

AGE DISCRIMINATION AND SOVEREIGN IMMUNITY: DOES *KIMEL* SIGNAL THE END OF THE LINE FOR ALABAMA'S STATE EMPLOYEES?

In *Marbury v. Madison*,¹ Chief Justice John Marshall wrote that the "very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."² Quoting Blackstone, he stated that "where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."³ An examination of the United States Supreme Court's recent decisions involving the law of state sovereign immunity and of congressional power under Section 5 of the Fourteenth Amendment reveals that such is not always the case. By interpreting the Eleventh Amendment and Section 5 of the Fourteenth Amendment as imposing limits on both the means by which and extent to which Congress can impose obligations on and enforce obligations against the states, the Court's recent jurisprudence in these two areas has effectively limited the availability of a federal remedy for the state employee seeking redress against his state for a violation of his federal rights.⁴

The most recent in this line of cases, *Kimel v. Florida Board of Regents*,⁵ is illustrative. In *Kimel*, the Court held that Congress, in enacting the Age Discrimination in Employment Act of 1967⁶ ("ADEA"), did not validly abrogate state sovereign immunity from suit by private individuals.⁷ The Court reasoned that Congress, in abrogating state sovereign immunity under the ADEA, exceeded its authority under Section 5 of

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

2. *Marbury*, 5 U.S. at 163.

3. *Id.* at 163 (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *8).

4. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress lacks authority under the Commerce Clause to abrogate states' Eleventh Amendment immunity); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 679-81 (1999) (overruling *Parden v. Terminal Ry.*, 377 U.S. 184 (1964), to hold that Congress cannot abrogate state sovereign immunity via the doctrine of constructive waiver); *Alden v. Maine*, 527 U.S. 706, 753 (1999) (holding that Congress has no authority under Article I of the Constitution to abrogate state sovereign immunity from private suit in state court); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that the Religious Freedom Restoration Act exceeded Congress' power under Section 5 of the Fourteenth Amendment).

5. 528 U.S. 62 (2000).

6. 29 U.S.C. §§ 621-34 (1994).

7. *Kimel*, 528 U.S. at 91.

the Fourteenth Amendment.⁸ In so holding, the Court for the first time erected the barrier of sovereign immunity, in conjunction with its limited, remedial interpretation of Congress' Section 5 power, to limit Congress' ability to impose obligations on and enforce obligations against the states in the arena of civil rights. For after *Kimel*, Congress cannot enforce the ADEA against the states pursuant to its Section 5 power via a private right of action.⁹

The *Kimel* decision raises the question whether state employees discriminated against on the basis of their age have any remaining federal remedies against the states. While the Court has stated that individuals may sue states only when authorized to do so pursuant to Congress' power under Section 5 of the Fourteenth Amendment or when the state has consented to suit,¹⁰ there are limits, implicit in the principle of state sovereign immunity, that could provide alternative mechanisms for enforcing the ADEA against the states.¹¹ For example, private individuals could possibly sue lesser governmental entities and state officers under the ADEA.¹² Furthermore, Congress could, under its spending power, condition the receipt of federal funds upon the states' voluntary consent to private suit.¹³ Moreover, Congress could authorize the United States government to bring suits against states.¹⁴

These remaining avenues of enforcement, however, are subject to their own limitations and do not always translate into a meaningful remedy for the state employee.¹⁵ For example, private individuals may sue state officers in their "official capacity" only to the extent that they seek prospective, injunctive relief and not retrospective money damages.¹⁶ In sum, the ineffectiveness of these remaining avenues of relief does not leave state employees with an adequate federal remedy.

The Court in *Kimel*, however, did remind state employees that its decision "does not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state em-

8. *Id.* at 76-91. Section 5 of the Fourteenth Amendment authorizes Congress to enforce, by appropriate legislation, the Fourteenth Amendment's command of equal protection of the laws. U.S. CONST. amend. XIV, § 5.

9. *Id.* at 91 (holding that Congress, in the ADEA, did not validly abrogate the states' sovereign immunity from suits by private individuals).

10. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999).

11. *See Alden v. Maine*, 527 U.S. 706, 753-58 (1999) (discussing the limits that preclude sovereign immunity from barring all judicial review of state compliance with the Constitution and federal law).

12. *See Alden*, 527 U.S. at 754-58.

13. *See id.* at 753-54.

14. *See id.*

15. *See infra* Part III.

16. *Edelman v. Jordan*, 415 U.S. 651, 663-68 (1974) (discussing the form of relief that may be awarded against a state officer).

employers.”¹⁷ As Justice O’Connor highlighted, “[s]tate employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in *almost* every State.”¹⁸ Implicit in Justice O’Connor’s remark is the notion that Congress need not “intrude into the States’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens,” by subjecting the states to private suits under federal law, when the states have already enacted parallel state laws that provide their citizens with adequate remedies.¹⁹ State sovereign immunity protects the states and individual citizens from this intrusion upon the states’ power to regulate by ensuring that the federal government gives the states the respect they are afforded as “residuary sovereigns” in our federalistic system.²⁰ It is this framework of “dual sovereignty,” according to the Court, that serves as the structural guarantor of liberty.²¹

As Justice O’Connor’s remark also indicates, however, not *every* state permits state employees to recover money damages against a state employer for a violation of its state age discrimination statute. The State of Alabama is an example of such a state. While Alabama, for instance, does have an age discrimination statute, this statute does not explicitly apply to state employers, who are nevertheless protected by a constitutionally-based state immunity.²² Thus, the consequence of *Kimel* for Alabama state employees is a resulting disparity in the legal rights and legal remedies afforded to them.²³

This Comment first examines the Court’s Eleventh Amendment and

17. *Kimel*, 528 U.S. at 91.

18. *Id.* (emphasis added).

19. *See City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). The Court in *Flores* did state that legislation seeking to remedy constitutional violations can be valid under Section 5 even if “in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’” *Flores*, 521 U.S. at 518. However, Congress must have identified a likelihood of unconstitutional behavior on the part of the states and enacted legislation proportional to its goal of preventing such unconstitutional behavior in order for the measure to be upheld. *Id.* at 519-20, 530 (stating that “the appropriateness of remedial measures must be considered in light of the evil presented”). When there is no reason to believe that the states are acting unconstitutionally, preventive measures may not be appropriate. *Id.* at 532. Thus, the widespread existence of state age discrimination laws is evidence of an unlikelihood that states are acting unconstitutionally, and in turn supports a conclusion that Section 5 cannot justify the ADEA’s intrusion into the states’ power to regulate.

20. *See Alden v. Maine*, 527 U.S. 706, 748 (1999) (“[O]ur federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation.”).

21. *See Printz v. United States*, 521 U.S. 898, 921 (1997) (stating that federalism is “one of the Constitution’s structural protections of liberty”).

22. ALA. CODE §§ 25-1-20 to -29 (2000). *See infra* Part IV.

23. One might argue that if states’ rights are paramount, any resulting disparity in the rights and remedies afforded to citizens is irrelevant—states simply have the discretion to choose what rights and remedies are appropriate. This argument, however, ignores the power that Section 5 of the Fourteenth Amendment confers upon Congress to enforce its substantive provisions against the states. Thus, states’ rights should not trump to justify disparities in rights and remedies when Congress has acted pursuant to its Section 5 power to erase such disparities.

Section 5 jurisprudence leading up to and including *Kimel* and then turns to examine the remaining avenues of relief, both federal and state, available to the Alabama state employee after *Kimel*. For the Alabama state employee, each of these avenues of relief presents problems. First, it is unrealistic to assume that the federal avenues of relief can effectively provide redress to all individuals who suffer at the hands of the state. Second, Alabama's Age Discrimination Statute does not expressly permit recovery against state employers, who are, nevertheless, immune from suit in most instances. This Comment concludes that the ineffectiveness of the remaining remedies available to the Alabama state employee leaves him with an unenforceable right and thus undercuts the implicit federalism concerns of *Kimel* by signaling a need, despite the Court's conclusion to the contrary, for Section 5 legislation.

I. STATE SOVEREIGN IMMUNITY AND CONGRESSIONAL POWER

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."²⁴ Despite its literal text, the Supreme Court has interpreted the Eleventh Amendment's jurisdictional bar to extend to all suits, whether under federal question or diversity jurisdiction, brought by a citizen against a non-consenting state, even where the plaintiff is a citizen of the state being sued.²⁵ In *Seminole Tribe v. Florida*,²⁶ the Supreme Court reaffirmed this interpretation of the Eleventh Amendment, first observed over a century ago in *Hans v. Louisiana*²⁷ and premised on the notion that Article III of the Constitution does not supercede the sovereign immunity that the states possessed prior to entering the Union.²⁸ And while this immunity is not absolute,²⁹ a series of Supreme Court decisions,

24. U.S. CONST. amend. XI. The Eleventh Amendment was ratified in 1798 to overrule the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), in which the Court held that it had jurisdiction over an action in assumpsit brought by a South Carolina citizen against the State of Georgia to recover payment of a war debt. *Chisholm*, 2 U.S. at 449-50.

25. See *Hans v. Louisiana*, 134 U.S. 1 (1890). In *Hans*, a citizen of Louisiana sued the State of Louisiana to recover on bonds and coupons purchased from the state. *Hans*, 134 U.S. at 1. The Court held that the Eleventh Amendment barred the suit, reasoning that it would be "anomalous" to bar suits against states by citizens of other states but to permit suits against states by their own citizens. *Id.* at 14-18.

26. 517 U.S. 44 (1996).

27. 134 U.S. 1 (1890).

28. *Seminole Tribe*, 517 U.S. at 54 (stating that each state is a sovereign entity in our federal system, and is therefore based on the inherent nature of sovereignty, "not to be amenable to the suit of an individual without its consent" (citation omitted)).

29. See, e.g., *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (stating that the Court has recognized that an individual may sue a state when that state has waived its sovereign immunity and when Congress has authorized the suit pursuant to its power to enforce the provisions of the Fourteenth Amendment).

beginning with *Seminole Tribe*, have delimited Congress' ability to both impose obligations on and enforce obligations against the states.

Seminole Tribe held that Congress had no power under the Indian Commerce Clause to abrogate the states' Eleventh Amendment immunity through the Indian Gaming Regulatory Act.³⁰ The Court explained that the Eleventh Amendment places a constitutional limit on judicial power under Article III that cannot be circumvented by Congress through the Commerce Clause.³¹ The Court's decision overruled its earlier decision in *Pennsylvania v. Union Gas Co.*,³² in which a plurality of the Court held that the Commerce Clause does give Congress the power to abrogate state sovereign immunity.³³ After *Seminole Tribe*, Congress can authorize private suits against the states pursuant only to its authority under Section 5 of the Fourteenth Amendment, which confers upon Congress the power to "enforce" the Amendment's provisions.³⁴

Then, in *City of Boerne v. Flores*,³⁵ the Supreme Court set the limits of Congress' power under Section 5 of the Fourteenth Amendment.³⁶ In holding that the Religious Freedom Restoration Act³⁷ ("RFRA"), as applied to the states, constituted an excessive use of Congress' power under Section 5 of the Fourteenth Amendment, the Court described Congress' Section 5 power as "remedial," or preventive, but not substantive.³⁸ And, while preventive measures may prohibit conduct that is not itself unconstitutional, the Court warned that such measures cannot alter the meaning of the Constitution, as interpreted by the Supreme Court.³⁹ The Court stated that Congress does have "wide latitude" in drawing a line between remedial and substantive measures, so long as the measures have a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."⁴⁰ Thus, after *Flores*, when Congress legislates pursuant to Section 5, it must identify the unconstitutional conduct and "tailor its legislative scheme to remedying or preventing such conduct."⁴¹

30. *Seminole Tribe*, 517 U.S. at 47.

31. *Id.* at 72-73.

32. 491 U.S. 1 (1989).

33. *Union Gas*, 491 U.S. at 19-20 (stating that the power to regulate interstate commerce would be incomplete without the authority to render states liable for damages).

34. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (reasoning that the Fourteenth Amendment was adopted after the Eleventh Amendment, places express limits on the states, and provides Congress with the power to enforce these limits).

35. 521 U.S. 507 (1997).

36. *Flores*, 521 U.S. at 518-19.

37. 42 U.S.C. § 2000bb (1994).

38. *Flores*, 521 U.S. at 511, 519-20 (stating that "Congress does not enforce a Constitutional right by changing what the right is").

39. *Id.* at 518-19.

40. *Id.* at 520.

41. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 639 (1999).

Last term, the Supreme Court issued three separate opinions that reaffirmed *Seminole Tribe* and further narrowed Congress' ability to impose obligations on the states. First, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,⁴² the Supreme Court applied the test set out in *Flores* to hold that Congress exceeded its power under Section 5 of the Fourteenth Amendment when it abrogated state sovereign immunity through the Patent and Plant Variety Protection Remedy Clarification Act⁴³ ("Patent Remedy Act").⁴⁴ Congress enacted the Patent Remedy Act in order to make states amenable to suit in federal court for infringement of patent protections.⁴⁵ Yet the Court found that Congress, in enacting the Patent Remedy Act, "identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."⁴⁶ The Court further reasoned that because it was unlikely that many of the acts of patent infringement affected by the statute had any likelihood of being unconstitutional, the Act lacked the congruence and proportionality required under *Flores*.⁴⁷

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,⁴⁸ the Court held that when Congress enacted the Trademark Remedy Clarification Act⁴⁹ ("TRCA"), which subjects states to suits brought under Section 43(a) of the Trademark Act of 1946⁵⁰ ("Lanham Act") for false and misleading advertising, it did not validly abrogate state sovereign immunity.⁵¹ The Court reasoned that because the two property interests at stake under the Lanham Act did not even constitute a deprivation of property without due process under the Fourteenth Amendment, Congress lacked the power under Section 5 to authorize private suits against the states for violations of the Lanham Act.⁵² The Court further overruled *Parden v. Terminal Railway of the Alabama State Docks Department*⁵³ to hold that a state may no longer be subjected to suit, despite its sovereign immunity, under the doctrine of constructive waiver.⁵⁴ Thus, the State of Florida had not waived its im-

42. 527 U.S. 627 (1999).

43. 35 U.S.C. §§ 271(h), 296(a) (1994).

44. *Florida Prepaid*, 527 U.S. at 630-31.

45. *See id.* at 632.

46. *Id.* at 640.

47. *Id.* at 646-47.

48. 527 U.S. 666 (1999).

49. Pub. L. No. 102-542, § 1, 106 Stat. 3567 (1992).

50. 15 U.S.C. § 1125 (1994).

51. *College Sav.*, 527 U.S. at 668-75.

52. *Id.* at 674-75.

53. 377 U.S. 184 (1964).

54. *College Sav.*, 527 U.S. at 680-84. In *Parden*, the Court held that the Federal Employers' Liability Act ("FELA") authorized suits against the states by way of provisions subjecting all railroad carriers engaging in interstate commerce to suit, and that Alabama waived its immunity from suit under the FELA by operating a railroad in interstate commerce. *Parden*, 377 U.S. at 190-93. The Court in *College Savings* reasoned that the doctrine of constructive waiver could not

munity by voluntarily electing to engage in the conduct regulated by the Lanham Act.⁵⁵

Lastly, in *Alden v. Maine*,⁵⁶ the Court addressed whether Congress has the authority under the Commerce Clause to authorize private suits against the states in state court.⁵⁷ In *Alden*, state-employed probation officers sued the State of Maine in state court under the Fair Labor Standards Act of 1938⁵⁸ ("FLSA") for violations of overtime provisions.⁵⁹ The Court held that Congress does not have the power under Article I to abrogate a state's sovereign immunity to private suits for damages in state court.⁶⁰ The Court supported its holding with an analysis of "history, practice, precedent, and the structure of the Constitution," all of which it found to indicate that state sovereign immunity is a "fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today."⁶¹ After *Alden*, state employees suing states for money damages under federal law are foreclosed from bringing their claims in state court as well as federal court unless the authorization to suit constitutes a valid exercise of Congress' Section 5 power.

II. *KIMEL V. FLORIDA BOARD OF REGENTS* AND THE DEPRIVATION OF A REMEDY FOR STATE EMPLOYEES

Kimel v. Florida Board of Regents,⁶² the most recent case in this line of decisions, illustrates how the Court's recent Eleventh Amendment and Section 5 jurisprudence has effectively limited the availability of a federal remedy for state employees seeking redress against their respective states for discrimination on the basis of age. In *Kimel*, three groups of plaintiffs, composed of faculty members and librarians employed by state universities in Florida and Alabama, filed suit against their respective state employers under the ADEA, seeking declaratory and injunctive relief, promotions to full professor, compensatory and punitive damages, backpay, liquidated damages, and permanent salary adjustments.⁶³ The ADEA, as amended, prohibits a state from "fail[ing] or

be squared with cases requiring that state waiver of sovereign immunity be unequivocal. *College Sav.*, 527 U.S. at 680-81. The Court furthermore stated that constructive waiver operated as an unconstitutional sanction by excluding a state who refused to waive its sovereign immunity from participating in otherwise lawful activity. *Id.* at 687.

55. See *College Sav.*, 527 U.S. at 675-87.

56. 527 U.S. 706 (1999).

57. *Alden*, 527 U.S. at 712.

58. 29 U.S.C. §§ 201-219 (1994 & Supp. IV 1998).

59. *Alden*, 527 U.S. at 712.

60. *Id.*

61. *Id.* at 713, 741.

62. 528 U.S. 62 (2000).

63. *Kimel*, 528 U.S. at 69-70.

refus[ing] to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age," and creates a private right of action for damages resulting from violations of the Act.⁶⁴ The Court held that although Congress clearly stated in the ADEA its intent to abrogate state sovereign immunity, it did not validly do so under Section 5 of the Fourteenth Amendment.⁶⁵ Therefore, the Court concluded, the ADEA cannot serve as a basis for private suits against a state for money damages in federal court.⁶⁶

In concluding that the ADEA did not qualify as "appropriate legislation" under Section 5 of the Fourteenth Amendment, the Court applied the "congruence and proportionality" test articulated in *City of Boerne v. Flores*.⁶⁷ The Court emphasized that age classifications, unlike classifications based on race and gender, are constitutional under the Fourteenth Amendment's Equal Protection Clause, so long as the classifications are rationally related to legitimate state interests.⁶⁸ Because the ADEA's broad restrictions on the use of age as a proxy for discrimination swept within its purview many types of conduct that would be held constitutional under the Fourteenth Amendment's Equal Protection Clause, the Court concluded that the statute was, in the words of *Flores*, "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."⁶⁹

Furthermore, the ADEA, in the eyes of the Court, did not qualify as valid prophylactic legislation.⁷⁰ The Court found that the ADEA's legislative record did not indicate that Congress had identified "[a] pattern of age discrimination by the States, much less any discrimination . . . that rose to the level of constitutional violation."⁷¹ Therefore, the Court concluded that Congress did not have reason to believe that "state and local governments were unconstitutionally discriminating against their employees on the basis of age," and that broad prophylactic legislation was

64. 29 U.S.C. §§ 623(a)(1), 626(c)(1), 626(b) (1994). In 1974, Congress extended the coverage of the ADEA to the states by amending its definition of "employer" to include a "State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State." *Id.* § 630(b).

65. *Kimel*, 528 U.S. at 91. Although still an open question, *Alden v. Maine* suggests that private individuals would be foreclosed from suing the states under the ADEA in state court. See *Alden*, 527 U.S. at 754 (holding that Congress cannot, under the Commerce Clause, subject a state to private suit in state court). Although *Alden* addressed the commerce power, it follows that state employees should not be able to sue a state under the ADEA in state court when they are foreclosed from doing so in federal court. See *id.*

66. *Kimel*, 528 U.S. at 91.

67. *Id.* at 81.

68. *Id.* at 83-84.

69. *Id.* at 86 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 532 (1997)).

70. See *id.* at 87-91.

71. *Kimel*, 528 U.S. at 89.

necessary to prevent constitutional violations.⁷² Rather, the ADEA constituted an “unwarranted response to a perhaps inconsequential problem.”⁷³

In holding that suits brought under the ADEA by private citizens against the states are barred by sovereign immunity, the Court in *Kimel* limited Congress’ ability to enforce, through private suits, the provisions of the Fourteenth Amendment against the states. For the *Kimel* decision eliminates the private suit as a mechanism for enforcement of the ADEA’s substantive provisions against the states. From the perspective of a state employee, the decision creates two classes of plaintiffs: those who are employed by the private sector and can therefore sue their employers under the ADEA, and those who are employed by the state and therefore cannot.

The Court, however, appeared to emphasize the limited extent of its holding by stating that its decision held *only* that Congress, in the ADEA, did not abrogate states’ sovereign immunity from suits by private individuals.⁷⁴ Yet the Court did not even address whether state employees had any remaining remedies under federal law. *Kimel* thus raises the issue whether state employees have any remaining federal remedies that could provide adequate redress for violations of the ADEA on the part of state employers.

III. FEDERAL REMEDIES AVAILABLE TO THE STATE EMPLOYEE AFTER *KIMEL*

Justice Stevens, in his dissent in *Seminole Tribe v. Florida*,⁷⁵ cautioned that the majority’s opinion would “prevent[] Congress from providing a federal forum for a broad range of actions against States.”⁷⁶ And Justice Souter, in his dissent in *Alden v. Maine*,⁷⁷ suggested that the Court’s decision “abandons [the] principle . . . that where there is a right, there must be a remedy.”⁷⁸ And while the *Kimel* Court failed to discuss any remaining federal remedies for state employees—thus suggesting that none existed—the majority’s opinion in *Alden v. Maine* does point out that state sovereign immunity does not bar *all* judicial review of state compliance with the Constitution and valid federal law.⁷⁹

72. *Id.* at 91.

73. *Id.* at 89.

74. *Id.* at 91.

75. 517 U.S. 44 (1996).

76. *Seminole Tribe*, 517 U.S. at 77 (Stevens, J., dissenting).

77. 527 U.S. 706 (1999).

78. *Alden*, 527 U.S. at 812 (Souter, J., dissenting) (stating that the majority “has no qualms about saying frankly that the federal right to damages afforded by Congress under the FLSA cannot create a concomitant private remedy”).

79. *Id.* at 755 (stating that “certain limits are implicit in the constitutional principle of state sovereign immunity”).

First, states may voluntarily consent to suit through statutes.⁸⁰ Second, Congress can, pursuant to its spending power, condition the receipt of federal funds upon the states' voluntary consent to private suit.⁸¹ Third, when the states ratified the Constitution, they consented to suits brought by other states or by the federal government.⁸² Fourth, the states consented to certain suits when they adopted the Fourteenth Amendment.⁸³ Fifth, a private individual may sue a city, municipality, or other governmental entity, as long as that entity is not an arm of the state.⁸⁴ Sixth, under the doctrine of *Ex parte Young*,⁸⁵ a private individual may sue a state officer for injunctive or declaratory relief.⁸⁶ Finally, a private plaintiff can sue a state officer in his individual capacity for unconstitutional or wrongful behavior "fairly attributable to the officer himself," so long as the relief is sought from the officer himself, and not from the state treasury.⁸⁷ Although a majority of the Court in *Alden* agreed that these limits adequately vindicate constitutional and federal rights,⁸⁸ an examination of these limits reveals that they do not translate into an effective remedy for the state employee seeking to sue a state under the ADEA.

A. Voluntary Consent through Statutes

In regard to a state's ability to voluntarily consent through statutes, a state does not always voluntarily consent to suit. In the case of the ADEA, Alabama and Florida did not consent to private suits, but rather invoked their sovereign immunity as a jurisdictional bar to such suits.⁸⁹ It is unlikely that these states would decide in the future to voluntarily consent to suits under the ADEA after claiming that they are immune under the doctrine of sovereign immunity. Furthermore, after the Court's decision in *College Savings*, state employees can no longer argue that

80. *Id.* at 755 (stating that the "rigors of sovereign immunity are thus 'mitigated by a sense of justice which has continually expanded by consent the suability of the sovereign'").

81. *See* *South Dakota v. Dole*, 483 U.S. 203 (1987).

82. *Alden*, 527 U.S. at 755-56. The Court explained that suits brought by the federal government are different from suits brought by individuals because the Constitution contemplates suits by the federal government as an alternative to extralegal measures. *Id.* By contrast, the framers feared private suits against nonconsenting states, and hence preserved the doctrine of sovereign immunity. The Court also noted the political accountability inherent in suits brought by the federal government, yet absent in suits brought by individuals. *Id.*

83. *Id.* at 756 (describing the adoption of the Fourteenth Amendment as a fundamental altering of the federal-state balance, imposing explicit limits on the states and providing a mechanism by which Congress could enforce those limits).

84. *Id.* at 756.

85. 209 U.S. 123 (1908).

86. *Alden*, 527 U.S. at 757.

87. *Id.*

88. *See id.* (stating that the Court's rules provide "ample means to correct ongoing violations of law and to vindicate the interests which animate the Supremacy Clause").

89. *Kimel*, 528 U.S. at 69-71.

states have constructively waived their sovereign immunity by engaging in conduct regulated by the ADEA pursuant to the Commerce Clause.⁹⁰

B. *Voluntary Consent through Conditional Spending*

When Congress seeks a state's voluntary consent through conditional spending, the exercise of the spending power is not without limits, as the Court articulated in *South Dakota v. Dole*.⁹¹ In *Dole*, the State of South Dakota challenged the constitutionality of a federal statute that authorized the federal government to withhold a percentage of federal highway funds from states that failed to set a minimum drinking age at twenty-one.⁹² South Dakota argued that the Twenty-First Amendment posed an "independent constitutional bar" to the expenditure at hand.⁹³ The Court rejected South Dakota's challenge, concluding that because a state's refusal to set the drinking age at twenty-one resulted in a loss of only five percent of highway funds, the conditional spending imposed amounted to no more than "mild encouragement" on the part of Congress.⁹⁴

In reaching its holding, the Court in *Dole* listed several limits on the spending power. First, the expenditure must be in pursuit of the general welfare.⁹⁵ Second, Congress must unambiguously condition the receipt of federal funds.⁹⁶ Third, the conditions imposed might be illegitimate if they are unrelated to the federal interest in the particular program.⁹⁷ And fourth, other constitutional provisions may pose an independent bar to the conditional grant of federal funds.⁹⁸ The Court stated that the "independent constitutional bar" limitation on the spending power does not prohibit Congress from indirectly achieving objectives that it could not directly achieve.⁹⁹ Rather, the Court stated, the limitation prohibits Congress from "induc[ing] the States to engage in activities that would

90. See *supra* text accompanying notes 54-55.

91. 483 U.S. 203, 207 (1987) (stating that the spending power is "subject to several general restrictions").

92. *Dole*, 483 U.S. at 205.

93. *Id.* at 209.

94. *Id.* at 211-12 (stating that even if Congress may not have the power to directly impose a national minimum drinking age, the encouragement found here is within the bounds of the spending power).

95. *Id.* at 207 (stating, however, that "courts should defer substantially to the judgment of Congress"). The Court concluded that the provision in *Dole* served the general welfare by attempting to ensure safer travel on the interstate. *Id.* at 208.

96. *Dole*, 483 U.S. at 207 ("enabl[ing] the States to exercise their choice knowingly" (citation omitted)). The Court found that Congress clearly stated the condition it imposed on the funds. *Id.* at 208.

97. *Id.* at 207. The Court found that the condition imposed by Congress was directly related to one of the main purposes of the expenditure—safe interstate travel. *Id.* at 208.

98. *Id.* at 208.

99. *Dole*, 483 U.S. at 210.

themselves be unconstitutional.¹⁰⁰ The Court warned that at some point financial inducement offered by Congress crosses the line and becomes coercion, leaving a state no meaningful choice and rendering the expenditure unconstitutional.¹⁰¹ Yet Congress does not violate the Tenth Amendment, which protects state sovereignty, when the State can adopt the "simple expedient" of not yielding to the federal condition.¹⁰²

Although the first two limits articulated in *Dole* would not pose a barrier to congressional use of its power to condition a state's receipt of federal funds on its consent to private suit under the ADEA, the last two limits very well might. First, based on *Dole*'s language, a state could argue that the condition imposed—a waiver of sovereign immunity from suits by private citizens based on age discrimination—is not related to the federal interest in the particular program receiving federal funds.¹⁰³ While the federal government could argue that it has an interest in preventing age discrimination in all programs that receive federal funding, the argument appears to be weak in light of *Kimel*, in which the Court stated that Congress did not have reason to believe that "state and local governments were unconstitutionally discriminating against their employees on the basis of age."¹⁰⁴ Second, a state could argue that the conditional expenditure, unlike the expenditure in *Dole*, passes the point at which inducement turns into compulsion.¹⁰⁵ In light of the constitutional problems associated with Congress' conditional spending power, state employees cannot rely on it to give them an adequate remedy against states in the context of age discrimination.

C. Consent to Suits Brought by the Federal Government

As Justice Souter pointed out in his dissent in *Alden v. Maine*,¹⁰⁶ it is unrealistic to assume that the federal government, by bringing suit itself, can adequately provide redress for violations of the Constitution and federal law, "unless Congress plans a significant expansion of the National Government's litigating forces."¹⁰⁷ Moreover, such a suit still

100. *Id.*

101. *Id.* at 210-11 (citing *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590 (1937)). The Court in *Dole* found that neither the Twenty-First Amendment nor the Tenth Amendment constituted an independent bar because the expenditure did not induce, but merely tempted, the states to enact higher drinking ages. *Id.* at 209, 211-12.

102. *Id.* at 210.

103. See Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 53-54 (questioning whether the idea that "spending conditions must be germane" may limit aggressive use of the spending power).

104. *Kimel*, 528 U.S. at 91.

105. See Meltzer, *supra* note 103, at 50-51 (stating that "[a] state might object that such a statute creates an unconstitutional condition, by making the availability of funds depend upon a waiver of the state's 'constitutional right' to immunity in federal courts").

106. 527 U.S. 706 (1999).

107. *Alden*, 527 U.S. at 810 (Souter, J., dissenting).

does not allow state employees to recover money damages against the states. And although some have suggested that Congress can authorize the United States to give the fines collected against the state to the injured citizen, as it did in the Fair Labor Standards Act,¹⁰⁸ such a provision still does not cure the fact that the United States Government does not have the resources to bring suit in a majority of cases.

D. Consent to Suits as a Consequence of the Fourteenth Amendment's Ratification

The *Kimel* decision probably precludes Congress from authorizing a private right of action against the states for age discrimination in the future. As *Kimel* illustrates, the test for measures enacted pursuant to Section 5 of the Fourteenth Amendment, first articulated in *City of Boerne v. Flores*,¹⁰⁹ will be applied strictly. First, the *Kimel* Court confirmed that states may, consistent with the Fourteenth Amendment, use age as a proxy.¹¹⁰ Furthermore, the Court suggested that Congress must "identify a widespread pattern of age discrimination by the States" when enacting prophylactic legislation.¹¹¹ This language indicates that Congress would have a difficult time should it again attempt to use Section 5 of the Fourteenth Amendment as a vehicle for authorizing private suits under the ADEA against the states. For while some legislation simply cannot be classified under Section 5, even legislation involving discrimination is unlikely to qualify under Section 5, as *Kimel* suggests, if the classification at hand receives only rational review under the Fourteenth Amendment. In light of the strict test imposed on legislation purporting to rely on Section 5 of the Fourteenth Amendment, state employees cannot rely upon Section 5 to provide them with a future remedy against the states in the context of age discrimination.

E. Suits Against Lesser Governmental Entities

Although the Eleventh Amendment does not bar private citizens from suing municipal corporations or other governmental entities which are not arms of the state,¹¹² this exception does not provide a remedy for state employees, such as the plaintiffs in *Kimel*. For citizens working for the state who suffer age discrimination caused by their employer have been discriminated against by the state or an arm of the state, not the

108. Meltzer, *supra* note 103, at 55 (citing Jonathan R. Siegel, *The Hidden Source of Congress' Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995)).

109. 521 U.S. 507 (1997).

110. *Kimel*, 528 U.S. at 84.

111. *Id.* at 90-91.

112. *Alden*, 527 U.S. at 756.

city.

F. Suits Brought Pursuant to Ex parte Young

The allowance of suits against state officers in their "official capacity" under the *Ex parte Young*¹¹³ fiction does not provide adequate relief to the state employee seeking to sue a state under the ADEA.¹¹⁴ First, while this allowance does provide an important mechanism by which Congress can police the states, it does not provide any damages or retrospective relief to the state employee bringing suit. For under the fiction, these officers may be sued in their "official capacity" only for prospective relief against a continuing violation of federal law.¹¹⁵ And such prospective relief, the Court has held, cannot include an injunction for backpay, because the money would come from the state treasury, not the officer.¹¹⁶ The *Ex parte Young* exception also has limited applicability. The Court has held that the *Ex parte Young* fiction is not available in situations where Congress has provided a detailed remedial scheme for enforcement against the state,¹¹⁷ or where the suit is one to quiet title.¹¹⁸ Furthermore, in suits for injunctive relief, the private litigant must allege a substantial likelihood that he or she will be subjected in the future to the alleged discrimination in order to have constitutional standing to bring the suit.¹¹⁹ The standing requirement could therefore bar the suit if the state employee could not show a substantial likelihood of being discriminated against on the basis of age in the future. Too, language in the Court's decision in *Idaho v. Coeur d'Alene Tribe of Idaho*¹²⁰ indicates that two justices are willing to restrict the *Ex parte Young* exception.¹²¹ Finally, *Ex parte Young* suits may not even apply under the ADEA, as the Act only authorizes suits against the State and its political subdivisions and not state officials.¹²² In light of the foregoing reasons, the

113. 209 U.S. 123 (1908).

114. *Monell v. Department of Soc. Servs.*, 532 F.2d 259, 265 (2d Cir. 1976) (noting that "[t]he fiction upon which the *Young* decision is supported is that a suit against a state officer to restrain him from taking action in his official capacity is a suit against the individual officer and not against the state"), *rev'd*, 436 U.S. 658 (1978).

115. *See Edelman v. Jordan*, 415 U.S. 651, 663-68 (1974).

116. *Edelman*, 415 U.S. at 663-68.

117. *Seminole Tribe v. Florida*, 517 U.S. 44, 73-76 (1996).

118. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997).

119. *Los Angeles v. Lyons*, 461 U.S. 95 (1983) (holding that Lyons, who sued to enjoin the use of choke-holds by the Los Angeles police, did not have the requisite standing to sue because he could not show a substantial likelihood that he would be harmed by the choke-hold in the future).

120. 521 U.S. 261 (1997).

121. *Coeur d'Alene Tribe*, 521 U.S. at 278-80 (advancing a balancing approach in determining whether the *Ex parte Young* exception applies in a given case). Only Chief Justice Rehnquist joined this section of the opinion. *Id.* at 264.

122. *See* 29 U.S.C. § 630 (1994); *Walker v. Snyder*, 213 F.3d 344, 346 (7th Cir. 2000) (rejecting that *Ex parte Young* can support relief in an action under Title II of the Americans with Dis-

Ex parte Young exception, which allows suits against state officers in their official capacity for injunctive relief, probably does not provide an adequate remedy for the state employee.

G. Suits Against State Officers in Their Official Capacity

Finally, the fact that the Eleventh Amendment does not bar suits for money damages against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally, does not adequately compensate the state employee. As Professor Meltzer indicates, such a suit has "obvious defects."¹²³ For the individual officer may be hard to identify or locate, is usually not one with deep pockets, and may be judgment proof.¹²⁴ And again, a state officer sued in his individual capacity may not qualify as a proper defendant under the ADEA.¹²⁵

As illustrated above, each federal avenue of relief poses problems for the state employee, as these "limits" on the Eleventh Amendment are riddled with their own limitations. The result is, as Justice Souter remarked in *Alden*, the conferral upon state employees of a "right" without a "remedy."¹²⁶ The most powerful mechanism for enforcement of the Constitution and federal laws against the states, found in the *Ex parte Young* suit against officers, does not allow recovery for money damages and may not even apply in the context of the ADEA. Furthermore, while seven justices did reaffirm *Ex parte Young*, two want to limit it.¹²⁷

The *Kimel* Court did not even discuss any remaining federal remedies for state employees.¹²⁸ Rather, the Court told state employees to look to their respective states for monetary relief.¹²⁹ And in the context of age discrimination, most states do have their own age discrimination statutes, which authorize recovery for money damages.¹³⁰ However, a review of Alabama law reveals that there is no available state remedy for state employees who are discriminated against in the workplace on the basis of age.

abilities Act ("ADA"), 42 U.S.C. §§ 12131-65 (1994), which prohibits discrimination by "any public" entity, as only the public body is the proper defendant, and as a suit based on *Ex Parte Young* is a "suit against state officers as individuals, not against the state itself").

123. Meltzer, *supra* note 103, at 48.

124. *Id.*

125. See *Walker*, 213 F.3d at 346 (stating that the proper defendant in suits under federal anti-discrimination laws, such as the ADEA, usually is the public entity, not a natural person).

126. *Alden*, 527 U.S. at 711, 760.

127. See *supra* text accompanying note 121.

128. See *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

129. *Kimel*, 528 U.S. at 91-92.

130. *Id.*

IV. STATE REMEDIES AVAILABLE TO ALABAMA STATE EMPLOYEES

While the State of Alabama does have an age discrimination statute, this statute does not explicitly apply to state employers.¹³¹ Even if interpreted to cover state employers, the State of Alabama enjoys state sovereign immunity from suit, granted by Article I, Section 14 of the Alabama Constitution.¹³² Section 14 further prohibits suits against state officers and agents in both their official and individual capacity when "a result favorable to the plaintiff would directly affect a contract or property right of the State," unless the suit falls within one of six enumerated exceptions.¹³³

Because the Alabama Supreme Court has held that neither it nor the Alabama Legislature has the authority to waive immunity derived from article I, section 14, it appears that there is no judicially enforceable mechanism for enforcing Alabama's age discrimination statute against the State.¹³⁴ Furthermore, suits brought under Alabama's age discrimination statute probably would not fall into any of the enumerated exceptions to section 14's prohibition. As a result, the consequence of *Kimel* at both the federal *and* state level for the Alabama state employee is a resulting disparity in the legal rights and legal remedies afforded to him under the ADEA.

In 1997, the Alabama Legislature enacted the Alabama Age Discrimination Act of 1997.¹³⁵ Like the Federal Age Discrimination in Employment Act,¹³⁶ Alabama's Age Discrimination in Employment Act ("the Act") prohibits employers from discriminating against employees age forty and over on the basis of age, in the context of hiring, job retention, compensation, or other conditions of employment.¹³⁷ And like the federal ADEA, the Act creates a private right of action for those aggrieved under the Act, and provides for such legal and equitable relief necessary to effectuate its purposes.¹³⁸ In contrast to the federal ADEA, however, the Act does not expressly include the state and its political subdivisions within the definition of "employer."¹³⁹ Rather, it simply defines "employer" as "[a]ny person employing 20 or more employees

131. ALA. CODE §§ 25-1-20 to -29 (2000).

132. ALA. CONST. art. I, § 14; *Ex parte Cranman*, No. 1971903, 2000 WL 1728367, at *4 (Ala. Nov. 22, 2000).

133. *Williams v. Hank's Ambulance Serv.*, 699 So. 2d 1230, 1232 (Ala. 1997) (citing *Southall v. Stricos Corp.*, 153 So. 2d 234 (Ala. 1963)). *See infra* text accompanying notes 152-53.

134. *See Cranman*, 2000 WL 1728367, at *5 (stating that because the State of Alabama's immunity is constitutionally based, neither the Alabama Legislature nor the Alabama Supreme Court has the power to waive the state's immunity from suit).

135. 1997 Ala. Acts 723.

136. 29 U.S.C. §§ 621-34 (1994 & Supp. IV 1998).

137. ALA. CODE § 25-1-22 (2000).

138. *Id.* § 25-1-29.

139. *Id.* § 25-1-20.

. . . including any agent of that person.”¹⁴⁰

Because the Act does not expressly exclude the state as an employer covered under the Act, one could argue that its coverage extends to state employers, and that state employees therefore have a right of action against the state under the Act. Supporting the existence of a remedy against the state for the statutory right provided for in the Alabama Age Discrimination Act is Article I, Section 13 of the Alabama Constitution, which provides that “every person, for any injury done him, . . . shall have a remedy by due process of law.”¹⁴¹ A plaintiff making this argument, however, will immediately run into the barrier posed by Article I, Section 14 of the Alabama Constitution, which provides that “the State of Alabama shall never be made a defendant in any court of law or equity.”¹⁴² First, the mere fact that the Alabama Legislature did not expressly include the state in the Act’s definition of “employer” indicates an unlikelihood that Alabama courts will construe Alabama’s age discrimination statute to cover state employees.¹⁴³ However, because the Alabama Supreme Court has held that section 14 removes any power from the Alabama Legislature and all other state authorities to waive the state’s constitutional immunity, section 14 appears to render such a construction unconstitutional.¹⁴⁴

In *Williams v. Hank’s Ambulance Service*,¹⁴⁵ the Alabama Supreme Court addressed Alabama’s general sovereign immunity rule and its exceptions. In *Williams*, ambulance companies and other medical service providers sued the State of Alabama and Gwendolyn Williams, in her official capacity as commissioner of the Alabama Medicaid Agency, challenging the legality of the commissioner’s reimbursement plan on the grounds that it was not in accordance with federal law.¹⁴⁶ The plaintiffs sought retroactive payment by the commissioner for previous services they had rendered.¹⁴⁷ The court held that the state’s reimbursement plan did violate federal law, but that the order for retroactive reimbursement violated principles of state sovereign immunity.¹⁴⁸

In reaching its holding, the court first confirmed the general rule for sovereign immunity, articulated in *Gunter v. Beasley*,¹⁴⁹ stating that “Section 14 prohibits the State from being made a defendant in any

140. *Id.*

141. ALA. CONST. art. I, § 13.

142. *Id.* § 14.

143. See *Hutchinson v. Board of Trustees of Univ. of Ala.*, 256 So. 2d 281 (Ala. 1971).

144. *Ex parte Cranman*, No. 1971903, 2000 WL 1728367, at *6 (Ala. Nov. 22, 2000); *Dunn Constr. Co. v. State Bd. of Adjustment*, 175 So. 2d 383, 386 (Ala. 1937).

145. 699 So. 2d 1230 (Ala. 1997).

146. *Williams*, 699 So. 2d at 1230-31.

147. *Id.* at 1231.

148. *Id.* at 1231, 1237-38.

149. 414 So. 2d. 41 (Ala. 1982).

court of this state and neither the State nor any individual can consent to a suit against the State.”¹⁵⁰ The court further stated that section 14 prohibits suit against state officers in both their official and individual capacity “when a result favorable to the plaintiff would directly affect a contract or property right of the State.”¹⁵¹ Suits that fall into one of the six enumerated categories, however, are exempted from section 14’s prohibition.¹⁵² Section 14, the court stated, does not prohibit: (1) actions brought to compel state officers to perform their legal duties; (2) actions brought to enjoin state officials from enforcing an unconstitutional law; 3) actions to compel state officials to perform ministerial acts; (4) actions brought under the Declaratory Judgments Act; (5) valid inverse condemnation actions brought against state officials in their representative capacity; and (6) actions for an injunction or damages brought against state officials in their representative capacity and individually where it was alleged that they acted fraudulently, in bad faith, beyond their authority, or in a mistaken interpretation of law.¹⁵³

The court first concluded that because judgment for the plaintiffs in the form of retroactive reimbursement would result in the state having to pay “millions of dollars” to plaintiffs, such a judgment would directly affect a property right of the state.¹⁵⁴ The Court then considered whether the action qualified under one of the exceptions to section 14’s bar.¹⁵⁵ The Court concluded that because the action did not fall into one of the above exceptions, the judgment of the court below, ordering retroactive reimbursement, was unconstitutional.¹⁵⁶

According to *Williams* and Alabama’s general rule for sovereign immunity, section 14 would bar suits against the state under Alabama’s age discrimination statute. Furthermore, because suits against state officials for damages or retrospective relief would affect a property right of the state, as it did in *Williams*, state employees would be barred from suing state officials for age discrimination unless their claims qualified under one of the exceptions. These exceptions, however, would not be applicable in an action by a state employee to recover money damages against a state official for age discrimination. As a result, section 14

150. *Williams*, 699 So. 2d at 1232 (quoting *Gunter*, 414 So. 2d at 48).

151. *Id.* (internal quotations omitted).

152. *Id.*

153. *Id.*

154. *Id.* at 1232.

155. *Williams*, 699 So. 2d. at 1232-38. The court analyzed the action under the first category, which permits suits to compel State officials to perform their legal duties. *Id.* The court reasoned that the action did not qualify under this exception because the Medicare and Medicaid Acts, which contained the provisions in question, are “not easily decipherable,” and the Alabama commissioner interpreted the Acts consistent with the interpretation of the Secretary of the Department of Health and Human Services, the United States governmental agency charged with enforcing the Acts. *Id.* at 1237-38.

156. *Id.* at 1232-38.

would effectively prohibit all suits under Alabama's age discrimination statute brought not only against the state, but against state officials as well, when a judgment for plaintiffs would affect a property right of the state.

The Alabama Legislature could amend the Constitution. However, such an amendment is unlikely given the rejection of the language in a recently proposed constitutional amendment that would have replaced the current language of article I, section 14 with the following: "The Legislature may by law direct in what manner, in what courts, and in what cases suits may be brought against the state and its political subdivisions."¹⁵⁷ Moreover, while Alabama Administrative Code Rule 670-x-4-.01 does prohibit age discrimination,¹⁵⁸ this administrative rule, as pointed out in the *Brief of Alabama as Amici Curiae* filed on behalf of Respondents in *Board of Trustees of the University of Alabama v. Garrett*,¹⁵⁹ (1) has limited applicability¹⁶⁰ and (2) only grants a right on the part of the aggrieved to appeal to the State Personnel Board, whose decision is final and whose corrective power appears to be limited.¹⁶¹ And while the Alabama Legislature has established a Board of Adjustment, which has limited funds available to compensate citizens of the state who have been injured by the state or its agencies, the Board is under only a moral, not legal, obligation to award money damages and may not even have jurisdiction over claims arising under the ADEA.¹⁶² Thus, despite the Alabama Constitution's guarantee that "every person, for an injury done him, . . . shall have a remedy by due process of

157. See H.B. 191 § 1.12. (visited Feb. 27, 2001) <<http://www.legislative.state.al.us/SearchableInstruments/2000RS/Bills/HB191.htm>>. Representative Venable introduced H.B. 191 on February 1, 2000. The bill, with the language of section 1.12 deleted, passed the House of Delegates but died in the Senate. See *id.*

158. ALA. ADMIN. CODE r. 670-x-4-.01 (1981 & Supp. 1990) ("Discrimination against any person in recruitment, examination, appointment, training, promotion, retention or any personnel action, because of race, sex, national origin, age, handicap, or any other nonmerit factor, is prohibited.").

159. No. 99-1240, 2000 WL 33179681 (Feb. 21, 2001) also available at <<http://www.bazelon.org/alabamavrief.html>>.

160. See ALA. ADMIN. CODE r. 670-x-2-.01 (1981 & Supp. 1990) (stating that these rules apply only to members of the classified service and to members of the unclassified service except as to appointment and dismissal). Alabama Administrative Code Rule 670-x-3-.01 defines "classified service" as "all positions in the state service not specifically exempt," thereby rendering rule 670-x-4-.01 inapplicable to, for example: elected officers; officers and employees of the Legislature; officers, attendants and employees of the circuit courts; clerks of county jury boards, and deputy circuit solicitors; members of boards and commissions; heads of departments appointed by the Governor or by boards and commissions with the Governor's approval; and officers and employees of the state's institutions of higher learning. *Id.* r. 670-x-3-.01 (f)(1) & (3). Thus, the Alabama plaintiffs in *Kimel* were precluded from seeking relief under this administrative rule, as they were employed by a state university.

161. *Id.* r. 670-x-4-.03 (stating that the Board's decision is final); *id.* r. 670-x-5-.08(8) (discussing only reinstatement with or without loss of pay or dismissal).

162. ALA. CODE §§ 41-9-60 to -74 (2000).

law,"¹⁶³ Alabama's age discrimination statute appears to do just the opposite: it creates a right of action for violations, but has no mechanism by which state employees can recover.

V. CONCLUSION

As *Kimel*'s effect on the Alabama state employee illustrates, the United States Supreme Court's recent Eleventh Amendment and Section 5 jurisprudence has effectively resulted in a hole or gap in the rights and corresponding remedies afforded to state employees in the context of age discrimination. Admittedly, nothing in the Court's recent sovereign immunity decisions has curbed Congress' power to regulate the states.¹⁶⁴ Rather, Congress is limited in its means of enforcement—it cannot enforce rights against the state through private suit unless it uses Section 5 of the Fourteenth Amendment. But, by limiting congressional avenues of enforcement and by further limiting Congress' power under Section 5, the Court has, for all practical purposes, removed the possibility for state employees to recover against the states for damages under the federal ADEA. And despite the *Kimel* Court's statement that its decision did not "signal the end of the line" for state employees, Alabama's state employees have no corresponding state remedy under Alabama's state age discrimination statute. Alabama's lack of an enforcement mechanism against the state in its age discrimination statute shows the appropriateness of federal law parallels in discrimination legislation enacted pursuant to Section 5. For although Congress may in many cases merely be providing an alternate remedy, in the case of Alabama it could be providing the only remedy.

Evelyn Corwin McCafferty

163. ALA. CONST. art I, § 13.

164. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537-56 (1985) (overturning *National League of Cities v. Usery*, 426 U.S. 833 (1976), to hold that the Commerce Clause empowers Congress to enforce the minimum-wage and overtime provisions of the Fair Labor Standards Act against the states). In so holding, the Court reasoned that the federal political process, not the judiciary, served as the structural safeguard of the states' sovereign interests. *Garcia*, 469 U.S. at 550-56.