GREGORY V. ASHCROFT

Supreme Court of the United States
501 U.S. 452 (1991)

JUSTICE O'CONNOR delivered the opinion of the Court.

[It is a prima facie violation of the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, for an "employer" covered by the Act to specify a mandatory retirement age for "employee" over forty years of age who are covered by the ADEA. In this case, the Missouri Constitution provided a mandatory retirement age of seventy for most state judges. Petitioners were state judges seeking to obtain a declaration that the mandatory retirement age violates the ADEA. The district court dismissed the action, concluding that the judges were "appointees on the policymaking level," a category of state officials excluded from the definition of "employees" covered by the Act. The Court of Appeals affirmed. What follows is Part II of Justice O'Connor's opinion.]

A.

As every schoolchild learns, Our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt,* 493 U.S. 455, 458, 107 L. Ed. 2d 887, 110 S. Ct. 792 (1990), "we beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Over 120 years ago, the Court described the constitutional scheme of dual sovereigns:

> 'The people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence,' . . . 'Without the States in union, there could be no such political body as the United States.' Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas v. White,* 74 U.S. 700*,* quoting *Lane County v. Oregon,* 74 U.S. 71, 76 (1869).

The Constitution created a Federal Government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. As James Madison put it:

> "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961).

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

Perhaps the principal benefit of the federalist system is a check on abuses of government power. "The 'constitutionally mandated balance of power' between the States and the Federal Government was adopted by the Framers to ensure the protection of 'our fundamental liberties.'" *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528, 572 (1985) (Powell, J., dissenting). Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. Alexander Hamilton explained to the people of New York, perhaps optimistically, that the new federalist system would suppress completely "the attempts of the government to establish a tyranny":

> "In a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress." The Federalist No. 28, pp. 180-181 (C. Rossiter ed. 1961).

James Madison made much the same point:

> "In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *Id.*, No. 51, p. 323.

One fairly can dispute whether our federalist system has been quite as successful in checking government abuse as Hamilton promised, but there is no doubt about the design. If this "double

security" is to be effective, there must be a proper balance between the States and the Federal Government. These twin powers will act as mutual restraints only if both are credible. In the tension between federal and state power lies the promise of liberty.

The Federal Government holds a decided advantage in this delicate balance: the Supremacy Clause. U.S. Const., Art. VI, cl. 2. As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States. Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly.

The present case concerns a state constitutional provision through which the people of Missouri establish a qualification for those who sit as their judges. This provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity. Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. * * * *

Congressional interference with this decision of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. *Atascadero*. We explained recently:

> "If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' *Atascadero;* see also *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 99 (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States, ... 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 65 (1989).

This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

In a recent line of authority, we have acknowledged the unique nature of state decisions that "go to the heart of representative government." [Here Justice O'Connor referred to cases holding that, although state exclusion of aliens from public employment generally raises serious equal protection questions, the Court has created a 'political function' exception and upheld state programs limiting to citizens employment in positions that are 'intimately related to the process of democratic self-government.']

These cases stand in recognition of the authority of the people of the States to determine the

qualifications of their most important government officials. · It is an authority that lies at "'the heart of representative government.'" *Ibid.* It is a power reserved to the States under the Tenth Amendment and guaranteed them by that provision of the Constitution under which the United States "guarantee[s] to every State in this Union a Republican Form of Government." U.S. Const., Art. IV, § 4.

The authority of the people of the States to determine the qualifications of their government officials is, of course, not without limit. Other constitutional provisions, most notably the *Fourteenth Amendment*, proscribe certain qualifications; our review of citizenship requirements under the political function exception is less exacting, but it is not absent. Here, we must decide what Congress did in extending the ADEA to the States, pursuant to its powers under the *Commerce Clause*. See *EEOC v. Wyoming,* 460 U.S. 226 (1983) (the extension of the ADEA to employment by state and local governments was a valid exercise of Congress' powers under the *Commerce Clause*). As against Congress' powers "to regulate Commerce . . . among the several States," U.S. Const., Art. I, § 8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate.

We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause. See *Garcia v. San Antonio Metropolitan Transit Authority,* (declining to review limitations placed on Congress' *Commerce Clause* powers by our federal system). But there is no need to do so if we hold that the ADEA does not apply to state judges. Application of the plain statement rule thus may avoid a potential constitutional problem. Indeed, inasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests." L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988).

B.

In 1974, Congress extended the substantive provisions of the ADEA to include the States as employers. Pub. L. 93-259, § 28(a), 88 Stat. 74, 29 U. S. C. § 630(b)(2). At the same time, Congress amended the definition of "employee" to exclude all elected and most high-ranking government officials. Under the Act, as amended:

> "The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." 29 U. S. C. § 630(f).

Governor Ashcroft contends that the § 630(f) exclusion of certain public officials also excludes judges, like petitioners, who are appointed to office by the Governor and are then subject

to retention election. The Governor points to two passages in *§ 630(f)*. First, he argues, these judges are selected by an elected official and, because they make policy, are "appointee[s] on the policymaking level."

Petitioners counter that judges merely resolve factual disputes and decide questions of law; they do not make policy. Moreover, petitioners point out that the policymaking-level exception is part of a trilogy, tied closely to the elected-official exception. Thus, the Act excepts elected officials and: (1) "any person chosen by such officer to be on such officer's personal staff"; (2) "an appointee on the policymaking level"; and (3) "an immediate advisor with respect to the exercise of the constitutional or legal powers of the office." Applying the maxim of statutory construction *noscitur a sociis* -- that a word is known by the company it keeps -- petitioners argue that since (1) and (3) refer only to those in close working relationships with elected officials, so too must (2). Even if it can be said that judges may make policy, petitioners contend, they do not do so at the behest of an elected official.

Governor Ashcroft relies on the plain language of the statute: It exempts persons appointed "at the policymaking level." [The Governor argued that state judges make policy in making common law decisions and exercising supervisory authority over the state bar. Moreover, state appellate judges have additional policymaking responsibilities: supervising inferior courts, establishing rules of procedure for the state courts, and developing disciplinary rules for the bar.]

The Governor stresses judges' policymaking responsibilities, but it is far from plain that the statutory exception requires that judges actually make policy. The statute refers to appointees "on the policymaking level," not to appointees "who make policy." It may be sufficient that the appointee is in a position requiring the exercise of discretion concerning issues of public importance. This certainly describes the bench, regardless of whether judges might be considered policymakers in the same sense as the executive or legislature.

Nonetheless, "appointee at the policymaking level," particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not "employees" would seem the most efficient phrasing. But in this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*. This does not mean that the Act must mention judges explicitly, though it does not. Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials, "appointee on the policymaking level" is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.

The ADEA plainly covers all state employees except those excluded by one of the exceptions. Where it is unambiguous that an employee does not fall within one of the exceptions, the Act states plainly and unequivocally that the employee is included. It is at least ambiguous whether a state judge is an "appointee on the policymaking level."

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In the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment.

CONCURRING AND DISSENTING OPINION

JUSTICE WHITE, with whom JUSTICE STEVENS joins, concurring in part, dissenting in part, and concurring in the judgment.

I.

While acknowledging this principle of federal legislative supremacy, the majority nevertheless imposes upon Congress a "plain statement" requirement. The majority claims to derive this requirement from the plain statement approach developed in our Eleventh Amendment cases, see, *e. g., Atascadero*, and applied two Terms ago in *Will.* The issue in those cases, however, was whether Congress intended a particular statute to extend to the States *at all*. In *Atascadero*, for example, the issue was whether States could be sued under § 504 of the Rehabilitation Act of 1973, 29 U. S. C. § 794. Similarly, the issue in *Will* was whether States could be sued under 42 U. S. C. § 1983. In the present case, by contrast, Congress has expressly extended the coverage of the ADEA to the States and their employees. Its intention to regulate age discrimination by States is thus "unmistakably clear in the language of the statute." *Atascadero*. The only dispute is over the precise details of the statute's application. We have never extended the plain statement approach that far, and the majority offers no compelling reason for doing so.

The majority also relies heavily on our cases addressing the constitutionality of state exclusion of aliens from public employment. In those cases, we held that although restrictions based on alienage ordinarily are subject to strict scrutiny under the Equal Protection Clause, the scrutiny will be less demanding for exclusion of aliens "from positions intimately related to the process of democratic self-government." This narrow "political-function" exception to the strict-scrutiny standard is based on the "State's historical power to exclude aliens from participation in its democratic political institutions." *Sugarman* .

It is difficult to see how the "political-function" exception supports the majority's plain statement rule. First, the exception merely reflects a determination of the scope of the rights of aliens under the *Equal Protection Clause*. Reduced scrutiny is appropriate for certain political functions because "the right to govern is reserved to citizens." This conclusion in no way establishes a method for interpreting rights that are statutorily created by Congress, such as the protection from age discrimination in the ADEA. Second, it is one thing to limit *judicially created* scrutiny, and it is quite another to fashion a restraint on *Congress'* legislative authority, as does the majority; the latter is both counter-majoritarian and an intrusion on a coequal branch of the Federal Government. Finally, the majority does not explicitly restrict its rule to "functions that go to the heart of representative government," and may in fact be extending it much further to all "state governmental functions."

The majority's plain statement rule is not only unprecedented, it directly contravenes our decisions in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), and *South Carolina v. Baker,* 485 U.S. 505 (1988). In those cases we made it clear "that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity." We also rejected as "unsound in principle and unworkable in practice" any test for state immunity that requires a judicial determination of which state activities are "'traditional,'" "'integral,'" or "'necessary.'" *Garcia, supra,* at 546. The majority disregards those decisions in its attempt to carve out areas of state activity that will receive special protection from federal legislation.

The majority's approach is also unsound because it will serve only to confuse the law. First, the majority fails to explain the scope of its rule. Is the rule limited to federal regulation of the qualifications of state officials? Or does it apply more broadly to the regulation of any "state governmental functions"? Second, the majority does not explain its requirement that Congress' intent to regulate a particular state activity be "plain to anyone reading [the federal statute]." See *ante*, at 467. Does that mean that it is now improper to look to the purpose or history of a federal statute in determining the scope of the statute's limitations on state activities? If so, the majority's rule is completely inconsistent with our pre-emption jurisprudence. See, *e. g., Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 715 (1985) (pre-emption will be found where there is a "'clear and manifest *purpose*'" to displace state law) (emphasis added). The vagueness of the majority's rule undoubtedly will lead States to assert that various federal statutes no longer apply to a wide variety of state activities if Congress has not expressly referred to those activities in the statute. Congress, in turn, will be forced to draft long and detailed lists of which particular state functions it meant to regulate.

The imposition of such a burden on Congress is particularly out of place in the context of the ADEA. Congress already has stated that all "individual[s] employed by any employer" are protected by the ADEA unless they are expressly excluded by one of the exceptions in the definition of "employee." See 29 U. S. C. § 630(f). The majority, however, turns the statute on its head, holding that state judges are not protected by the ADEA because "Congress has [not] made it clear that judges are *included."* * * *

The majority asserts that its plain statement rule is helpful in avoiding a "potential constitutional problem." It is far from clear, however, why there would be a constitutional problem if the ADEA applied to state judges, in light of our decisions in *Garcia* and *Baker*, discussed above. As long as "the national political *process* did not operate in a defective manner, the Tenth Amendment is not implicated." *Baker.* There is no claim in this case that the political process by which the ADEA was extended to state employees was inadequate to protect the States from being "unduly burdened" by the Federal Government. In any event, as discussed below, a straightforward analysis of the ADEA's definition of "employee" reveals that the ADEA does not apply here. Thus, even if there were potential constitutional problems in extending the ADEA to state judges, the majority's proposed plain statement rule would not be necessary to avoid them in this case. Indeed, because this case can be decided purely on the basis of statutory interpretation, the majority's announcement of its plain statement rule, which purportedly is derived from constitutional principles, *violates* our general practice of avoiding the unnecessary resolution of constitutional

issues.

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The majority's departures from established precedent are even more disturbing when it is realized, as discussed below, that this case can be affirmed based on simple statutory construction.

II.

The statute at issue in this case is the ADEA's definition of "employee," which provides:

> "The term 'employee' means an individual employed by any employer except that the term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision." 29 U. S. C. § 630(f).

A parsing of that definition reveals that it excludes from the definition of "employee" (and thus the coverage of the ADEA) four types of (noncivil service) state and local employees: (1) persons elected to public office; (2) the personal staff of elected officials; (3) persons appointed by elected officials to be on the policymaking level; and (4) the immediate advisers of elected officials with respect to the constitutional or legal powers of the officials' offices.

The question before us is whether petitioners fall within the third exception. * * * * [I] conclude that petitioners are "on the policymaking level."

"Policy" is defined as "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usu[ally] determine present and future decisions." Webster's Third New International Dictionary 1754 (1976). Applying that definition, it is clear that the decisionmaking engaged in by common-law judges, such as petitioners, places them "on the policymaking level." In resolving disputes, although judges do not operate with unconstrained discretion, they do choose "from among alternatives" and elaborate their choices in order "to guide and . . . determine present and future decisions." * * *

Moreover, it should be remembered that the statutory exception refers to appointees "on the policymaking level," not "policymaking employees." Thus, whether or not judges actually *make* policy, they certainly are on the same *level* as policymaking officials in other branches of government and therefore are covered by the exception. * * *

Petitioners argue that the "appointee[s] on the policymaking level" exception should be construed to apply "only to persons who advise or work closely with the elected official that chose

the appointee." Brief for Petitioners 18. In support of that claim, petitioners point out that the exception is "sandwiched" between the "personal staff" and "immediate adviser" exceptions in § 630(f), and thus should be read as covering only similar employees.

Petitioners' premise, however, does not prove their conclusion. It is true that the placement of the "appointee" exception between the "personal staff" and "immediate adviser" exceptions suggests a similarity among the three. But the most obvious similarity is simply that each of the three sets of employees are connected in some way with elected officials: The first and third sets have a certain working relationship with elected officials, while the second is *appointed* by elected officials. There is no textual support for concluding that the second set must *also* have a close working relationship with elected officials. Indeed, such a reading would tend to make the "appointee" exception superfluous since the "personal staff" and "immediate adviser" exceptions would seem to cover most appointees who are in a close working relationship with elected officials.

Petitioners seek to rely on legislative history, but it does not help their position. There is little legislative history discussing the definition of "employee" in the ADEA, so petitioners point to the legislative history of the identical definition in Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e(f). If anything, that history tends to confirm that the "appointee[s] on the policymaking level" exception was designed to exclude from the coverage of the ADEA all high level appointments throughout state government structures, including judicial appointments.

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[The dissenting opinion of JUSTICE BLACKMUN, joined by JUSTICE MARSHALL, is omitted.]