note 56 and accompanying text.

64. EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988); EEOC v. Illinois, 721 F. Supp. 156 (N.D. Ill. 1989); *In re* Stout, 559 A.2d 489 (Pa. 1989); *Apkin*, 517 N.E.2d at 141.

65. EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990), *aff'g*, 717 F. Supp. 261 (D. Vt. 1989); Schlitz v. Virginia, 681 F. Supp. 330 (E.D. Va.), *rev'd on other grounds*, 854 F.2d 43 (4th Cir. 1988).

66. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976).

Many of the proposed rational bases advanced by Missouri in *Gregory*, however, were also used in other cases to bolster and justify the result. In *Apkin*, the Massachusetts court claimed that its mandatory retirement provision "eliminates the anguish, time, delay, expense and embarrassment of the supervision and removal of older judges of failing competence pursuant to an evaluation process."[67] The court also asserted that Massachusetts's mandatory retirement provision assures that judges will be respected, that judges will share the same generational values with the populace, and that judges who are forced to retire will make room for the appointment of women and minorities to the bench.[68]

IV. THE INSTANT DECISION[69]

A. ADEA Claim

The majority in *Gregory v. Ashcroft* introduced its decision by explaining the virtues of the federalist system of government and by describing the system of dual sovereignty as a "fundamental principle."[70] The Court listed the advantages of a federalist system as follows: (1) a more sensitive government to the needs of the population; (2) an increased opportunity to participate in "democratic processes"; (3) more latitude for "innovation and experimentation"; (4) greater governmental responsiveness; and (5) "a check on abuses of governmental power."[71] The Court also found support for the value of federalism in the writings of James Madison.[72] Referring to the

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67. *Apkin*, 517 N.E.2d at 146.

68. *Id.*; *see also* EEOC v. Massachusetts, 858 F.2d at 57 (adopting the reasoning of the *Apkin* court).

69. The majority opinion in *Gregory* was penned by Justice O'Connor, who was joined by Chief Justice Rehnquist, Justice Scalia, Justice Kennedy, and Justice Souter. Justice White concurred in the judgment, but wrote a separate opinion in which Justice Stevens joined. Justices White and Stevens also joined the majority opinion's resolution of the equal protection claim. Justice Blackmun filed a dissenting opinion in which Justice Marshall joined.

70. *Gregory*, 111 S. Ct. at 2399.

71. *Id.* at 2399-400.

72. *Id.* at 2400 (quoting THE FEDERALIST NO. 51 at 323 (James Madison) (Clinton Rossiter ed. 1961)).

> In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate

Missouri Constitutional provision, the Court stated that "[t]his provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity."[73]

Following its explanation of the value of federalism, the Court then described the standard by which encroachment upon state sovereignty is allowed. The Court held that Congress must make its intention to change the federal/state balance "unmistakably clear in the language of the statute."[74] The Court may apply the plain statement rule[75] to avoid a potential constitutional problem.[76]

Although Justice White concurred in the majority's result, he disagreed with the rationale that the majority used to dispense with the ADEA claim.[77] Justice White criticized the majority's "plain statement rule" as "unsupported by the decisions upon which the majority relies, contrary to our Tenth Amendment jurisprudence, and fundamentally unsound."[78]

Justice White contended that the only real issue "is whether petitioners fall within the definition of 'employee' within the Act."[79] If the judges are employees, then they are covered by the ADEA. Preemption is not an issue because it automatically applies when state law is in conflict with federal law.[80]

Justice White also found the majority's reasoning as to the "plain statement rule" misguided because "the only dispute is over the precise details

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departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id.

73. *Id.* at 2400.

74. *Id.* at 2401 (quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985)).

75. The Court uses the phrase "plain statement rule" in the same way as the prior courts have used the "clear statement rule." The distinction is meaningless, but the Supreme Court chose to use the phrase "plain statement" and this Note will use the court's label.

76. In the past the Court has refused to consider the limits of federalism on the Commerce Clause. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

77. *Gregory*, 111 S. Ct. at 2408. Justice White is joined in this section of his concurring opinion by Justice Stevens, Justice Blackmun, and Justice Marshall. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 2409; *see* Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 204 (1983) (standing for the position that preemption is automatic "to the extent that it [state law] conflicts with federal law").

of the statute's application."[81] He stated that the majority's reliance on *Atascadero State Hospital v. Scanlon*[82] and *Will v. Michigan Department of State Police*[83] was misplaced because the issue in those cases was whether the statute in question was intended to be extended to the states at all.[84] Therefore, Justice White concluded, the majority has unnecessarily extended the plain statement rule.[85]

Additionally, Justice White disagreed with the majority's application of the "political function" cases to the facts of this case.[86] Because those cases dealt with the Equal Protection claims of aliens instead of federal limits on congressional commerce power, Justice White thought that the majority was unnecessarily injecting the political function exceptions into the analysis, limiting congressional legislative power under the "plain statement rule."[87]

Justice White also accused the majority of confusing the issue by failing to explain the scope of its rule and by failing to explain its requirement that the intent to regulate the activity be "plain to anyone reading the statute."[88]

Next, the majority focused on the definition of "employee" under the ADEA and the "appointees on the policymaking level" exception. The state argued that Missouri courts make policy because Missouri is a common law state, because the Missouri Supreme Court has supervisory authority over lower courts, because the Missouri Supreme Court establishes rules of procedure, and because the Missouri Supreme Court has the authority to establish disciplinary rules.[89] The United States Supreme Court found that for judges to be considered "employees at the policy-making level" that "it must be plain to anyone reading the Act that it covers judges."[90] The Court determined that state judges "presumptively" fall under the policymaking-level exception to the ADEA.[91] The Court reasoned that although Congress could have been less ambiguous if it meant to exclude state judges, "in this case we

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81. *Id.* at 2409.

82. 473 U.S. 234 (1985).

83. 491 U.S. 58 (1989).

84. *Gregory*, 111 S. Ct. at 2409.

85. *Id.* at 2409.

86. *Id.* (Justice White believed that reliance on the "political function" exception to support the "plain meaning rule" ignores the thrust of the "political function" exception, which is to exclude aliens from the strict scrutiny normally granted to them, reserving the governing functions exclusively to citizens.)

87. *Id.* at 2409-10.

88. *Id.* at 2410.

89. *Id.* at 2403-04.

90. *Id.* at 2404.

91. *Id.*

are not looking for a plain statement that judges are excluded."[92] Instead, the Court decided that it "will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*."[93] The Court was unwilling to give employees whose position is not specifically mentioned in the ADEA the benefit of ADEA protection.[94]

Justice White agreed with the majority in the result, but he reached the result purely on an analysis of whether state court judges were "employees" under the ADEA.[95] He recited the definition of "policy" as "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions."[96] Justice White joined the majority in quoting Justice Cardozo's statement on the role of the judge as a policy maker:

> Each [common-law judge] indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law . . . . [W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. *The law which is the resulting product is not found, but made.*[97]

Justice White concluded by adopting the rationale of *EEOC v. Massachusetts*[98] and holding that state court judges are exempt from the ADEA as "appointees on a policymaking level."[99]

Justice Blackmun was joined by Justice Marshall in the dissenting opinion.[100] The dissent agreed with part I of White's analysis, which disagreed with the majority's reasoning on the issue of the ADEA's applicability.[101] The dissent disagreed with the majority's holding that an appointed state judge is an "employee on a policymaking level."[102]

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92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 2412.
96. *Id.* at 2412 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1754 (4th ed. 1976)).
97. *Id.* at 2412 (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 113-15 (1921) (emphasis added)).
98. *See supra* notes 35-37, 48 & 52 and accompanying text.
99. *Gregory*, 111 S. Ct. at 2414.
100. *Id.*
101. *Id.*
102. *Id.*

The first reason that Justice Blackmun gave in disagreement was that Congress did not intend to include state judges in the policymaking category.[103] Because the "policymaker" exception is grouped close to "the exclusion of 'any person chosen by such [elected] officer to be on such officer's personal staff,' and the exclusion of 'an immediate advisor with respect to the exercise of the constitutional or legal powers of the office,'" the rules of statutory construction would require that this exclusion relate to the others.[104] This rule of construction employed by Justice Blackmun was not used in the prior cases.

Justice Blackmun first set out the rule that "words grouped in a list should be given related meaning."[105] The rule further states that "'in expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but to the provisions of the whole law, and [by] its object and policy.'"[106] Justice Blackmun noted that, "the policy maker exclusion is placed between the exclusion of 'any person chosen by such [elected] officer to be on such officer's personal staff' and the exclusion of 'an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.'"[107]

Justice Blackmun stated that the exclusion "should be limited to those who share the characteristics of personal staff members and immediate advisers, *i.e.*, those who work closely with the appointing official and are directly accountable to that official."[108]

Justice Blackmun also argued that "a reasonable interpretation" of the ADEA would extend coverage to state judges.[109] The EEOC has found that it is permissible to read the phrase "appointee at the policymaking level" to exclude state court judges.[110] Justice Blackmun would support this interpretation as reasonable,[111] thereby adopting the ruling of the Second Circuit in *EEOC v. Vermont*.[112]

Because the majority's holding that the state court judges were included within the "appointees on the policymaking level," the Court chose not to rule on the states's contention that because the state judges are subject to retention

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103. *Id.*
104. *Id.* at 2415 (citing 29 U.S.C. § 630(f) (1988)).
105. *Id.* (quoting Dole v. Steelworkers, 110 S. Ct 929, 930 (1990)).
106. *Id.* at 2415 (quoting Massachusetts v. Morash, 490 U.S. 107, 115 (1989)).
107. *Id.*
108. *Id.*
109. *Id.* at 2418.
110. *Id.*
111. *Id.*
112. *Id.* at 2415 (citing EEOC v. Vermont, 904 F.2d 794 (2d Cir. 1990)).

election, they fall under the "elected to public office" exception of the ADEA.[113]

B. *The Equal Protection Claim*[114]

The plaintiff judges also argued that the mandatory retirement provision violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[115] The judges claimed that Missouri had shown no rational basis for two distinctions: first, between judges who have reached age 70 and younger judges; and, second, between judges 70 and over and other state employees of the same age who are not subject to mandatory retirement.[116] Because age is not a suspect classification and there is no fundamental interest at stake,[117] "'courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws.'"[118]

The Court pointed out that the mandatory retirement provisions are found in the Missouri Constitution, and are, therefore, given more weight than mere "governmental action."[119] The Court used the standard of *Vance v. Bradley*,[120] which states that "we will not overturn such a [law] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational."[121]

The state raised several rational bases for Missouri's mandatory retirement provision.[122] Among the bases raised were (1) maintaining high

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113. *Gregory*, 111 S. Ct. at 2404; *see* MO CONST. Art. V., § 25(c)(1) (concerning the procedures for the retention elections of Missouri state court judges).

114. Justice White and Justice Stevens joined the five member majority opinion concerning the equal protection claim. *Gregory*, 111 S. Ct. at 2408. Justice Blackmun and Justice Marshall did not rule concerning the equal protection clause. *Id.* at 2414-19.

115. The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST., amend. XIV.

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

117. *See supra* note 66 and accompanying text.

118. *Gregory*, 111 S. Ct. at 2406 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

119. *Id.* at 2406 (The court stated that the Missouri Constitution "reflects both the considered judgment of the state legislature that proposed it and that of the citizens of Missouri who voted for it.").

120. 440 U.S. 93 (1979).

121. *Gregory*, 111 S. Ct. at 2406 (quoting *Bradley*, 440 U.S. at 97).

122. *Id.* at 2406-07. The state cites to O'Neil v. Baine, 568 S.W.2d 761 (Mo. 1978), which upheld a mandatory retirement statute that established age 70 as the

competency in judicial posts, (2) elimination of a wasteful judge-by-judge competency determination, (3) orderly attrition, and (4) ease and predictability of administering pension plans.[123] The Court held that each of these bases was sufficient to rebut the judges' claim of no rational basis.[124]

The Court proceeded to point out the shortcomings of the alternatives available to the state. Voluntary retirement was seen as an insufficient mechanism.[125] Likewise, impeachment was characterized as having "elaborate procedural machinery" that would not as effectively serve the goal of retaining qualified judges.[126] Also, the retention election process may not adequately protect the judiciary because the general public is less likely to follow the actions and opinions of state court judges.[127] Finally, Missouri judges are less accountable to the people of Missouri, the Court thought, because of the judges' lengthy terms.[128]

The Court noted that "[t]he Missouri mandatory retirement provision . . . is founded on a generalization."[129] The Court also pointed out that many judges do not suffer any "significant deterioration in performance at age 70."[130] The imperfections of a state's laws, however, do not violate the Equal Protection Clause.[131] Thus, Missouri's requirement did not violate the Equal Protection Clause.[132]

V. COMMENT

Justice White's concurrence is the best use of judicial restraint in deciding the case. Although the result he reached mirrors the majority's decision, his rationale as to the applicability of the Supremacy Clause and the unnecessary establishment of new tests shows moderation while reaching the same result. The majority's exposition of a new "plain meaning rule" standard

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retirement age for state probate and magistrate judges. Numerous rational bases were included in this decision. *Id.* at 766-67.

123. *Gregory*, 111 S. Ct. at 2407 (quoting the *O'Neil* rational bases).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* (quoting *Murgia*, 427 U.S. at 316).

132. *Gregory*, 111 S. Ct. at 2408; ("The people of Missouri rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step aside at age 70. This classification does not violate the Equal Protection Clause.").

puts another technical burden on Congress to show that preemption was intended. This standard appears especially unnecessary when the ADEA purpose is broad and its exceptions limited and narrowly construed.

The decision also runs afoul of the intent of Congress as evidenced by the legislative history. The broad scope of ADEA, when combined with the instructions to construe its exceptions narrowly, contradicts the decision in this case. Contrary to the majority's holding, the drafters of the ADEA did not intend to include a laundry list of persons covered; rather, the intent seems to have been to cover *all persons*, other than those *specifically* excluded. The majority's interpretation of the ADEA's purpose not only limits its applicability, but also its usefulness. By ignoring the broad scope of the ADEA the majority has unnecessarily added to the confusion that accompanies statutory construction. Although the statutory construction arguments are tenable on either side, the better argument is not found in the majority opinion.

The outcome of cases in this area ultimately should rest on the role of the judiciary in American jurisprudence and on the role of state citizens in determining the qualifications of their judiciary as the state uses the election route.

Today, most persons have accepted the notion that judges are makers of policy, rather than oracles of natural law. Thus, the citizenry has demanded more control over the appointment or election of its judiciary. While some states elect members to their highest courts, other states have, through their citizens, chosen to limit the terms of the high court's members through mandatory retirement provisions. It seems that the states that have chosen to limit the judge's terms via the mandatory retirement route should be given the same opportunity to shape their state judiciary.

Finally, the competency of older judges is an issue requiring sensitivity and thoughtfulness. Although the normal aging process eventually reduces everyone's capacity to perform certain tasks, the process is neither uniform nor predictable. Thus, an arbitrary age limit, when applied to many individuals, is often inequitable. Therefore, the citizens of states that have chosen to use mandatory retirement provisions to regulate their judiciary may have chosen an irrational means to reach their desired purpose.

VI. CONCLUSION

In deciding *Gregory v. Ashcroft*, the majority resolved a split in the circuits that allowed some judges to retain their positions while other judges were forced into retirement. Unfortunately, the majority failed to adequately limit its holding and may have unnecessarily created a new battery of tests in the application of federal law to the states.

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