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## The U.S. Supreme Court's New Federalism and Its Impact on Antidiscrimination Legislation

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*In recent years, the U.S. Supreme Court has developed a new federalism policy that has eviscerated the powers of the U.S. Congress in favor of states' rights. This article addresses the implications of the Supreme Court's new federalism policy for the Americans With Disabilities Act (ADA) of 1990 and the Age Discrimination in Employment Act (ADEA) of 1967 as amended. It focuses on two recent High Court decisions, Kimel v. Florida Board of Regents and Garrett v. the University of Alabama, which greatly reduced the scope of both the ADA and the ADEA. In light of these decisions, alternative actions for enforcing antidiscrimination laws are provided.*

*Keywords:* federalism; civil rights, states' rights; sovereign immunity; discrimination; 14th Amendment; employment legislation

In the past few decades, we have witnessed an accelerated devolution of powers from the federal government to the states, not only by the executive branch but by the judicial branch of government as well. The issue of federalism—or more appropriately, the new federalism—as it pertains to the courts refers to the distribution of power between state and federal courts. At its core is the concept of “state sovereignty,” which, through a number of constitutional provisions, seeks to preserve the “immunity”<sup>1</sup> rights of states, protecting them from unnecessary or unwarranted intrusion by the federal government. Recently, the U.S. Supreme Court has brought the new federalism to the forefront of constitutional law.

This article examines the U.S. Supreme Court's role in the new federalism, particularly around two pieces of antidiscrimination legislation: The Americans with Disabilities Act (ADA) of 1990 and the Age Discrimination in Employment Act (ADEA) of 1967 as amended. It begins with a brief examination of the legal framework under which the Supreme Court has been applying and justifying its federalism policy. It then examines the

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Supreme Court's decisions in two cases involving antidiscrimination laws: *Kimel v. Florida Board of Regents* (2000) and *Garrett v. the University of Alabama* (2001). The implications of these decisions and viable legal responses to them are also addressed.

It should be noted at the outset that the analysis presented here does not address the official or personal immunity doctrines as they pertain to individual government employees (see Rosenbloom, 1994, 1997). These immunity doctrines address whether federal, state, and local government officials or employees who violate an individual's statutory or constitutional rights can be sued and held liable for their actions. However, as will be discussed later in the text, reliance on these doctrines may provide alternative relief to state employees alleging they have been discriminated against based on age or disability.

#### THE NEW FEDERALISM AND THE U.S. SUPREME COURT

In the past two decades or so, as the U.S. Supreme Court has been faced with opportunities to strike a balance between state and federal power, it has sided almost exclusively with the states. The U.S. Supreme Court's policy of federalism has, in effect, resulted in severe restrictions to an individual's ability to sue a state in federal court for federal rights' violations (Braveman, 2000; Wise, 2001).

In two landmark cases, *Seminole Tribe of Florida v. Florida* (1996) and *Alden v. Maine* (1999),<sup>2</sup> the U.S. Supreme Court expanded the boundaries of the new federalism to extraordinary dimensions.<sup>3</sup> In *Seminole* and *Alden*, a Court majority held that Congress is barred from authorizing individuals to pursue private suits for damages in the federal courts against the states when it does so pursuant to its commerce clause powers.<sup>4</sup> The Court opined that Congress cannot subject an unconsenting state to suit in either federal or (its own) state court, whether the suit is brought by a citizen or noncitizen of that state and whether it is based on federal law or state law. The rulings limit congressional legislation in favor of states' rights, restrict the role of the federal courts in adjudicating claims alleging state violations of federal rights, and ultimately impede an individual's ability to seek court enforcement of their federal and perhaps even state rights against a state (Goodman, 2001; Wise, 2001).

It is important to enunciate the constitutional provisions invoked by the Supreme Court in its new federalism rulings. When we think of state sovereignty, we typically think of the 10th and 11th Amendments to the U.S.

Constitution. The 10th Amendment, ratified in 1791 as part of the Bill of Rights, reserves all powers not specifically granted to the United States to the states and to the people, respectively. It seeks to protect state governments from being “commandeered” by the federal government or from being eviscerated as viable political entities (*Printz v. United States*, 1997). In short, it limits Congress’s powers to regulate state governments.

The 11th Amendment, which has been more critical than the 10th to the Supreme Court’s new federalism policy, gave concrete and specific expression to the abstract or general guarantee of the 10th Amendment. Ratified in 1795, it originally sought to prevent a resident of one state from suing another state in federal court. It was proposed and ratified in response to the U.S. Supreme Court ruling in *Chisholm v. Georgia* (1793), in which the State of Georgia was being sued in federal court by a citizen of South Carolina. Georgia claimed sovereign immunity and refused to appear in court. By a vote of 4 to 1 the Court issued a judgment against Georgia, stating that a state could be sued by citizens of another state.<sup>5</sup>

In an explicit effort to overturn the *Chisholm* decision, the 11th Amendment was proposed and ratified. It was a direct solution that remained unambiguous until Congress enacted the Judiciary Act of 1875, which was part of the post-Civil War civil rights legislation and guaranteed the right of a citizen to sue his or her own state in federal court. As will be seen shortly, it is the 11th Amendment that the U.S. Supreme Court has primarily relied upon in applying its new federalism policy, essentially granting state governments much greater immunity from lawsuits.

Finally, state sovereignty claims also weigh congressional power as defined by the commerce clause of Article I of the U.S. Constitution and § 5 of the 14th Amendment, which grants the U.S. Congress authority to enact legislation enforcing the 14th Amendment.<sup>6</sup> The 14th Amendment essentially applies the Bill of Rights to state governments.<sup>7</sup>

The Supreme Court’s reliance on the commerce clause in applying its new federalism policy was first seen in its 1995 *United States v. Lopez* ruling. For the first time since the New Deal, the Supreme Court invalidated a federal statute enacted pursuant to the interstate commerce clause.<sup>8</sup> In *Lopez*, the Court declared unconstitutional a law<sup>9</sup> banning the possession of guns within 1,000 feet of a school, despite the aggregate impact of the regulated activity on the national economy through its effects on education and crime. Turning heavily on whether the law or the activity being regulated affected “economic activity,” the Court ruled that “the possession of a gun in a local school zone is in no sense an economic activity that might,

through repetition elsewhere, have such a substantial effect on interstate commerce” (p. 549).<sup>10</sup>

Similarly, in the *United States v. Morrison* (2000), the same narrowly divided Court struck down a provision of the 1994 Violence Against Women Act<sup>11</sup> (VAWA) creating a federal civil remedy against the perpetrators of gender-motivated crimes of violence. Again, the Court stressed the noneconomic nature of the regulated activity, stating that Congress does not have the authority to regulate a criminal offense such as rape because it is not an economic issue. The *Morrison* Court stated that “gender-motivated crimes of violence are not, in any sense, economic activity” (p. 598). It said that

[while] the statute, *is* supported by numerous findings regarding the serious impact of gender-motivated violence on victims and their families, these findings are substantially weakened by the fact that they rely on reasoning that this Court has rejected, namely a but-for causal chain from the initial occurrence of violent crime to every attenuated effect upon interstate commerce. (p. 599)

Broadly interpreted, the *Morrison* and *Lopez* rulings suggest, in effect, that Congress, pursuant to the commerce clause, can only regulate an activity if it is economic and has a substantial impact on interstate commerce.<sup>12</sup>

The *Morrison* Court further ruled that § 5 of the 14th Amendment also does not give Congress the authority to enact the provision of the VAWA creating a federal civil remedy for victims of gender-motivated violence. In so doing, the Court referred to its decision in *City of Boerne v. Flores* (1997), in which it ruled that the 14th Amendment places limitations on the manner in which Congress may attack discriminatory conduct. Foremost among them is the principle that the amendment prohibits only state action, not private conduct. The *City of Boerne* Court affirmed that the states should be unencumbered by far-reaching limitations on their authority, particularly in the absence of clear evidence that they have threatened constitutional guarantees. The *City of Boerne* Court ruled that there was “a considerable congressional intrusion into the states’ traditional prerogatives and general authority to regulate for the health and welfare of their citizens” (p. 509). Ultimately, the Court’s ruling in *Morrison* further tipped the balance of power toward the states and the judiciary.

In sum, the U.S. Supreme Court has placed severe restrictions on the power of Congress to enact legislation enforceable against the states and has attenuated the ability of individuals to sue a state in federal court. The effects of the Court’s expansive new federalism policy can be seen in two

recent decisions, *Kimel* (2000) and *Garrett* (2001), in which, for the first time, the High Court held antidiscrimination statutes enacted to protect civil rights inapplicable to the states.

#### THE SUPREME COURT'S *KIMEL* AND *GARRETT* DECISIONS

In 1967 Congress enacted the ADEA, which made it illegal for private businesses to refuse to hire, discharge, or to otherwise discriminate against an individual, in compensation or privileges of employment, between the ages of 40 and 65. The act was amended in 1974 to apply to federal, state, and local governments. A series of amendments to the ADEA banned forced retirement for all employees, except for public safety officers (i.e., law enforcement officers and firefighters at every level of government).<sup>13</sup> Enforcement authority over the ADEA was originally vested in the Department of Labor but was transferred to the Equal Employment Opportunity Commission (EEOC) as part of the federal service reform of 1978.<sup>14</sup>

In 2000 the U.S. Supreme Court issued a decision in *Kimel v. Florida Board of Regents* that widely reduced the scope of the ADEA. In *Kimel*, the Court barred state employees from suing their employers (i.e., state governments) in federal court to redress age discrimination under the ADEA. The Court ruled that the 14th Amendment's § 5 does not permit Congress to abrogate states' 11th Amendment immunity for violations under the ADEA. Unless a state is willing to waive its sovereign immunity, state employees cannot bring a private cause of action in federal court for discrimination under the ADEA. In effect, state employees do not have the same age discrimination protections as private sector and local and federal government employees under the ADEA.<sup>15</sup>

The *Kimel* case served as another opportunity for the Court to advance its policy of new federalism. The Supreme Court in *Kimel* began by taking as a given the interpretation of the state sovereign immunity doctrine offered in the *Seminole Tribe* (1996) line of cases and proceeded to consider whether the ADEA qualified as an exercise of Congress's § 5 power under the 14th Amendment. To do so, the Court applied the "congruence and proportionality test" from its *City of Boerne* (1997) decision. This test asks whether the legislation in question is congruent and proportional with the constitutional problem identified by Congress. In applying the test, the Court focused its attention primarily on the legislative history of the ADEA and determined that Congress did not identify a serious problem in state and local government sufficient to warrant the protections provided by the

ADEA. It said that "Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age" (*Kimel*, 2000, p. 65).

The Court arrived at this conclusion without even considering the argument that Congress could have relied on statistics showing widespread discrimination in the private sector and assumed that a similar pattern existed for state employees. The Court's insistence on a showing of explicit documentation of unconstitutional conduct by state employers is rather extraordinary because it indicates that the Court will not permit Congress to infer the existence of a problem and may not even permit Congress to anticipate the future emergence of one. As Ray (2000) observed:

The strict limitations the Court appears to place on Congress in *Kimel* begs the question of what sort of constitutional conduct Congress is empowered to reach when it passes legislation to deter or prevent unconstitutional conduct by the states, as well as the nature of the basis that the Court will require in order to permit Congress this flexibility. (p. 1767)

The Court went a step further and ruled that the enforcement powers prescribed by § 5 of the 14th Amendment do not permit Congress to determine what constitutes a constitutional violation. It ruled that Congress cannot "decree the substance of the Fourteenth Amendment's restrictions on the States. . . . It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation" (*Kimel*, 2000, p. 81). With the conclusion that there was no constitutional problem respecting age and that Congress, in any event, lacked the power to determine the existence of a constitutional violation, it followed inevitably that the Court would rule that a remedy such as the ADEA was not warranted. The broader implication here is that the High Court is continuing to narrow the nature of the powers it will consider as a valid exercise of congressional authority.

In a second case, *Garrett v. the University of Alabama* (2001), the Supreme Court again accepted an 11th Amendment immunity defense in striking down the applicability of the 1990 ADA to state governments.<sup>16</sup> Title I of the ADA prohibits employment discrimination against qualified disabled persons. It covers nonfederal government employers, employment agencies, labor unions, and joint labor-management committees with 15 or more employees. The federal government, which is excluded from the ADA, continues to be covered by executive orders and the Vocational Rehabilitation Act of 1973 as amended (Lee, 1999; Lee & Greenlaw, 1998-1999).

Interestingly, despite the Supreme Court's rulings in *Seminole Tribe* (1996) and related cases, the U.S. Court of Appeals for the 11th Circuit in *Garrett* (1999) ruled that the ADA is not only valid but also a legitimate use of congressional authority. Thus, the appeals court rejected Alabama's sovereign immunity claim for ADA violations.<sup>17</sup>

In February of 2001, however, the U.S. Supreme Court overturned the appellate court decision in *Garrett*, stating that Congress did not exercise a valid use of power under § 5 of the 14th Amendment in abrogating states' 11th Amendment immunity for violations under the ADA.<sup>18</sup> Consistent with its previous decisions, the Court, in effect, restricted the scope of Title I of the ADA, while at the same time strengthening state sovereignty.

The Court began by examining whether there was "congruence and proportionality" between the injury and the remedy chosen to correct it. Again referring to its *City of Boerne* (1997) decision, the Court argued that this test was appropriate for determining whether remedial legislation such as the ADA is appropriate under § 5 of the 14th Amendment. The Court first ruled that Congress should have made its intentions about the scope of the ADA clear in the record or text of the legislation. The Court majority said that in order to make states liable to private suits for damages, it was inappropriate for Congress to consider general societal discrimination against people with disabilities. Rather, the Court went on to say, Congress must demonstrate a high level of proof that the states themselves had engaged in unconstitutional discrimination.

The *Garrett* Court (2001) thus concluded that the ADA's legislative record failed to show that Congress identified a history and pattern of irrational employment discrimination by the states against the disabled. The Court opined that

Although the record includes instances to support . . . a finding [that society has tended to isolate and segregate individuals with disabilities], the great majority of these incidents do not deal with state activities in employment. Even if it were to be determined that the half a dozen relevant examples from the record showed unconstitutional action on the part of States, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based. (p. 959)

The Court went on to say that

Although "negative attitudes" and "fear" often accompany irrational biases, their presence alone does not a constitutional violation make. Thus, the Fourteenth Amendment does not require states to make special accommodations for the disabled, so long as their actions toward such individuals are

rational. They could quite hardheadedly—and perhaps hardheartedly—hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the equal protection clause. (p. 959)

The Court concluded that the ADA did not exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. By applying the rational basis standard to discrimination, the Court has set a very high hurdle for Congress, which must demonstrate that the state choices (i.e., “discrimination”) serve no legitimate governmental purpose or are not rationally related to the achievement of a legitimate government purpose. This very heavy burden of persuasion is ultimately placed on Congress.

#### IMPLICATIONS OF THE *KIMEL* AND *GARRETT* RULINGS

The general effects of the Supreme Court’s new federalism on civil rights laws and antidiscrimination legislation are relatively clear. Federal laws are passed to address broad societal issues and problems that the states are either unable or unwilling to address. As many states, particularly those in the South, have historically demonstrated, federal civil rights laws were greatly resisted. And if the states did choose to establish such laws, they differed widely in scope. The question, then, is, Should the states have the power to determine the existence and strength of civil rights laws? If they do, some states will work hard to preserve the civil rights of their citizens, whereas others may be less rigorous in doing so. It is not necessarily the case that state governments would revert to the days of the pre-1960s, wherein pure hate and unmitigated prejudice often governed the actions of policy makers. But rather, state governments today may seek to sidestep employees’ civil rights because of the costs that may ultimately be imposed. For example, efforts to achieve pay equity are seen as being very costly to employers, as are efforts to make reasonable accommodations for disabled workers. In seeking to balance the interests of employee’s civil rights with economic expenditures, it seems axiomatic that state employers, if given a choice, will decide in favor of cost containment. As a corollary, employees’ civil rights could be transgressed.

An analogous situation can be further illustrated in the area of labor relations in the public sector, where there is no national labor law to regulate or oversee collective bargaining in state and local governments.<sup>19</sup> Each state

develops its own labor law or policy, resulting in a hodgepodge of regulations or laws in which some states mandate collective bargaining,<sup>20</sup> others permit it,<sup>21</sup> and yet others either have no policy<sup>22</sup> or they prohibit it outright.<sup>23</sup> Moreover, the strength of the state laws varies greatly in terms of scope of bargaining, binding interest arbitration, and striking rights. In the South, several states not only continue to prohibit collective bargaining, but they have developed mechanisms or policies that severely weaken the ability of public employee unions to adequately represent their constituents. In Florida, Georgia, and other southern states, for example, "right-to-work" laws make it extraordinarily difficult to unionize workers, collect union dues, or provide any meaningful protections and benefits to make unionization desirable to public employees (see, e.g., Kearney, 1992; Rosenbloom & Shafritz, 1985).

Another implication of the Supreme Court's devolution of power to state courts is that no national precedents around civil rights will be set. A new body of patchwork case law, expressing the interests of the states, will thus govern the civil rights of the American people. Of course, one might argue the benefits of this, given the conservative majority on the Court. But the issue of the power distribution between federal and state courts, or the federal and state governments, for that matter, goes beyond this concern to the question of which issues should be governed by national interests and, hence, Congress *and* the U.S. Supreme Court and which issues should fall under the jurisdiction of the states. This broader issue surrounding the new federalism goes well beyond the scope of this analysis. So, too, do the numerous other implications of the Supreme Court's burgeoning new federalism. These issues include Congress's concern for individual rights versus the Supreme Court's proclivity toward states' rights, which type of matters the Court sees as the judiciary's exclusive role of constitutional interpretation, and even the less political matter of the workload of the federal courts (see Althouse, 2001).

More specific to *Kimel* (2000) and *Garrett* (2001), the Supreme Court's decisions have resulted in nearly 5 million state employees losing their federal protection from age and disability discrimination. Although the decisions continue to allow state workers to sue state governments, they can do so only in state court, and then only if the state agrees to the suit.<sup>24</sup> Moreover, the suit must be brought under state disability or age discrimination laws,<sup>25</sup> which are often weaker, less effective, and narrower in scope. For example, state disability laws tend to be much less rigorous than the ADA around reasonable accommodations (Levinson, 2000).

*Kimel* and *Garrett* may also have ramifications for other civil rights statutes. The Equal Pay Act (EPA) of 1963, the Family and Medical Leave Act (FMLA) of 1993, and perhaps even Title VII of the Civil Rights Act of 1964, as amended, may fall prey to the Supreme Court's new federalism crusade. In fact, in accordance with the Supreme Court's new federalism policy, many lower courts have recently determined that the FMLA exceeded Congress's enforcement powers under § 5 of the 14th Amendment.<sup>26</sup>

The implications of *Kimel* and *Garrett* for the EPA, however, are less clear. Prior to these High Court decisions most lower courts ruled that the EPA meets the "congruence and proportionality" tests, thus rendering it enforceable against state government employers.<sup>27</sup> But since *Kimel* and *Garrett*, there have been conflicting decisions by lower courts around whether the EPA is a valid abrogation of state sovereign immunity. For example, the U.S. Court of Appeals for the First Circuit, in *Jusino Mercado v. Commonwealth of Puerto Rico* (2000), determined that a nonconsenting state cannot be sued in a federal venue by state employees seeking to enforce the EPA. The *Jusino* court justified its ruling here by pointing to post-*Kimel* Supreme Court actions, which vacated appellate court rulings upholding the EPA's applicability to the states<sup>28</sup> (Murdock, Sezer, & Hodge, 2000; Ray, 2000).

On the other hand, the Seventh Circuit Court of Appeals in *Varner v. Illinois State University* (2000), *on remand* from the U.S. Supreme Court,<sup>29</sup> upheld its initial decision that the state university was not immune from a wage discrimination suit brought by female faculty members under the EPA. The *Varner* court ruled that "Although the Eleventh Amendment grants unconsenting States immunity from suit in federal court, that immunity is not absolute" (p. 930). It concluded with a finding that "the extension of the Equal Pay Act to the States was a valid exercise of congressional authority under § 5 of the Fourteenth Amendment" (p. 937). Thus, despite the Supreme Court's ruling in *Kimel*, as well as its explicit directions to the Seventh Circuit to reconsider its position on state sovereign immunity, at least one circuit court is unwilling to render the EPA inapplicable to the states.

One of the major unresolved issues as of this writing is whether the U.S. Supreme Court will find Title VII, the cornerstone of civil rights laws in this nation, inapplicable to the states, despite the fact that in its 1976 *Fitzpatrick v. Bitzer* ruling the Court upheld Title VII as a valid exercise of Congress's enforcement powers under § 5 of the 14th Amendment. Since *Fitzpatrick*, lower courts have routinely upheld the applicability of Title VII to state governments.<sup>30</sup> *In re Employment Discrimination Litigation Against the State*

of *Alabama* (1999), for example, the U.S. Court of Appeals for the 11th Circuit ruled that “in enacting the disparate impact provisions of Title VII, Congress has unequivocally expressed its intent to abrogate the states’ Eleventh Amendment sovereign immunity, and that Congress has acted pursuant to a valid exercise of its Fourteenth Amendment enforcement power” (p. 1324).

However, in recent years some states have argued that the Civil Rights Act of 1991, which amends Title VII to create a remedy of compensatory damages for plaintiffs who proved intentional discrimination, constitutes a separate intrusion on sovereign immunity and therefore requires a separate, independent expression of congressional intent to abrogate sovereign immunity. States have also argued that the increased risk of large monetary awards allowed under the 1991 act calls for a reexamination of *Fitzpatrick*, which was decided when the only monetary remedy available was back pay (Murdock, Sezer, & Hodge, 2000).

A pivotal decision was issued in 1998 by the Seventh Circuit Court of Appeals in *Varner v. Illinois State University*, discussed earlier in the context of the EPA. The *Varner* case involved a challenge to both the EPA’s and Title VII’s applicability to states. The *Varner* court (1998) flatly rejected the argument that Title VII, as amended by the Civil Rights Act of 1991, violated the 11th Amendment. It stated that

The plain language of [the 1991 act] shows that Congress intended to create an additional remedy for Title VII violations, as opposed to a separate cause of action . . . Under Title VII, the abrogation of the States’ Eleventh Amendment immunity is settled. (p. 718)

Because the Supreme Court vacated and remanded *Varner* (Seventh Circuit, 1998) to the circuit court for reconsideration in light of *Kimel* (2000), questions have been raised as to whether the Supreme Court was implicitly suggesting that states are immune from suits brought under Title VII of the Civil Rights Act of 1991. Murdock, Sezer, and Hodge (2000) argued that this is unlikely, and that it is much more probable that the case was remanded for reconsideration of the EPA issue. First, the 1998 *Varner* court wrote most of its decision around the EPA, and not Title VII. Second, in rendering its decision on the applicability of the EPA to state governments, the Seventh Circuit relied on one of its own precedents, in which it had decided that the ADEA was enforceable against state governments (see *Goshtasby v. Board of Trustees of the University of Illinois*, 1998). But because *Kimel* clearly reversed the Seventh Circuit’s ADEA precedent, the Supreme

Court had, in effect, eviscerated the Seventh Circuit's rationale for upholding the power of Congress to abrogate state sovereignty rights under the EPA. By remanding the *Varner* case to the Seventh Circuit, the Supreme Court was thus instructing the circuit court to reconsider its decision around the EPA and not necessarily Title VII of the 1991 Civil Rights Act.<sup>31</sup>

It also seems unlikely that the Supreme Court will decide that Title VII is not enforceable against the states, because in its *Kimel* decision, the Court repeatedly relied on race and gender discrimination as examples of the type of discrimination that Congress can appropriately regulate under § 5 of the 14th Amendment. The *Kimel* Court (2000, p. 83) ruled, for example, that "Age classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy'" (citing its decision in *Cleburne v. Cleburne*, 1985). It further stated that "Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a history of purposeful unequal treatment" (Kimel, 2000, p. 83).

In short, it appears unlikely that the Supreme Court would actually consider rendering Title VII outside of Congress's purview with respect to applicability and enforcement. However, without a substantive ruling from the High Court on the applicability of the FMLA or the EPA to the states, circuit court decisions, conflicting in the case of the EPA, will govern which states are or are not immune from lawsuits by their employees under the FMLA or the ADA.

#### ALTERNATIVE ACTIONS FOR ENFORCING ANTIDISCRIMINATION LAWS

Despite the long line of new federalism decisions issued by the Supreme Court, local government employees are still able to file suit against local government employers. Nothing in *Kimel* (2000) or *Garrett* (2001) suggests that Congress did not have the authority to pass the ADEA or the ADA pursuant to its commerce clause power.<sup>32</sup> *Kimel*, for example, held only that Congress did not have the power to pass the 1974 amendment extending the ADEA to state and local government employers pursuant to its power under § 5 of the 14th Amendment (p. 91). In fact, the Supreme Court had already flatly rejected a 10th Amendment state sovereignty defense in *EEOC v. Wyoming* (1983, pp. 236-239), when it ruled that the

1974 amendment to the ADEA was a valid exercise of Congress's Article I commerce clause powers.<sup>33</sup>

Moreover, the Supreme Court has never suggested that the 11th Amendment protects local governmental entities.<sup>34</sup> In its recent decision in *Alden v. Maine* (1999, p. 706), the Court reaffirmed that a core principle of the sovereign immunity doctrine is that it bars suit against states, but it "does not bar suits against lesser entities; it does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the state." Thus, Congress need not abrogate 11th Amendment immunity when regulating local governments. Ultimately, local government employees can file suit against their employers (Bodensteiner & Levinson, 2001).

In addition, a disability or age discrimination suit brought under 42 U.S. Code § 1983 claim to enforce the equal protection clause of the 14th Amendment would subject government officials, acting in their official capacity, to suit for prospective relief in accordance with the *Ex parte Young* 1908 doctrine. Section 1983 gives individuals a cause of action for damages and injunctive relief against those persons who violate the 14th Amendment under color of state law. Section 1983 amends and codifies the Civil Rights Act of 1871. Thus, local government officials in their official capacity are subject to lawsuits.<sup>35</sup> Furthermore, state officials may be sued in their personal capacity for damages. Both enjoy qualified immunity, but both are also subject to liability for compensatory as well as punitive damages (see Rosenbloom, 1997).

In addition, neither *Kimel* (2000) nor *Garrett* (2001) precludes the EEOC from filing suit on behalf of an alleged victim of age or disability discrimination. The EEOC, which has enforcement authority over the ADEA and the ADA, can file suit against state or local government employers as well as private sector employers. And suits brought by the EEOC are not barred by the 11th Amendment (Bodensteiner & Levinson, 2001).<sup>36</sup> In fact, the decision in *Kimel* suggests that the EEOC should work more aggressively on behalf of state government employees in order to promote the intention of Congress to eliminate age discrimination by state government employers.

Also, state employees may bring suits against states that have consented to have suits brought against them for certain actions. Some states have specified activities for which citizens may file suit against a state (Wise, 2001), but as of this writing there is no evidence that states have included "civil rights" as one such activity.

Finally, when employees lose their rights they sometimes turn to collective bargaining and unions for protection. Public employee unions have a legal responsibility to fairly represent their constituents and can pursue a number of actions to protect them from discriminatory practices.

Then, notwithstanding the Supreme Court's ardent propagation of the new federalism, there are still avenues for state and local government employees to mount legal challenges in federal courts against states, localities, or government officials for discrimination on the basis of age or disability.

## CONCLUSION

For almost 50 years, Congress has sought to eradicate various forms of discrimination in the U.S. workplace. Laws prohibiting discrimination on the basis of race, gender, color, religion, national origin, age, and disability have worked to protect workers and help create work environments free of biases and hostilities. However, the Supreme Court's new federalism decisions, particularly in *Kimel* (2000) and *Garrett* (2001) impose new and substantial restrictions on Congress's power to enact antidiscrimination legislation under § 5 of the 14th Amendment. The Supreme Court's decisions ultimately undermine civil rights and employment legislation enacted by Congress.

It is worth noting in closing that although the U.S. Supreme Court has consistently applied its policy of new federalism in recent years, there is one glaring exception in which the Court struck down the decision of a state court. In *Bush v. Gore* (2000), the U.S. Supreme Court was asked to review a decision by the Florida Supreme Court (see *Gore v. Harris*, 2000), which ordered a manual recount of the state's results in the 2000 presidential election. The U.S. Supreme Court reversed the decision of the state court, ruling that the judgment of the state supreme court violated the equal protection clause of the Constitution's 14th Amendment with respect to the fundamental nature of the right to vote. The Court stated that regardless of

whether the Florida Supreme Court had the authority . . . to define what a legal vote is and to mandate a manual recount implementing that definition, the recount mechanisms . . . do not satisfy the minimum requirements for the non-arbitrary treatment of voters that are necessary to secure the fundamental right to vote. (*Bush*, 2000, p. 530).

At the very least, the decision suggests that the U.S. Supreme Court will continue to devolve authority to state courts, but it will also sit in final judgment of the *merits* of state court rulings.

## NOTES

1. There is a wide body of case law addressing personal and official immunity from lawsuits (see, e.g., Rosenbloom, 1994, 1997, and Rosenbloom, Carroll, & Carroll, 2000). In contrast, the research presented here examines the current Supreme Court's decisions around government *employer* immunity.

2. There were two companion cases handed down on the same day of the *Alden v. Maine* (1999) decision. See *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (1999), holding that Congress could not abrogate state sovereign immunity in federal court on a trademark case, even though the federal courts had exclusive jurisdiction, and rejecting the constructive waiver of sovereign immunity via a state's activities in interstate commerce; *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (1999), holding that Congress could not abrogate state sovereign immunity in federal court on a patent case, and congressional power under the due process clause of the 14th Amendment did not give Congress the power to abrogate state sovereign immunity to protect property rights.

3. It may be recalled that in the *National League of Cities v. Usery* (1976), the U.S. Supreme Court ruled that a 1974 amendment to the Fair Labor Standards Act (FLSA) was not applicable to state and local governments. The 1974 amendment extended federal wage and hour requirements to state and local government employees. However, this decision was effectively overturned by the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority* (1985, p. 546), in which the U.S. Supreme Court found that *Usery* was "unsound in principle and unworkable in practice." See Kearney (1992).

4. The Court held in *Seminole Tribe of Florida v. Florida* (1996) that the Constitution embodies a principle of state sovereign immunity that is not subject to abrogation by Congress. In so doing, the Court majority advanced a two-part test for measuring Congress's ability to abrogate a state's sovereign immunity: (1) "whether Congress has 'unequivocally expressed its intent to abrogate the immunity'" and (2) "whether Congress has acted 'pursuant to a valid exercise of power.'" The *Alden v. Maine* Court (1999) took a significant step beyond *Seminole Tribe* by announcing that this constitutional immunity applies even in state court lawsuits where the 11th Amendment is wholly inapplicable. It should be further noted that in *Alden*, the Supreme Court held that 11th Amendment immunity does not extend to suits brought against municipal corporations or other governmental entities that are not "an arm of the state."

5. The four justices in the majority based their reasoning not on the original intent of the Framers but on the judicial power granted to the Supreme Court under Article III of the Constitution. Section 2 of Article III was revoked by the 11th Amendment.

6. Section 5 essentially permits Congress to enforce, by appropriate legislation, the constitutional guarantee that no state shall deprive any person of life, liberty, or property, without due process or deny any person equal protection of the laws.

7. There is a body of case law, however, addressing whether two of the rights recognized in the Bill of Rights have actually been “incorporated” into the 14th Amendment. They are the right to keep and bear arms of the 2nd Amendment and the 5th Amendment right, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” Although the U.S. Supreme Court has avoided taking any cases that would require it to rule on the right to keep and bear arms under the 14th Amendment, it has ruled on the 5th Amendment right noted above. See, for example, the Supreme Court’s decision in *Hurtado v. California* (1884), in which it ruled that an individual could be tried and convicted by a jury in the California County Court, because a state is not required to indict by grand jury. The plaintiff contended that under the due process clause of the 14th Amendment, he was entitled to a proper indictment by a grand jury before trial.

8. In response to a political backlash from both the executive and legislative branches, the post-New Deal U.S. Supreme Court slowly began legitimating congressional power to address the social and economic ills of the time. Beginning with its 1942 *Wickard v. Filburn* decision, the Court no longer asked whether a particular statute infringed on state sovereignty but whether it was enacted within the scope of congressional power. Thus, with *Wickard* the Court largely abandoned any efforts to curtail congressional power under the commerce clause (see Merico-Stephens, 2000).

9. The Gun-Free School Zones Act of 1990 forbids “any individual knowingly to possess a firearm at a place that [she/he] knows . . . is a school zone.”

10. Also see *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (2001), in which the U.S. Supreme Court just barely bypassed a commerce clause challenge to the Clean Water Act. In effect, the Court sidestepped the issue of whether Congress’s regulating of the environment reaches economic activities and thus operates within its constitutional powers under the commerce clause.

11. The Violence Against Women Act was amended in 2000 to improve legal tools and programs addressing domestic violence, sexual assault, and stalking. The act reauthorizes critical grant programs created by the Violence Against Women Act of 1994 and subsequent legislation, establishes new programs, and strengthens federal laws.

12. See Note 10.

13. However, recognizing that age is not an accurate predictor of a public safety officers’ fitness to serve, Congress also included a provision to the amendments stating that if a state or local public safety officer is able to pass a physical fitness exam, he or she cannot be forced into mandatory retirement.

14. In 1990 the Age Discrimination in Employment Act (ADEA) was once again amended to include the Older Workers Benefit Protection Act (OWBPA), which ensures that older workers are not compelled or pressured into waiving their rights under the ADEA.

15. As of this writing, a bill is being proposed that will counteract the Court’s *Kimel* (2000) decision, thereby restoring the rights of state employees to sue in age discrimination cases.

16. The state also claimed immunity under the Rehabilitation Act of 1973 and the Family Medical Leave Act of 1993.

17. The *Garrett* Appellate Court also ruled that the State of Alabama was not immune from suits under the Rehabilitation Act, but that under the circumstances before the court

in this particular case it was immune from suit under the Family Medical Leave Act. See *Garrett* (1999), p. 1214.

18. The Supreme Court in *Garrett* ruled only on the Americans With Disabilities Act (ADA) aspects of the case and not the Rehabilitation Act or the Family and Medical Leave Act.

19. Of course, some might argue that public sector labor relations is not a matter of great national concern and therefore does not need a uniform national response. It should further be noted that all federal employees, regardless of the jurisdiction or state in which their agencies are located, are covered by Title VII of the Civil Service Reform Act of 1978.

20. New York, Wisconsin, and New Jersey, for example.

21. For example, Louisiana.

22. Mississippi and South Carolina, for example.

23. For example, North Carolina and Virginia.

24. See *Alden v. Maine* (1999), as discussed earlier in the text. It should further be noted that the *Kimel* (2000) and *Garrett* (2001) decisions do not effect private sector employees nor, as will be argued later in the text, local government employees.

25. Although some have argued that litigants will have to research state waiver laws to determine whether they can rely on the ADA or the ADEA to sue their employers in state courts (see Levinson, 2000).

26. See, for example, *Garrett* (1999) addressed earlier in the text and in Note 15. Also see *Sims v. University of Cincinnati* (6th Cir. 2000); *Kilvitis v. County of Luzerne* (M.D. Pa. 1999); *Driesse v. Florida Board of Regents* (M.D. Fla. 1998).

27. See, for example, *Hundertmark v. State of Florida Department of Transportation* (11th Cir. 2000).

28. See *State University of New York, College at New Paltz v. Anderson* (2000) and *Illinois State University v. Varner* (2000).

29. One week after *Kimel* (2000) was handed down, the U.S. Supreme Court vacated a 1998 judgment in *Varner* and remanded it to the Seventh Circuit for reconsideration in light of *Kimel* (see *Illinois State University v. Varner*, 2000). The 1998 *Varner* decision of the Seventh Circuit held that "Congress clearly expressed its intent to abrogate the States' Eleventh Amendment immunity when it enacted the EPA" (Equal Pay Act) (p. 710).

30. See, for example, *In re Employment Discrimination Litigation Against the State of Alabama* (11th Cir. 1999).

31. On remand, the Title VII claim had been waived, and so the *Varner* circuit court did not ultimately reconsider its earlier decision upholding the applicability of Title VII to the states.

32. It may be recalled, however, that the *Seminole* Court (1996, pp. 72-73) interpreted Congress's Article I commerce clause powers *not* to include the power to subject states to suit at the hands of private individuals. Rather, as it made clear in its *Fitzpatrick v. Bitzer* (1976, p. 456) decision and reaffirmed in *Kimel* (2000), it is § 5 of the 14th Amendment that grants Congress the authority to abrogate the states' sovereign immunity. The *Kimel* Court further ruled that the ultimate interpretation and determination of the 14th Amendment's substantive meaning remains the province of the judicial branch.

33. Also see Bodensteiner and Levinson (2001).

34. See *Will v. Michigan Department of State Police* (1989, p. 70). Also see Bodensteiner and Levinson (2001).

35. In *Ex parte Young*, the Supreme Court ruled that 11th Amendment sovereign immunity does not bar federal suits against state government officials for violations of federal rights. It should further be noted, however, that a number of recent U.S. circuit court decisions have limited liability claims under certain statutes, including the ADEA, the ADA, and Title VII to employers only, thus eliminating the possibility of naming state governmental officials in their official capacity. See, for example, *Silk v. City of Chicago* (7th Cir. 1999), holding that the ADA provides only for employer, not individual liability; *Wathen v. General Electric Company* (6th Cir. 1997), holding that individual liability is prohibited under Title VII; *Mason v. Stallings* (11th Cir. 1996), holding that Title I of ADA does not provide for individual liability, only for employer liability. Also see Bodensteiner and Levinson (2001).

36. Also see *Alden v. Maine* (1999), in which the Supreme Court recognized that the FLSA remains enforceable against state governments in actions brought by the U.S. Department of Labor.

## REFERENCES

- Alden v. Maine, 527 U.S. 706 (1999).
- Althouse, A. (2001). Inside the federalism cases: Concern about the federal courts. *The Annals of The American Academy of Political and Social Science*, 574, 132-145.
- Bodensteiner, I. E., & Levinson, R. B. (2001). Litigating age and disability claims against state and local government employers in the new "federalism" era. *Berkeley Journal of Employment and Labor Law*, 22, 99-129.
- Braveman, D. (2000). Enforcement of federal rights against states: *Alden* and federalism non-sense. *The American University Law Review*, 49, 611-657.
- Bush v. Gore, 531 U.S. 98 (2000).
- Chisholm v. Georgia, 2 U.S. 419 (1793).
- City of Boerne v. Flores, 521 U.S. 507 (1997).
- Cleburne v. Cleburne, 473 U.S. 432 (1985).
- College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666 (1999).
- Driesse v. Florida Board of Regents, 26 F. Supp. 2d 1328, 1332-34 (M.D. Fla. 1998).
- Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1983).
- Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).
- Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999).
- Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985).
- Garrett v. the University of Alabama, 193 F.3d 1214 (11th Cir. 1999); University of Alabama at Birmingham Board of Trustees v. Garrett, cert. granted, 529 U.S. 1065 (2000); Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 121 S. Ct. 955 (2001).
- Goodman, F. (2001). Preface. *The Annals of The American Academy of Political and Social Science*, 574, 9-24.
- Gore v. Harris, 772 So. 2d 1243 (2000); revised and remanded, Bush v. Gore, 531 U.S. 98 (2000).
- Goshtasby v. Board of Trustees of the University of Illinois, 141 F.3d 761, 765-66 (7th Cir. 1998)

- Hundertmark v. State of Florida Department of Transportation, 205 F.3d 1272, 1275, n. 2. (11th Cir. 2000).
- Hurtado v. California, 110 U.S. 516 (1884).
- Illinois State University v. Varner, 528 U.S. 1110 (2000), vacating Varner v. Illinois State University, 150 F.3d 706 (7th Cir. 1998); *on remand*, Varner v. Illinois State University, 226 F.3d 927 (2000).
- In re Employment Discrimination Litigation Against the State of Alabama, 198 F.3d 1305 (11th Cir. 1999).
- Jusino Mercado v. Commonwealth of Puerto Rico, 214 F.3d 34, 36 n.1. (2000).
- Kearney, R. C. (1992). *Labor relations in the public sector* (2nd ed.). New York: Marcel Dekker.
- Kilvitis v. County of Luzerne, 52 F. Supp. 2d 403, 408-409 (M.D. Pa. 1999).
- Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).
- Lee, R. D. (1999). The Rehabilitation Act and federal employment. *Review of Public Personnel Administration*, 19, 45-64.
- Lee, R. D., & Greenlaw, P. S. (1998-1999). Rights and responsibilities of employees and employers under the Americans with Disabilities Act of 1990. *Journal of Individual Employment Rights*, 7, 1-13.
- Levinson, R. B. (2000). Litigation and administrative practice course handbook series: Discrimination claims. *Practicing Law Institute*, 646, 81-102.
- Mason v. Stallings, 82 F.3d 1007 (11th Cir. 1996).
- Merico-Stephens, A. M. (2000). Of Maine's sovereignty, Alden's federalism, and the myth of absolute principles: The newest oldest questions of constitutional law. *University of California at Davis Law Review*, 33, 325-388.
- Murdock, G. B., Jr., Sezer, K., & Hodge, J. S. (2000). Developments in Title VII and Section 1981: Implications for Title VII. *Practicing Law Institute, 29th Annual Institute on Employment Law*, 637, 597-624.
- National League of Cities v. Usery, 426 U.S. 833 (1976).
- Printz v. United States, 521 U.S. 898 (1997).
- Ray, B. (2000). Out the window? Prospects for the EPA and FMLA after *Kimel v. Florida Board of Regents*. *Ohio State Law Journal*, 61, 1755-1792.
- Rosenbloom, D. H. (1994). Fuzzy law from the high court. *Public Administration Review*, 54, 503-506.
- Rosenbloom, D. H. (1997). Public employees' liability for "constitutional torts." In C. Ban & N. M. Ricucci (Eds.), *Public personnel management: Current concerns, future challenges* (pp. 237-252). New York: Longman.
- Rosenbloom, D. H., Carroll, J., & Carroll, J. (2000). *Constitutional competence for public managers: Cases and commentary*. Itasca, IL: F.E. Peacock.
- Rosenbloom, D. H., & Shafritz, J. M. (1985). *Essentials of labor relations*. Reston, VA: Reston Publishing.
- Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).
- Silk v. City of Chicago, 194 F.3d 788 (7th Cir. 1999).
- Sims v. University of Cincinnati, 219 F.3d 559, 566 (6th Cir. 2000).
- Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001).
- State University of New York, College at New Paltz v. Anderson, 120 S.Ct. 929 (2000), *vacating* 169 F.3d 117 (2d Cir. 1999).

- Stults v. Conoco, Inc., 76 F.3d 651, 655 (5th Cir. 1996).  
United States v. Lopez, 514 U.S. 549 (1995).  
United States v. Morrison, 529 U.S. 598 (2000).  
Varner v. Illinois State University, 150 F.3d 706, (7th Cir. 1998); *vacated and remanded*, Illinois State University v. Varner, 528 U.S. 1110 (2000); *on remand*, Varner v. Illinois State University, 226 F.3d 927 (7th Cir. 2000).  
Wathen v. General Electric Company, 115 F.3d 400, 405 (6th Cir. 1997).  
Wickard v. Filburn, 317 U.S. 111 (1942).  
Will v. Michigan Department of State Police, 491 U.S. 58 (1989).  
Wise, C. R. (2001). The Supreme Court's new constitutional federalism: Implications for public administration. *Public Administration Review*, 61, 343-358.

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