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The ADEA in the Wake of Seminole

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THE ADEA IN THE WAKE OF SEMINOLE

I. INTRODUCTION

Everyone, regardless of their sex or race, has at least one thing in common, we all get older. Nonetheless, attitudes about our elders in society differ depending on the context. Sometimes the aged are considered wise; other times they are considered incompetent. In 1967, Congress attempted to combat age discrimination in the workplace with the Age Discrimination in Employment Act\(^1\) (ADEA or the Act). Congress found that older Americans faced "disadvantages in their efforts to retain employment"\(^2\) which consisted of arbitrary age limits on employment notwithstanding that person's skill and job performance.\(^3\) Further, Congress prohibited arbitrary age discrimination in a number of different areas, ranging from employment agency referrals to pension benefits.\(^4\)

Congress used its power under the Commerce Clause to enact the original ADEA.\(^5\) In 1974, Congress extended the ADEA definition of "employer" to the states.\(^6\) Unlike the original Act however, Congress did not specify which provision of the constitution empowered them to include the states under the ADEA's

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2. Id. § 621(a)(1).
3. See id. § 621(a)(2).
4. See id. § 623(a)(1).
5. See id. § 621(a)(3); see also U.S. Const. art. I, § 8, cl. 3.
coverage. Twenty-two years later, in *Seminole Tribe of Florida v. Florida,* the Supreme Court ruled that the Indian Gaming Regulatory Act (IGRA), which was legislated under the Indian Commerce Clause, could not abrogate a state's sovereign immunity from suit. The Court held that Congress could not make the states amenable to suit because of the Eleventh Amendment:

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.

To reach this decision, the Court overruled *Pennsylvania v. Union Gas Co.* by declaring that legislation passed pursuant to the Commerce Clause cannot abrogate the states' sovereign immunity.

The adverse effect this ruling could have on the ADEA is enormous. If the Supreme Court decides that the 1974 Amendments to the Act, which extended coverage of the ADEA to the states, were passed pursuant to the Commerce Clause, then any person arbitrarily discriminated against by a state employer because of her age may have no recourse in the federal courts. Section 630(b) of the ADEA would establish a right without a remedy; it would be a statute without any teeth.

This paper addresses the effect the *Seminole* decision will have on this portion of the Act. Section II briefly examines the underlying rationale behind *Seminole,* including the effect on *Ex parte Young.* Section III examines the effect *Seminole* will have on the ADEA if the Court determines that the Amendments were passed pursuant to the Commerce Clause. Section

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10. See *Seminole,* 116 S. Ct. at 1119.
11. U.S. CONST. amend. XI.
13. See *Seminole,* 116 S. Ct. at 1128.
14. See id. at 1127-29.
IV argues that the 1974 Amendments were not passed under the Commerce Clause, but were enacted pursuant to Section Five of the Fourteenth Amendment. Thus, the ability to bring a suit against a state *qua* state will be preserved under the rationale of *Fitzpatrick v. Bitzer*. Finally, Section V concludes this examination by predicting the future course the Court may take concerning the states' potential amenability to suit under the ADEA.

II. *SEMINOLE TRIBE OF FLORIDA V. FLORIDA*¹⁸

A. The Decision

On March 27, 1996, Chief Justice Rehnquist, writing for a five-to-four majority, held that the Indian Commerce Clause could not be used by Congress to abrogate the states' sovereign immunity. The Court also held that the state official, in this case the Governor of Florida, could not be sued under the doctrine of *Ex parte Young* because the IGRA contained a detailed remedial scheme.

The Court reaffirmed the proposition established in *Hans v. Louisiana* that despite the Eleventh Amendment's text, the

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¹⁶. See U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

¹⁷. 427 U.S. 445 (1976). The Court found that the Civil War Amendments, most notably the Fourteenth Amendment, "sanctioned intrusions by Congress" normally reserved to the states. *Id.* at 455. Thus, legislation passed pursuant to Section Five limits the principle of state sovereign immunity embodied in the Eleventh Amendment. See *id.* at 456.

¹⁸. 116 S. Ct. 1114 (1996). The Seminole Tribe filed suit against the States of Florida and Alabama to compel negotiations under the IGRA. See Seminole Tribe of Florida v. Seminole, 11 F.3d 1016 (11th Cir. 1994). The U.S. District Court for the Southern District of Florida denied the State's motion to dismiss, while the Alabama District Court granted the motion to dismiss. See *id.* The Court of Appeals held that Congress could not abrogate the states' sovereign immunity under the Indian Commerce Clause, distinguishing Congress' power under the Indian Commerce Clause from the Commerce Clause. See *id.* at 1028.

¹⁹. See *Seminole*, 116 S. Ct. at 1132; see also 25 U.S.C. § 2710(d)(7) (1994). The Court of Appeals held that *Ex parte Young* did not apply because negotiating a contract was a discretionary act. See Seminole Tribe of Florida v. Florida, 11 F.3d 1016, 1028 (11th Cir. 1994). According to the Eleventh Circuit, *Ex parte Young* applies only to ministerial acts. See *id*.

²⁰. See *Seminole*, 116 S. Ct. at 1132-33.

²¹. 134 U.S. 1 (1890).
states’ sovereign immunity extends to federal question jurisdiction. In cases where it is alleged that Congress abrogated the states’ sovereign immunity, courts must make two determinations: first, whether Congress “unequivocally expressee[d] its intent to abrogate the immunity,” and second, whether Congress acted “pursuant to a valid exercise of power.”

The Court answered the first inquiry in the affirmative. It concluded that Congress clearly established its intent to abrogate the states’ sovereign immunity from suit in the IGRA. The Court, addressing the second inquiry, confronted the decision of Union Gas. Chief Justice Rehnquist dismissed the notion that the Hans decision, which established the states’ sovereign immunity in federal question suits only stated a rule of federal common law. Instead, the Court concluded that the Eleventh Amendment as it applies to federal questions suit is a constitutional limitation on the “federal courts’ jurisdiction under Article III.” The majority based its holding on the premise that the Eleventh Amendment limited Congress’ power under the Commerce Clause, thereby limiting the federal courts’ jurisdiction under Article III. Further, and more problematic, it adopted the rationale from Hans that state sovereign immunity is “inherent” to the nature of sovereignty.

The Court also prevented the Tribe from bringing an Ex parte Young action against the Governor for failing to follow

22. See Seminole, 116 S. Ct. at 1122 (quoting Hans v. Louisiana, 134 U.S. 1, 15 (1890)).
23. Id. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).
24. Id.
29. See id. at 1128.
30. See id. at 1130-31, n.13; see also Henry Paul Monaghan, The Sovereign Immunity “Exception,” 110 HARV. L. REV. 102, 123 (1996) (noting that the meaning of the word “inherent” is a problematic concept in the area of sovereign immunity).
section 2710(d)(3) of the IGRA.  

The Court created an anomalous situation. Congress could not subject Florida to the IGRA’s remedial scheme because the statute violated the Eleventh Amendment, yet the IGRA also barred an *Ex parte Young* action against Governor Chiles because this statute contained a detailed remedial scheme.  

Congress intended the state to be subjected to section 2710(d)(7), therefore “[w]here Congress has created a remedial scheme for the enforcement of a particular federal right, we have . . . refused to supplement that scheme with one created by the judiciary.” This principle was adopted from the *Bivens* context, based on the assumption that “Congress is in a better position to decide whether or not the public interest would be served by creating” another liability. The Court declared “the fact that Congress chose to impose upon the State a liability which is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young* strongly indicates that Congress had no wish to create the latter under [section] 2710(d)(3).”  

The decision in *Seminole* reflects the Rehnquist Court’s disposition toward protecting the “integrity of state governments against federal encroachment.” This trend is reflected in the Court’s holdings from *New York v. United States*, *United States v. Lopez*, and *Gregory v. Ashcroft*. In *Gregory*, the Court held that Missouri state court judges were “appointees on the policymaking level” and, thus, were excluded from the ADEA. Before reaching this conclusion, the Court described

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31. See *Seminole*, 116 S. Ct. at 1132. Section 2710(d)(3) is the enforcement provision of the IGRA which requires the state and the Indian tribe to come up with a compact. See id. at 1132-33.

32. See id.

33. Id. (quoting *Schweiker v. Chilicky*, 487 U.S. 412 (1988)).


41. See *Gregory*, 501 U.S. at 467.
its view on the role of the states in the federal system. The Court, speaking through Justice O'Connor, declared that the "principal benefit of the federalist system is a check on abuses of government power." For this system to be effective, "there must be a proper balance between the states and the Federal Government." The employee challenging a state's decision to terminate her employment, because of her age, faces this Court's conviction about federalism.

B. A Rock and a Hard Place

The holding from Seminole could create a constitutional quagmire: there may be no forum to enforce a constitutional right. Seminole may have constructed the proverbial rock and a hard place. If, as in the case of the IGRA, a statute is deemed to have been enacted under the commerce clause, and has a detailed remedial scheme, there is no federal forum.44 If Seminole applies to all Article I powers, and legislation enacted under an Article I power, like antitrust or copyright law, is deemed to have a detailed remedial scheme

In some cases there may be no state forum either. For instance, federal courts have exclusive jurisdiction over federal antitrust laws. If Seminole applies to all Article I powers, and legislation enacted under an Article I power, like antitrust or copyright law, is deemed to have a detailed remedial scheme

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42. Id. at 458.
43. Id. at 459.
44. See Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1130-34 (1996) (stating the two holdings of the Court, that the Eleventh Amendment protects the state from being sued in federal court and the preclusion of Ex parte Young, effectively bars the Seminole Tribe from suing in federal court). See also Monaghan, supra note 30, at 130 (noting that Congress would prefer some federal court remedy to no remedy at all); HART & WECHSLER, supra note 27, at 47 (asking whether Congress would prefer enforcing the federal law against the state official to no judicial remedy at all).
45. See, e.g., Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373, 379 (1985). The effect Seminole could have on other Article I powers is beyond the scope of this paper. For a more complete discussion of the effect of sovereign immunity on federal antitrust and copyright laws prior to Seminole, see H. Stephen Harris, Jr. & Michael P. Kenney, Eleventh Amendment Jurisprudence After Atascadero: The Coming Clash With Antitrust, Copyright and Other Causes of Action Over Which Federal Courts Have Exclusive Jurisdiction, 37 EMORY L.J. 645 (1988). Another Article I power which Seminole could affect is the impairment of the contracts clause. While the possible effects Seminole has on this clause are unknown, it states that "No State shall . . . pass any . . . [law impairing the Obligation of Contracts, . . . ."] U.S. CONST. art. I, § 10, cl. 1. If Seminole applies to all Article I powers, this clause could be severely weakened.
precluding an *Ex parte Young* action, then there is no federal review either. When there is a violation of a constitutionally protected right there has to be some forum.

The decisions from *Battaglia v. General Motors Corporation*\(^46\) and *Bartlett v. Bowen*\(^47\) recognized that Congress’ power over jurisdiction of the courts is limited by the Due Process Clause.\(^48\) The *Bartlett* court also suggested that such action would “remove [ ] from the courts an essential judicial function under our implied constitutional mandate of separation of powers . . . .”\(^49\)

While the courts in both cases found that Congress could not preclude both federal and state court jurisdiction, there has never been a case which squarely decided whether the Court could withdraw judicial review.\(^50\) The actors may have changed, but the effect is the same; the litigant is deprived of a judicial forum. The Due Process Clause, separation of powers and, federalism concerns should place constitutional limitations on the Court’s ability to preclude judicial review.\(^51\)

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46. 169 F.2d 254 (2d Cir. 1948). Employees sued under the FLSA for overtime compensation, but Congress, in a separate statute, withdrew jurisdiction from the District Courts while the suits were pending. See *id.* at 255. The Court of Appeals side-stepped Congress’ bar by holding that it had to ascertain whether it had jurisdiction to hear the claim. See *id.* at 256. To make its determination, the court claimed it had to review the merits of the case. See *id.* at 256-58. The court declared that Congress’ control over “jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment” Due Process Clause. *Id.* at 257.

47. 816 F.2d 695 (D.C. Cir. 1987). Bartlett, on behalf of her deceased sister, challenged the constitutionality of Part A of the Medicare Act, alleging that its partial bar from benefits burdened her sister’s free exercise of religion. See *id.* at 696. The Secretary of Health and Human Services claimed that the statute precluded federal jurisdiction, and thus, the Act’s constitutionality could not be attacked. See *id.* at 698. However, the Court of Appeals held that Congress did not preclude all review. See *id.* The court declared that even if Congress meant to exclude all review (federal and state), this would violate the separation of powers principle implicit in the Constitution. See *id.* at 703. Excluding the Act from review was also attacked on due process grounds by the court. See *id.* at 704-07.

48. See *Bartlett*, 816 F.2d at 704-07; *Battaglia*, 169 F.2d at 257.

49. *Battaglia*, 816 F.2d at 703.

50. Cf. *HART & WECHSLER*, supra note 27, at 375 (noting that no Supreme Court case has ever squarely held that there is a constitutional right, in any case involving a constitutional claim, to a judicial forum).

more, the Court's interpretation of the Eleventh Amendment is "inconsistent with the essential function of the federal courts—to provide a fair and impartial forum for the uniform interpretation and enforcement of the supreme law of the land . . . ." The analysis from these cases could be extended to the situation presented by Seminole. Its effect "would be equivalent to a judicial restraint of federal jurisdiction." Nonetheless, a case brought under the ADEA may not reach this crucial juncture.

III. LIMITED CHOICES FOR THE ADEA PLAINTIFF

If the Court adopts the view that the ADEA's 1974 Amendment, which includes the states as employers, was passed pursuant to the Commerce Clause, then the states cannot be sued directly. If that is the case, a litigant has two choices: one, sue the state official under an Ex parte Young action, or two, sue the State in state court.

A. Suing the State in State Court

The ADEA specifies that "[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 Act . . . ." State courts have jurisdiction to try an action brought under the ADEA; they have concurrent jurisdiction with federal courts, and are bound to uphold the federal law under the Supremacy Clause. Nevertheless, the plaintiff who sues the state in its court faces an uphill battle.

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with Bartlett, 816 F.2d at 695 (holding that withdrawal of all forms of judicial review violates the separation of powers principle and the due process clause).
52. Atascadero State Hosp. v. Scanlon, 473 U.S. 207, 255-56 (1985) (Brennan, J., dissenting); see also Harris & Kenny, supra note 45 (arguing that the decision from Atascadero could undermine the broad reach of the National Government over anti-trust and copyright laws).
53. Harris & Kenny, H. Stephen Harris, Jr. & Michael P. Kenny, (emphasis in original).
56. U.S. CONST. art. VI; see Tafflin, 493 U.S. at 458-59.
A state's consent to be sued in its court has no effect on the exercise of jurisdiction in the lower federal courts. Nonetheless, the Supreme Court may review a state court decision of federal law on appeal from the state's highest court. In *Cohens v. Virginia*, Chief Justice Marshall established the right of Supreme Court review of state court judgments where the State was one of the participants and the decision rested on federal law.

The Court in *Seminole* suggested, probably erroneously, that in order for a state to be sued in its own court it must consent to suit. If this is the case, many states, such as Virginia, would probably not give their consent. It is questionable whether an ADEA suit brought in state court against the state can be heard in that court. In *Howlett v. Rose* the Court held, in a section 1983 action against a local school board, that sovereign immunity will not protect the municipality because under the statute’s definition it was a “person,” and not an arm of the state. The Court reasoned that, through the Supremacy Clause, federal law is enforceable in state courts. Since municipalities are deemed “persons” under section 1983, a state’s determination that they are protected by state common-law

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59. 19 U.S. (6 Wheat.) 264 (1821).
60. See id. The Eleventh Amendment prevents lower federal courts from hearing claims against the state. See Seminole Tribe of Florida v. Florida, 116 S. Ct. 1114, 1121-22 (1996). The Supreme Court, on appeal from the state's highest court, can hear a suit against the state. See *Cohens*, 19 U.S. (6 Wheat.) 264 (1821). These two outcomes illustrate the anomalous interpretation of the Court's Eleventh Amendment jurisprudence. See Jackson, *supra* note 27, at 15-16. If the case is brought in a federal district court, without the state's consent, there is no federal jurisdiction. However, if a state consents to be sued in its own court, federal review is possible if the Supreme Court grants *certiorari* to hear the appeal. See id. at 29-30.
61. See *Seminole*, 116 S. Ct. at 1131 n.14. See also Monaghan, *supra* note 30, at 125 n.161 (noting that the Court's suggestion is incorrect).
62. See, e.g., Messina v. Burden, 321 S.E.2d 657 (1984). The Virginia Supreme Court noted that the doctrine of sovereign immunity is “alive and well” in the Commonwealth. Id. at 660. Also, in *Howlett v. Rose*, 496 U.S. 356 (1990), the Florida courts went to great lengths to protect the school board under the guise of sovereign immunity. See id. at 360-61.
64. See id. at 376.
immunity has no force in a state court interpreting federal law.65

Nevertheless, the Court also declared that a state does not have to "entertain in its own courts suits from which it was immune in federal court."66 Thus, the Court's interpretation of the ADEA Amendment may also affect the possibility of state judicial review. If the Court decides that the ADEA Amendment was enacted under the Commerce Clause, and Seminole applies, the ADEA plaintiff cannot sue a state in its own courts.67 It would be anomalous for a state court to entertain a suit, based on federal law, when a federal court has no jurisdiction to hear it.68

B. Ex parte Young69

The Court determined that a state official could be sued in her official capacity in Ex parte Young.70 The fiction is this:

[If an] act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of the complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity.71

65. See id. at 367, 376.
66. Id. at 365.
67. See id. The Court held that section 1983 does not "override the traditional sovereign immunity of the States." Id. It also reiterated the Court's previous holding from Will v. Michigan Department of State Police, 491 U.S. 58 (1989), that those arms of the state "which have traditionally enjoyed Eleventh Amendment immunity" under section 1983 are not subject to suit in state or federal court. Id. This line of reasoning could be extended to the ADEA. If it is extended to the ADEA, it seemingly contradicts another line of holdings from the Court which says that the Eleventh Amendment has no application in state courts. See HART & WECHSLER, supra note 27, at 46 (citing Nevada v. Hall, 440 U.S. 410 (1979) for support). However, instead of relying on the Eleventh Amendment, the state could impose a claim of common law sovereign immunity, thus withholding consent. See Seminole, 116 S. Ct. at 1131 n.14; HART & WECHSLER, supra note 27, at 46.
68. See Howlett, 496 U.S. at 365.
69. 209 U.S. 123 (1907).
70. See id.
71. Id. at 159.
Therefore, this fiction is used "to permit the federal courts to vindicate federal rights and hold state officials responsible. . . ."72 Nonetheless, an Ex parte Young action can only seek prospective relief, and not retroactive relief for monetary damages.73

The ADEA provides that a violation of section 623 will be deemed a violation of section 215 of the Fair Labor Standards Act (FLSA).74 If an employer violates the ADEA, it owes the wrongfully discharged employee "unpaid minimum wages or unpaid overtime compensation" for purposes of sections 216 and 217 of the FLSA.75 An employer could also be liable for liquidated damages if it has willfully violated the ADEA.76

A litigant cannot recover a retroactive monetary award against the states' coffers.77 The Court in Edelman recognized the fiction behind an Ex parte Young action: when a state officer is sued there is enough state action for purposes of the Fourteenth Amendment, but not for the Eleventh Amendment.78 Thus, as the Court in Edelman concluded, a court can only award prospective relief against the state official. To award retroactive relief would ignore the constraints of the Eleventh Amendment.79 Prospective injunctive relief also "prevent[s] a continuing violation of federal law."80 While the Sem-

72. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984). The Court refused to extend federal court jurisdiction in suits against state officials based on state law. It found that the Ex parte Young fiction was established to promote the supremacy of federal law. Thus, when a state official has violated state law, there is no need to invoke the fiction of Ex parte Young. See id. at 107.


77. See Edelman, 415 U.S. at 663-64. The ADEA allows a plaintiff to recover lost wages in the form of minimum wage or overtime, and where there has been a willful violation she can recover liquidated damages. See 29 U.S.C. § 626(b) (1994) Nonetheless, these remedies are retroactive against the state. The Virginia Supreme Court provided a good example of how state courts will treat monetary claims against a state's treasury in Messina v. Burden, 321 S.E.2d 657 (1984). The court stated, in a tort action against Virginia, that the legislature must expressly remove sovereign immunity, otherwise the action cannot be brought in state court. See id. at 660-62.

78. See Edelman, 415 U.S. at 676-77; HART & WECHSLER, supra note 27, at 1077-79.

79. See Edelman, 415 U.S. at 664.

80. Green v. Mansour, 474 U.S. 64, 68 (1985). The Court held that federal courts
Inole decision may have all but destroyed a private citizen's ability to bring a suit against the states under the Commerce Clause, it has also limited the doctrine of Ex parte Young.\textsuperscript{81}

A state employee bringing an Ex parte Young action against her supervisor, not the state itself, must confront the ruling from Seminole. Seminole states that a federal court cannot award prospective relief under Ex parte Young where Congress has already provided a detailed remedial scheme.\textsuperscript{82} Therefore, the courts will examine the Act's enforcement provisions. The rationale behind Seminole indicates that the ADEA is not as comprehensive as the IGRA.\textsuperscript{83}

The ADEA specifically provides that a court enforcing this Act "shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act . . . ."\textsuperscript{84} Ex parte Young actions seek to enforce federal law by ending violations of a federal statute and preventing future violations.\textsuperscript{85} Clearly, the language of the Act indicates that Congress left open the possibility of an Ex parte Young remedy.\textsuperscript{86}

Conversely, the IGRA did not leave open the possibility of other remedies.\textsuperscript{87} As interpreted by the Court, IGRA's section 2710(d)(3) prescribes that if the state fails to negotiate in good

\textsuperscript{81} See supra notes 31-35 and accompanying text.
\textsuperscript{82} See supra, 116 S. Ct. at 1132.
\textsuperscript{83} See supra notes 31-35 and accompanying text.
\textsuperscript{84} See supra, 116 S. Ct. at 1132.
\textsuperscript{85} See supra notes 31-35 and accompanying text.
\textsuperscript{86} See supra notes 31-35 and accompanying text.
\textsuperscript{87} See supra notes 31-35 and accompanying text.

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\textsuperscript{86} See supra notes 31-35 and accompanying text.
\textsuperscript{87} See supra notes 31-35 and accompanying text.
faith, the parties must compact within sixty days. If they fail to reach a compact, each party must submit a proposed compact to a mediator. If the state fails to abide by the mediator's compact, the Secretary of the Interior determines what regulations will govern. Chief Justice Rehnquist concluded that Congress, by imposing this "modest set of sanctions," meant to exclude any sanction that would expose state officials to the "full remedial powers of a federal court." The ADEA, unlike the IGRA, specifically allows the courts to enforce other remedies not mentioned in the statute. Thus, the intent the Court found in Seminole concerning IGRA section 2710(d)(3), would not be present in an ADEA lawsuit.

The view taken by the Court in Seminole, however, affords the Seminole Tribe a right without a remedy, which is a glaring weakness that the Court does not address. One commentator suggests that the Court could have declared that the suit against Governor Chiles "failed to state a claim for relief." The Seminole Tribe had no statutory claim against Governor Chiles, and accordingly, no remedy. Unlike the IGRA, the ADEA provides a right in the employee who has been arbitrarily dismissed because of her age. She can seek relief against her employer in the form of an Ex parte Young action.

What is problematic about an Ex parte Young action in the ADEA context is that by the time the suit actually gets to court, it may be too late. The person suing may have lost interest and time, something very precious to someone who is close to retiring. Lost wages, pension benefits, and overtime compensation are not recoverable under Ex parte Young. Consequently, reinstatement is the most likely remedy. Justice

89. See id.
90. See id. at 1133.
91. Id.
92. Id. at 1133 n.17.
94. See Monaghan, supra note 30, at 129; see generally Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (recognizing that where a right has been violated the laws, and the courts interpreting those laws, provide a remedy).
95. Monaghan, supra note 30, at 130-31.
96. See id. at 131.
Brennan recognized the defects of an *Ex parte Young* remedy in his dissenting opinion from *Atascadero State Hospital v. Scanlon.*

In *Atascadero,* a mentally disabled student sued the state for damages under the Rehabilitation Act. Justice Brennan noted that a litigant suing the state under *Ex parte Young* must follow a rigid set of rules. She must “remember” to name the official rather than the state as the defendant, and can only seek prospective relief. It took six years for the suit to finally be decided against Scanlon, the plaintiff. Scanlon’s reward for his perseverance was dismissal of his suit because of the Eleventh Amendment. The dissent recognized that a “damages award may often be the only practical remedy available to the plaintiff, and the threat of a damages award may be the only effective deterrent to a defendant’s willful violation of federal law.” The only effective remedy for an ADEA plaintiff is a damages award. Like Scanlon, “it is damages or nothing” for the ADEA litigant. If, as in *Atascadero,* she has to wait six years for her case to be decided, she may be ready for retirement. Consequently, the state obtains its desired goal: the retirement of an older employee. If an *Ex parte Young* remedy is the only recourse a wrongly discharged employee has in federal court, the ADEA’s bark may be worse than its bite.

The potential problems addressed in the *Ex parte Young* and state court contexts can be avoided in an ADEA suit. The Court should conclude that the 1974 Amendment to the ADEA, extending the coverage of the Act to include the states, was enacted under Section Five of the Fourteenth Amendment. Therefore, the state, and state actors, should be amenable to suit under the ADEA.

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100. 29 U.S.C. § 794 (1994). Scanlon alleged that the hospital denied him employment as a graduate student because of his disability. See *Atascadero,* 473 U.S. at 236. The Court held that since the state was not expressly named in the statute, Congress did not intend to abrogate the states’ sovereign immunity. See *id.* at 245-46.
101. See *Atascadero,* 473 U.S. at 256.
102. See *id.* at 256-57 n.9.
103. *Id.* at 256-57.
104. *Id.* at 256-57 n.9 (citing Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 410 (1971)).
IV. The Fourteenth Amendment to the Rescue?

The Supreme Court has never answered whether the ADEA's 1974 Amendment was passed pursuant to Section Five of the Fourteenth Amendment. The Supreme Court had an opportunity to address this issue in *EEOC v. Wyoming* and *Gregory v. Ashcroft*. Nevertheless, in both situations the Court declined to decide the issue. The Court, in *Wyoming*, declared that "[w]e need not decide whether [the ADEA Amendment] could also be upheld as an exercise of Congress' powers under [Section Five] of the Fourteenth Amendment." More recently, the Court in *Gregory* avoided the question by holding that the Missouri state judges were appointees "on the policy making level," a specific exception under the ADEA.

In *Gregory*, the Court conceded that if the ADEA Amendment was passed under Section Five of the Fourteenth Amendment the "concerns about federal intrusion into state government that compel the result in this case might carry less weight." The Court intimated, in very strong terms, that it would still find for Missouri because Congress did not explicitly impose obligations on the states' selection of its judges under Congress' Section Five Powers; the Court declared that the "Fourteenth Amendment does not override all principles of federalism." In essence, the Court was more concerned with federalism than with the possible discriminatory effect of Missouri's Constitutional provision requiring mandatory retirement at seventy years of age.

108. *Gregory*, 501 U.S. at 466-67. The Court declared that if Congress had wanted judges included in the ADEA, it would have made its intentions clear. See *id.* at 467.
109. *Id.* at 468.
110. *Id.* at 469.
111. See William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause*, 47 Vand. L. Rev. 1355, 1393-94 (1994). The authors assert that the Court is reluctant to interfere with the states' core function of governance without a clear, explicit statement by Congress. See *id.* at 1394.
A. The Seventh Circuit's Interpretation of the ADEA Amendment

Age is not a "suspect classification" under Equal Protection Clause standards. However, if Congress acted under Section Five of the Fourteenth Amendment, then it can ensure equal protection under the law as long as that law is "plainly adopted to that end. . . ." The language of the Act and the relevant legislative history of the ADEA and Title VII prove that the Amendment to the ADEA guaranteed equal protection under the law.

1. The Case Law

While the Supreme Court may be bashful about deciding the issue, some circuits have expressly dealt with it and concluded that the ADEA Amendment, extending the definition of employer to include the states, was enacted pursuant to Congress' legislative power under Section Five of the Fourteenth Amendment. The Seventh Circuit addressed this issue in \textit{EEOC v. Elrod}. It held that the 1974 Amendment to the ADEA was a constitutional exercise of Congress' power under Section Five of the Fourteenth Amendment.

\begin{footnotesize}
\begin{enumerate}
\item[112.] The Seventh Circuit is not the only circuit to adopt this interpretation. The Tenth and First Circuits have also found that the ADEA Amendment was passed pursuant to Section Five of the Fourteenth Amendment. \text{See} \textit{Hurd v. Pittsburgh State Univ.}, 821 F. Supp. 1410, 1413 (D. Kan. 1993), \textit{aff'd}, 29 F.3d 564 (10th Cir. 1994), \textit{cert. denied}, 115 S. Ct. 321 (1994); \textit{Ramirez v. Puerto Rico Fire Serv.}, 715 F.2d 694, 700 (1st Cir. 1983).
\item[113.] \text{See} \textit{Massachusetts Bd. of Retirement v. Murgia}, 427 U.S. 307, 313-14 (1976).
\item[114.] \text{McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).}
\item[115.] \text{See} \textit{Ramirez, 715 F.2d at 700; EEOC v. Elrod, 674 F.2d 601, 605-08 (7th Cir. 1982).}
\item[116.] \text{See} \textit{Davidson v. Board of Governors, 920 F.2d 441 (7th Cir. 1990); Ramirez, 715 F.2d at 700; \textit{Hurd, 821 F. Supp. at 1413. But see} \textit{Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690 (3d Cir. 1996); MacPherson v. University of Montevallo, 938 F. Supp. 785 (N.D. Ala. 1996).}
\item[117.] \textit{Johnson v. Mayor of Baltimore, 731 F.2d 209, 214-15 (4th Cir. 1984), rev'd, 472 U.S. 353 (1985). But see} \textit{Taylor v. Virginia, 951 F. Supp. 591, 599 (E.D. Va. 1996) (noting that under the ADEA, a legislative purpose was found to have invoked the Fourteenth Amendment).}
\end{enumerate}
\end{footnotesize}
Section Five of the Fourteenth Amendment. In so holding, the court determined that the proper inquiry was whether the ADEA Amendment was "plainly adapted" to the end of enforcing the Equal Protection Clause, and is 'not prohibited by but is consistent with the letter and spirit of the [C]onstitution." The court recognized the broad legislative powers of the Fourteenth Amendment:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

The Seventh Circuit used the legislative history of the 1974 Amendment, as well as the similarity between Title VII of the Civil Rights Act of 1964 and the ADEA, to show that the ADEA Amendment extending the coverage to the states was passed pursuant to the Fourteenth Amendment.

The court focused on the limited legislative history of the Act to buttress its reasoning. Senator Bentsen, an early supporter of the ADEA Amendment, expressed his concern about age discrimination by state employers in 1972 when he said:

there is mounting evidence that employees of... State[s]... are being denied that free choice between productive work or adequate retirement income. In fact, there are strong indications that the hiring and firing practices of governmental units discriminate against the elderly... The legislation I introduce today is intended to close the loophole in present law and to bring Government employees within the jurisdiction of the age discrimination law.

118. See id. at 603.
119. Id. at 604 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).
120. Id. at 604 (quoting Ex parte Virginia, 100 U.S. 339, 345-46 (1879)).
122. See EEOC v. Elrod, 674 F.2d 601, 604-09 (7th Cir. 1982).
123. 118 CONG. REC. 7745 (Mar. 9, 1972) (statements by Senator Bentsen).
At the time, Senator Bentsen's proposal did not make it out of the House-Senate conference committee. Nonetheless, he expressed similar sentiments when the Amendment, substantially comparable to his earlier proposal, was passed two years later. The legislative history does not specifically reference the Fourteenth Amendment, but it does indicate Congress' intention to bring the states within the age discrimination laws. It illustrates Congress' efforts to provide elderly Americans equal protection under the law as it applies to the states.

2. The Ratchet Theory: Roadblock or Permissible Extension of Congressional Power?

The Court may also have to confront the ratchet theory in a future ADEA case. The ratchet theory says that Congress can elevate certain rights under Section Five of the Fourteenth Amendment when the Court has not seen fit to do so. The current debate about the ratchet theory centers around the Religious Freedom Restoration Act (RFRA). The theory was

124. See 120 CONG. REC. 8768 (1974) (statements by Senator Bentsen). The language of Senator Bentsen's amendment proposal from 1972 is similar to the 1974 Amendment. The Senator's proposal for 29 U.S.C. § 630(b)(2), as it related to the states, said the Amendment should apply to "a State or political subdivision thereof, and any agency or instrumentality of the foregoing." 118 CONG. REC. 7746 (Mar. 9, 1972) (statements by Senator Bentsen). The language is substantially the same in the Act: "[A] State or a political subdivision [thereof] and any agency or instrumentality of a State, or political subdivision of a State, and any interstate agency . . . ." 29 U.S.C. § 630(b)(2) (1994) (the italicized language notes the changes between the Act and Senator Bentsen's proposal). The only difference between the two is that the word "foregoing" was substituted for the italicized language. See id.

125. See Elrod, 674 F.2d at 607-08. ("The 1974 ADEA Amendment differs from the 1972 Title VII amendments only in lacking explicit reference to the Fourteenth Amendment.").


128. 42 U.S.C. § 2000bb (1994). See, e.g., Laycock, supra note 127; Joanne C. Brant, Taking the Supreme Court at its Word: The Implication for RFRA and Sept-
developed in the Voting Rights Cases of the late 1960s and early 1970s, beginning with the Supreme Court's decision in *Katzenbach v. Morgan.* In an important footnote to that decision, Justice Brennan insisted that Congress could only adopt legislation which enforced provisions under the Fourteenth Amendment. In later decisions, the Court held that Congress could not ratchet down an equal protection right. Nonetheless, the uncertainty surrounding the theory is whether Congress can ratchet up rights that have not been recognized by the Court.

Some commentators have suggested that Congress does not have this power. To support this proposition, they cite the Court's decision from *Oregon v. Mitchell.* Four Justices in *Mitchell* decided that Congress could establish voting age requirements on the states; four others rejected this notion arguing that *Morgan* should only apply to discrete and insular minorities. Justice Black believed that federalism concerns prohibited Congress from establishing a voting age requirement on the states, and left open the question whether Congress could legislate under the Fourteenth Amendment in contexts


131. See *Katzenbach,* 384 U.S. at 651-52 n.10.


135. Justices Brennan, Marshall, and White believed that Congress could act under the Fourteenth and Fifteenth Amendment against the states. See *Mitchell,* 400 U.S. at 231-40. Justice Douglas wrote separately and held that Congress had the power to extend the age requirement in the Voting Rights Act to the states under the Fourteenth Amendment. See *id.* at 141-44. Justice Stewart, joined by Justices Burger and Blackmun, maintained that Congress could not impose voting age requirements on the states based on age because it was not a discrete and insular minority. See *id.* at 296. Justice Harlan also declared that there was no invidious discrimination against 18-21 year olds, and that the Voting Rights Act was not "valid as declaratory of the meaning of that clause [Section Five of the Fourteenth Amendment]." *Id.* at 212-13.
other than race. Nevertheless, the Court has "acknowledged congressional power to go beyond judicial interpretation of the Reconstruction Amendments."\(^{137}\)

Proponents of the ratchet theory contend that it is "consistent with the intent of the Framers and the purposes of the constitutional protections of individual liberty."\(^{138}\) This is the better reasoned view. If the principle behind the enactment of Section Five was to safeguard individual rights, then Congress should be able to legislate in order to protect those rights.\(^{139}\) This principle is embodied in our system of governance; the "separation of powers is 'essential to the preservation of liberty' and it is necessary to give 'those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.'\(^{140}\) When the Court is confronted with a ratchet issue it must decide "whether the powers of the other branches are limited by the Court's interpretation when the Court finds no constitutional right and issues no order against the other branches [of government].''\(^{141}\)

Congress can protect older Americans from arbitrary age discrimination in employment.\(^{142}\) The Court upheld a Congressional statute that protected a non-suspect class in *Fitzpatrick v. Bitzer*.\(^{143}\) When *Fitzpatrick* was decided, the minimum standard of scrutiny controlled in equal protection challenges to gender discrimination absent a statute.\(^{144}\) Further, the Court

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136. See id. at 131-34.
139. Laycock, *supra* note 127, at 160. "The principle [behind section five] was to multiply the institutions capable of protecting federal rights because it was not safe to rely exclusively on any single institution." *Id.*
140. Laycock, *supra* note 127, at 162 n.81 (quoting *The Federalist* No. 51 at 321-22 (James Madison) (Clinton Rossier ed., 1961)).
142. See Comment, *The Americans with Disabilities Act: Will the Court get the Hint? Congress' Attempt to Raise the Status of Persons with Disabilities in Equal Protection Cases*, 15 PACE L. REV. 621, 627 (1995). The author recognized that older persons are an example of a class of people who have not been afforded special protection by the Court, but Congress has seen fit to supply them with special protection. See *id.* at 627.
144. See Pawa, *supra* note 127, at 1076-77. *Fitzpatrick* was decided six months before the Court "bumped up" gender discrimination to an intermediate level of scru-
had two opportunities to hold that age discrimination against the states was not enacted under the Fourteenth Amendment and did not address the issue.\textsuperscript{145} While the Court has held that age is not a "suspect classification,"\textsuperscript{146} it has never held that the ADEA infringes on other constitutionally protected rights (i.e., the Court has not issued an order against Congress in the age discrimination context). Therefore, Congress can safeguard the rights of elderly Americans against the states under the Fourteenth Amendment.

The path of the ADEA and Title VII also augments the contention that Congress intended the ADEA's Amendment to be enacted under Section Five of the Fourteenth Amendment.\textsuperscript{147}

3. Title VII and the ADEA

Title VII was originally passed under the Commerce Clause, and was designed to reach the private sector.\textsuperscript{148} It was later extended to the states in a subsequent Amendment.\textsuperscript{149} The ADEA was also originally passed under the Commerce Clause. Like Title VII, the ADEA was extended to include the states in a later Amendment.\textsuperscript{150} When Congress amended Title VII to include the states, however, it specified which constitutional provision it was acting under, i.e., Section Five of the Fourteenth Amendment.\textsuperscript{151} Further, subsequent ADEA case law has also adopted rulings from the Title VII context.\textsuperscript{152}

On the surface, it would seem odd that both statutes were originally enacted under the Commerce Clause and only applied to the private sector. Congress frequently uses the Commerce Clause to legislate in social areas, an area of legislating authority that on its face does not address any social concerns.\textsuperscript{153}

\textsuperscript{145} See supra notes 105-08 and accompanying text.
\textsuperscript{146} See supra notes 105-08 and accompanying text.
\textsuperscript{147} See supra notes 105-08 and accompanying text.
\textsuperscript{148} See supra notes 105-08 and accompanying text.
\textsuperscript{149} See supra notes 105-08 and accompanying text.
\textsuperscript{150} See supra notes 105-08 and accompanying text.
\textsuperscript{151} See supra notes 105-08 and accompanying text.
\textsuperscript{152} See supra notes 105-08 and accompanying text.
\textsuperscript{153} See supra notes 105-08 and accompanying text.
However, when Congress legislates under the Commerce Clause, it occupies the field. When Congress intends to transform the "usual constitutional balance between the State and the Federal Government," it must make a "super-clear" statement in the relevant statute. Congress has made its intention known in both statutes. When determining whether the states are subject to suit, this is one of the factors federal courts must consider. Both Title VII and the ADEA meet the "super-clear" statement rule.

The Supreme Court recognized in Lorillard v. Pons that the purpose of the ADEA and Title VII was to eliminate discrimination in the workplace. The Court, speaking through Justice Marshall, proclaimed that "in fact, the prohibitions of the ADEA were derived in haec verba from Title VII." Therefore, when Congress extended the ADEA to the states, the "objective of the legislation was within Congress' power under the [Fourteenth] Amendment." Congress in passing the ADEA's Amendment, acted under Section Five of the Fourteenth Amendment.

B. Another Interpretation

In MacPherson v. University of Montevallo, the Northern District of Alabama took the opposite approach from the Seventh, Tenth and First Circuits. The court held that the ADEA's Amendment was enacted under the Commerce Clause, not the Fourteenth Amendment. The court found it unlikely

154. See id.
161. See id. at 584.
162. Id.
165. See id. at 786. The plaintiffs, two associate college professors, alleged that the University discriminated against them because of their age in favor of their younger colleagues.
166. See id. at 789.
that Congress failed to mention the Fourteenth Amendment when it revised the ADEA, but remembered it two years earlier when Congress amended Title VII.\footnote{167} \textit{MacPherson} also found Chief Justice Burger's dissent from \textit{Wyoming} persuasive when he argued that the ADEA could not have been passed under the Fourteenth Amendment.\footnote{168}

However, it appears the \textit{MacPherson} court may have misapplied the Chief Justice's argument. In \textit{Wyoming}, the dissent addressed the impact of the Fourteenth Amendment on the Tenth Amendment, not on sovereign immunity.\footnote{169} Further, Chief Justice Burger offered this caveat, "[t]his is not to say definitively that age discrimination is not protected by the Fourteenth Amendment because this case does not squarely raise that issue."\footnote{170} Fundamentally, he believed that choosing state employees was a local function for the state, not for the Congress.\footnote{171}

\textit{Taylor v. Virginia},\footnote{172} in contrast to the \textit{MacPherson} decision, followed the Court's precedent from the \textit{Fullilove} line of cases.\footnote{173} The court held that the inquiry for legislation enacted pursuant to Section Five of the Fourteenth Amendment is whether the statute "may be regarded as an enactment to the Equal Protection Clause . . . [if it] is plainly adopted to that end and whether it is not prohibited but is consistent with the letter and spirit of the Constitution."\footnote{174} A recital of constitutional power is unnecessary, but it must recognize the Amendment's objectives.\footnote{175} Furthermore, the court explicitly

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  \item \footnote{167} See \textit{id.} at 789 n.6.
  \item \footnote{168} See \textit{id.} at 789.
  \item \footnote{169} See \textit{Wyoming}, 460 U.S. at 259-60 (Burger, C.J., dissenting).
  \item \footnote{170} \textit{Id.} at 261 n.7.
  \item \footnote{171} \textit{See id.} at 264.
  \item \footnote{172} 951 F. Supp. 591 (E.D. Va. 1996). In \textit{Taylor}, the plaintiffs sought overtime compensation from the Virginia Department of Transportation based on section 207(a) of the FLSA. \textit{See id.} at 592-93. The court contrasted the ADEA with the FLSA, noting that the ADEA evidenced a "legislative purpose to invoke the Fourteenth Amendment . . . ." \textit{Id.} at 599.
  \item \footnote{173} Congress does not have to repeat the words "section 5" or "Fourteenth Amendment" or "equal protection." \textit{See Fullilove} v. \textit{Klutznick}, 448 U.S. 448, 476-78 (1980).
  \item \footnote{174} \textit{Taylor}, 951 F. Supp. at 597 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).
  \item \footnote{175} \textit{See id.} at 598.
\end{itemize}
recognized that a "legislative purpose to invoke the Fourteenth Amendment" is found in the ADEA.\textsuperscript{176}

When enacting legislation under Section Five of the Fourteenth Amendment, Congress does not need to "recite the words 'section five' or 'Fourteenth Amendment' or 'equal protection'..."\textsuperscript{177} This statement contradicts the Court's statement in \textit{Pennhurst State School & Hospital v. Halderman (Pennhurst I)}\textsuperscript{178} that Congress must explicitly state its intention to legislate under Section Five.\textsuperscript{179} While it is unfortunate that the 1974 Amendment to the Act does not refer to the Fourteenth Amendment, the Court's ruling in \textit{Pennhurst I} should not be an issue.

If a state raises the Eleventh Amendment as a defense in an ADEA action, the Fourteenth Amendment does not have to be expressly referenced because the state is challenging the constitutional validity of the statute.\textsuperscript{180} The Court in \textit{Wyoming} differentiated \textit{Pennhurst I} by noting that in \textit{Pennhurst I}, the Court construed a statute, it did not decide its constitutional validity.\textsuperscript{181} In a future case before the Court, concerning whether or not Congress acted pursuant to its Section Five powers under the Fourteenth Amendment when it extended coverage of the ADEA to the states, the rule from \textit{Pennhurst I} should not apply. The Court will be addressing whether or not Congress acted properly under Section Five, not whether the ADEA created any rights against the state.\textsuperscript{182} The issue before

\textsuperscript{176} Id. at 599. \textit{Accord Teichgraeberr v. Memorial Union Corp. of the Emporia State Univ.}, 946 F. Supp. 900 (D. Kan. 1996) (holding that Congress abrogated the states' sovereign immunity in the ADEA under the Fourteenth Amendment).

\textsuperscript{177} \textit{EEOC v. Wyoming}, 460 U.S. 226, 244 n.18 (1983); \textit{see}, e.g., \textit{Fullilove}, 448 U.S. at 476-78 (1980).

\textsuperscript{178} 451 U.S. 1 (1981).

\textsuperscript{179} \textit{See id.} at 15.

\textsuperscript{180} \textit{See Seminole Tribe of Florida v. Florida}, 116 S. Ct. 1114, 1125 (1996). The Court held that when Congress seeks to abrogate the states' sovereign immunity, one of the questions it must ask is whether "the Act in question [was] passed pursuant to a constitutional provision granting Congress the power to abrogate?" \textit{Id.} Further, the Court noted that since \textit{Union Gas} interpreted the Constitution, its holding can only be altered through a "constitutional amendment or revision by this Court." \textit{Id.} at 1128. As in \textit{Union Gas}, the Court also interpreted the Constitution in \textit{Seminole}. \textit{See id.} at 1131. Therefore, the Court must decide the constitutionality of the statute in question.

\textsuperscript{181} \textit{See Wyoming}, 460 U.S. at 244 n.18 (citations omitted).

\textsuperscript{182} \textit{See id.}
the Court will be a constitutional one concerning the Eleventh and Fourteenth Amendments and the ADEA. Therefore, the interpretation of the *MacPherson* court lacks merit considering the Supreme Court's precedent in this area.

C. The ADEA was Enacted Under the Fourteenth Amendment

Congress' motives for extending the protection of the ADEA to include the states will be ignored if the ADEA Amendment is found to be enacted under the Commerce Clause.183 The role of the federal courts is to uphold the federal laws as enacted by Congress.184 Imposing the Eleventh Amendment in an area where the goal is to enforce the age discrimination laws frustrates the will of Congress.185 Finding that the Amendment was enacted under the Fourteenth Amendment gives effect to the goals of Congress.

The Court in *Fitzpatrick v. Bitzer*,186 held that the Fourteenth Amendment can "provide for private suits against States or state officials which are constitutionally impermissible in other contexts."187 The *Seminole* decision reaffirmed *Fitzpatrick's* holding.188 Further, Congress may legislate, under the Fourteenth Amendment, what it determines is "appropriate legislation" for the purpose of enforcing provisions of the Fourteenth Amendment...189 The provision of the Fourteenth Amendment that Congress enforced when it extended the ADEA's coverage to include the states, was the Equal Protection Clause.190 Congress can enforce a constitutional provision

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183. Cf. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 255 (1985) (Brennan, J., dissenting). Justice Brennan believed that the majority's decision in *Atascadero*, and the Eleventh Amendment in general, obstructed the goals of Congress which are properly "within reach of its Article I powers." *Id.* See also *Harris & Kenny*, supra note 45, at 650-57 (arguing that the decision from *Atascadero* could undermine Congress' goals in the antitrust and copyright context).
184. See *Atascadero*, 473 U.S. at 255 (Brennan, J., dissenting).
185. See, e.g., *EEOC v. Elrod*, 674 F.2d 601, 604-05 (7th Cir. 1982).
186. 427 U.S. 445 (1976). In *Fitzpatrick*, the petitioners brought a class action suit alleging that Connecticut's retirement benefit plan discriminated against them on the basis of their sex, in violation of Title VII. See *id.* at 445.
187. *Id.* at 456 (citations omitted).
188. See *Seminole*, 116 S. Ct. at 1125.
190. U.S. CONST. amend XIV, § 1; see *Hurd v. Pittsburgh State Univ.*, 821 F.
“employ[ing] the means necessary” to achieve its purpose. If, as the Seminole decision suggests, Congress can only provide for private suits against the states under the Fourteenth Amendment, the only logical conclusion the Court can reach concerning the Act's Amendment is that it was passed under Section Five of the Fourteenth Amendment. The Amendment seeks to combat age discrimination; that which is not tolerated in the private sector, should also not be tolerated in the public sector.

V. CONCLUSION

State governments employ over fifteen million people, a great number of who are older Americans. If Seminole is followed, state employees may have lost some of their protections against arbitrary discrimination based on their age. There may be no federal forum to bring their claims against the state, and at the very least they will have lost some very effective remedies. The time is ripe for the Court to decide whether the states retain their sovereign immunity in an ADEA suit. The circuits are split, and the law is far from clear.

The Court must make a decision. There are two likely possibilities that the Court could reach. First, the Court could determine that the ADEA's Amendment was legislated under the Commerce Clause. In this scenario, Seminole applies and the Eleventh Amendment would bar a suit against the states. Nonetheless, under Ex parte Young a litigant could sue the state official who fired her in contravention of the ADEA.

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191. See supra notes 98-104 and accompanying text.
192. See supra notes 83-86 and accompanying text.
That portion of Seminole addressing Ex parte Young suits should not apply to the ADEA. Many remedies provided in the ADEA, however, would not apply because they are retroactive monetary awards. The ADEA litigant could also attempt to sue the state in state court. However, it is questionable whether she can bring any action in state court against the state.

Second, the Court could find that the ADEA Amendment was passed pursuant to Section Five of the Fourteenth Amendment. The purpose of the Act's Amendment is to enforce the Equal Protection Clause of the Fourteenth Amendment. The ADEA Amendment insures the state employee and the private sector employee are afforded the same treatment and rights under the law. As a result, the ADEA plaintiff easily clears both of Seminole's hurdles. Congress plainly intended to subject the states to suit under the ADEA. Further, Congress legislated under a constitutional provision that limits the states' sovereign immunity under the Eleventh Amendment. The Court, using this theory, should find the ADEA Amendment constitutional, which would save older Americans and their attorneys a lot of headaches.

Which way the Court will decide is open for debate. Nonetheless, the prospects do not look good for the ADEA litigant who tries the case before this Court. Even if the Court decides that the ADEA Amendment was passed under Section Five of the Fourteenth Amendment, it may elect not to hear the case anyway based on principles of federalism. The Seminole deci-

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195. See id.
196. See supra notes 75-80 and accompanying text.
197. See supra Part IIIA.
198. See supra Part IV.
199. See supra notes 157-59 and accompanying text.
200. See supra notes 6, 157-59 and accompanying text.
202. See Gregory v. Ashcroft, 501 U.S. 452, 469 (1991). The Court declared that the "Fourteenth Amendment does not override all principles of federalism." Id. As one commentator suggested, before the ruling from Seminole, the Court may balance a "State's interest in its immunity against the federal government's interest in the supremacy of its laws to determine when Congress has the power to strip the States' sovereign immunity." Note, Congressional Abrogation of State Sovereign Immunity, 86 COLUM. L. REV. 1436, 1440 (1986). Some of the language from Gregory suggests that the Court may pursue this route if a State is sued under a statute passed pursuant
sion may have been an aberration, a momentary lapse of rea-
son. If not, it will effect thousands of older Americans in the
workplace. It also fundamentally alters our federal system of
government; rights once enforceable against the states no longer
exist.

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