ELEVENTH AND FOURTEENTH AMENDMENTS—AMERICANS WITH DISABILITIES ACT—GOVERNMENT REGULATION AUTHORIZING SUIT BY PRIVATE INDIVIDUALS IN FEDERAL COURT FOR MONEY DAMAGES AGAINST THE STATE FOR VIOLATIONS OF TITLE I OF THE ACT INVALID—*Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).

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I. INTRODUCTION

Recently, the United States Supreme Court concluded that the Eleventh Amendment[1] bars the recovery of money damages by a state employee for violations of Title I of the Americans with Disabilities Act ("ADA").[2]

At the heart of this issue is a constitutional law classic—federalism and the role of the state and federal governments.[3] Having decided numerous federalism cases in the past decade and having declared several federal statutes in recent years unconstitutional,[4] it is becoming more apparent that the United States Su-

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[1] U.S. CONST. amend. XI. The text of the Eleventh Amendment provides "[t]he 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." *Id.*

[2] Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001).

[3] Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L.Q. 1, 8 (2000).

[4] *See e.g.*, *Garrett*, 531 U.S. at 373-74 (2001) (concluding that Congress did not properly abrogate the States' Eleventh Amendment sovereign immunity when it passed the ADA); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 91 (2000) (holding that although Congress expressed a clear intent to abrogate Eleventh Amendment immunity when it passed the Age Discrimination in Employment Act ("ADEA"), violation of the Act could not subject the State to suit by a private individual in federal court because the abrogation was not a proper exercise of its enforcement power under Section five of the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507, 532, 536 (1997) (holding that Congress exceeded its enforcement power under Section five of the Fourteenth Amendment when it attempted to define substantive constitutional guarantees); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996) (concluding that Congress can not confer jurisdiction over a State that does not consent to suit where Congress did not have the constitutional authority to pass the Act); United States v. Lopez,

preme Court has entered an age of "new federalism."[5] Recent cases have challenged Congress' role in defining both the relationship between state and federal governments and the relationship between the States and their citizens.[6] The idea of state sovereignty has been recently rejuvenated by the United States Supreme Court.[7]

The issue in *Board of Trustees of University of Alabama v. Garrett*[8] was whether a state employee may sue its employer, the State, for money damages for the State's failure to adhere to Title I of the ADA.[9] The Supreme Court held that if a State discriminates against an employee on the basis of a disability that is covered by Title I of the ADA, that state employee is barred from suing the

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514 U.S. 549, 567-68 (1995) (invalidating the Gun-Free School Zones Act of 1990, passed pursuant to Congress' Commerce Clause authority, because there was no connection to interstate commerce); New York v. United States, 505 U.S. 144, 175-77 (1992) (finding the "take title" portion of the Low-Level Radioactive Waste Policy Amendments Act of 1985 unconstitutional under the Tenth Amendment because it compelled state governments to conform to federal policy).

[5] *See generally*, Christina M. Royer, *Paradise Lost? State Employees' Rights in the Wake of "New Federalism,"* 34 AKRON L. REV. 637, 638-39 (2001) (positing that there is a "resurgence of sovereign immunity under the Eleventh Amendment . . . in the context of federal employment statutes and state employees' rights thereunder" and concluding that the Court's decisions in *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996), and *City of Boerne v. Flores*, 521 U.S. 507 (1997), mark the Court's return to federalism). *See also* Brown & Enrich, *supra* note 3, at 1. Brown and Enrich explain that the recent wave of federalism activity "re-envision[s] the foundations of the federal-state relationship . . . [and] signal[s] a newly activist role for the courts in patrolling the boundaries of federal authority." Brown & Enrich, *supra* note 3, at 1-2. Additionally, the authors indicate that the "restructuring" of federal responsibility is based on "the Court's vision of 'fundamental postulates implicit in the constitutional design'" instead of the text of the Constitution itself. *Id.* at 2 (quoting Alden v. Maine, 527 U.S. 706, 729 (1999)).

[6] *See* Brown & Enrich, *supra* note 3 and accompanying text.

[7] Note, *The Irrational Application of Rational Basis:* Kimel, Garrett, *and Congressional Power to Abrogate State Sovereign Immunity*, 114 HARV. L. REV. 2146, 2147 (2001).

[8] 531 U.S. 356 (2001).

[9] *Garrett*, 531 U.S. at 360 (analyzing the ADA, 42 U.S.C. §§ 12101-12213 (1995)). It is important to emphasize that the Court in *Garrett* dealt only with the Title I of the ADA, leaving for another day the question of whether the remedial provisions of Title II, which according to the Court are slightly different from those under Title I, are "appropriate legislation" under the Fourteenth Amendment. *Id.* at 360 n.1. Title I of the ADA applies to employment, Title II of the ADA applies to public services, and Title III of the ADA deals with public accommodations and services operated by private entities. 42 U.S.C. §§ 12101-12213 (1995).

employer under the Eleventh Amendment because the employer is the State.[10] A state employee is barred from suing her employer in federal court for money damages under Title I if her employer is the State because Congress did not properly abrogate Eleventh Amendment sovereign immunity when it passed the ADA.[11]

Congress passed the ADA[12] in 1990 as comprehensive federal anti-discrimination legislation to prohibit discrimination against disabled[13] Americans and create standards by which to enforce the anti-discrimination mandate.[14]

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[10] *Garrett*, 531 U.S. at 360.

[11] *Id.* at 373-74.

[12] 42 U.S.C. §§ 12101-12213 (1995).

[13] Under the ADA, "disability" means:

> a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
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> a record of such an impairment; or
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> being regarded as having such an impairment.

42 U.S.C. § 12102(2)(A-C) (1995).

Although the definition of the term "disability" is beyond the scope of this Note, it is important to mention that under the ADA, the definition of a "disability" is extremely broad. *See id.* As a result of the expanse of the definition, the statute affects millions of employees nationwide. 42 U.S.C. § 12101(a)(1) (1995) (noting that some "43,000,000 Americans have one or more physical or mental disabilities").

[14] 42 U.S.C. § 12101(b) (1995). In the text of the ADA, Congress set out the purpose of the Act as:

> to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
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> to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
>
> to ensure that the Federal Government plays a central role in enforcing the standards

The Fourteenth Amendment was invoked as one of the bases of the Act; the other, the Commerce Clause.[15] Moreover, Congress explicitly abrogated State Eleventh Amendment immunity and intended to create a cause of action for state employees against States.[16]

Congress' power under Section five[17] of the Fourteenth Amendment[18] is to enforce the substantive guarantees of Section one[19] and includes "the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[20] Where the Court has identified a constitutional harm, it is Congress' role to enact legislation designed to protect

established in this chapter on behalf of individuals with disabilities; and

to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment [sic] and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

[15] *See Garrett*, 531 U.S. 364 n.3 (citing 42 U.S.C. § 12101(b)(4) (1995)). In fact, Congress invoked its authority under both the Fourteenth Amendment and the Commerce Clause to pass the ADA: "It is the purpose of this chapter . . . (4) to invoke the sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4) (1995).

[16] 42 U.S.C. § 12202 (1995). Section 12202 provides, in pertinent part, that "[a] State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in Federal or State court . . . ." *Id.*

[17] U.S. CONST. amend. XIV, § 5. Section five of the Fourteenth Amendment provides that "[t]he Congress shall have power to enforce [the Fourteenth Amendment] by *appropriate legislation* . . . ." *Id.* (emphasis added).

[18] U.S. CONST. amend. XIV.

[19] U.S. CONST. amend. XIV, § 1. Section one of the Fourteenth Amendment provides in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[20] *Garrett*, 531 U.S. at 365 (quoting *Kimel*, 528 U.S. at 81). It has been argued that Sec-

tional harm, it is Congress' role to enact legislation designed to protect against that harm.[21] Congress' ability to remediate constitutional violations pursuant to the Fourteenth Amendment, however, is modified by the Eleventh Amendment and Congress may not permit suit against an unconsenting state in federal court for money damages by a private citizen, even for constitutional violations, unless Congress has properly abrogated sovereign immunity.[22] The Court's recent activity in this area has been described as "a new approach to policing the balance of power between the federal government and the States."[23] Pursuant to this trend, the Court, in *Board of Trustees of the University of Alabama v. Garrett*, held that a private citizen may not recover money damages from the State in federal court for violations of Title I of the Americans with Disabilities Act because Congress did not properly abrogate State sovereign immunity.[24]

The essence of the Eleventh Amendment is that a citizen may not sue an unconsenting State in federal court.[25] Congress may take away State sovereign immunity only when "it unequivocally [indicates that it] intends to do so and when it acts pursuant to a valid grant of constitutional authority."[26] Despite the

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tion five of the Fourteenth Amendment is a positive grant of authority to Congress, while Section one limits the authority of the States. Ruth Colker, *The Section Five Quagmire*, 47 UCLA L. REV. 653, 662 (2000).

[21] *See* City of Boerne v. Flores, 521 U.S. 507, 519 (concluding that the role of the Court is to determine the scope and substance of constitutional guarantees and Congress' role is limited to providing remedies for constitutional violations).

[22] *See, e.g.*, Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (concluding that because Congress did not properly abrogate Eleventh Amendment State sovereign immunity when it passed the ADEA, private citizens may not sue the State for violations of that Act).

[23] Note, *supra* note 7, at 2146.

[24] *Garrett*, 531 U.S. at 360. One commentator has asserted that the major factor in the results of *Kimel* and *Garrett* is that the Court is only willing to give the classifications at issue—age and disability—rational basis review and that the standard of review that should apply to such classifications is strict scrutiny. Note, *supra* note 7, at 2149.

[25] *Id.* at 364. The Eleventh Amendment actually prohibits suits against a State by citizens of another State. *Id.* However, the Court has interpreted the amendment to forbid suits by citizens against their own States. *Id.* (citing Kimel v. Florida Bd. of Regents, 528 U.S. 62, 72-73 (2000); College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 627 [sic], 669-70 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Hans v. Louisiana, 134 U.S. 1 (1890)).

[26] *Garrett*, 531 U.S. at 363 (quoting *Kimel*, 528 U.S. at 73). *See also*, Colker, *supra* note 20, at 658-59. Colker argues that there are actually four hurdles that Congress must leap for legislation passed under Section five of the Fourteenth Amendment to properly abrogate

importance of the Commerce Clause to civil rights legislation and the use of the clause as authority for passing a great deal of such legislation,[27] the Court has recently explained that Congress may no longer abrogate State sovereign immunity when acting pursuant to the Commerce Clause alone.[28] Thus, Section five of the Fourteenth Amendment has been left as the sole authority under which Congress may abrogate State Eleventh Amendment immunity.[29]

Fortunately, all hope is not lost for the state employee. The Eleventh Amendment bars a private suit for money damages from being brought against an unconsenting State.[30] The Eleventh Amendment does not give any State li-

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States' sovereign immunity:

> [1] [Congress] must explicitly abrogate state sovereign immunity if the legislation infringes on a traditional and essential state function; [2] Congress must create an ample record to justify the need for such legislation; [3] Congress must be seeking to protect interests in an area in which the Court has previously found that some genuine rights exist; [and] [4] Congress's enforcement efforts under Section five must not, themselves, violate another provision of the Constitution.

Id. at 661.

Additionally, Colker explains that there are two exceptions to the rule that immunizes States from suits in federal courts by individuals. *Id.* at 658. The first exception is the rule announced in *Ex Parte Young*, which provides that private individuals may sue state officials for injunctive relief. *Id.* at 658-59 (citing Ex Parte Young, 209 U.S. 123, 167 (1908)). The second exception is the notion of abrogation—the principle that Congress may abrogate State sovereign immunity under its enforcement power pursuant to Section five of the Fourteenth Amendment and permit private individuals to sue a state in federal court for retrospective damages. *Id.* (noting that under *Seminole Tribe*, Congress may not abrogate Eleventh Amendment immunity in legislation passed solely under the Commerce Clause).

[27] *E.g.*, Civil Rights Act of 1964, 42 U.S.C. §§ 1981-2000h-6 (2001).

[28] *Garrett*, 531 U.S. at 364 (citing *Kimel*, 528 U.S. at 79, in which the Court concluded that an action against the State for money damages under the ADEA can not be based solely on Congress' Article I commerce power).

[29] *See id.* at 962. Professors Post and Siegel argue that the Court's decisions in *Kimel* and United States v. Morrison, 120 S. Ct. 1740 (2000), "impose new and substantial restrictions on Congress's power to enact antidiscrimination laws under Section five." Robert C. Post and Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 445 (2000).

[30] Alden v. Maine, 527 U.S. 706, 711 (1999) (explaining that Congress can not compel an unconsenting State to be sued in its own courts); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54-55 (1996) (affirming the holding in Hans v. Louisiana, 134 U.S. 1 (1890), and concluding that an unconsenting State can not be sued in federal court for money damages

cense to violate federal law, however, and indeed, States are still obligated to observe the substantive requirements of Title I of the ADA.[31] Additionally, the Eleventh Amendment does not bar suits against state officers for money damages to be paid by the officers individually,[32] suits by private individuals seeking injunctive relief against a state officer even though compliance with the injunction will affect the implementation of state policy[33] or will force the State to spend money from its treasury in the future,[34] suits by the United States,[35] and

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unless Congress has properly abrogated State sovereign immunity); Hans v. Louisiana, 134 U.S. 1, 13-15 (1890) (explaining the meaning of the Eleventh Amendment to be a prohibition of private suits against a State in federal court, noting that "[t]he truth is that the cognizance of suits and actions unknown to the law . . . was not contemplated by the constitution when establishing the judicial power of the United States").

[31] The Commerce Clause permits Congress to enact the substantive requirements of Title I of the ADA and make them binding on the States. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546-47 (1984) (concluding that a State is not immune under the Tenth Amendment from federal regulation passed by Congress passed under the Commerce Clause simply because the state function to be regulated is a "traditional governmental function" because that principle is "unworkable").

[32] Because the Eleventh Amendment doctrine pertains only to suits against States, a suit against an individual is not barred by it. Additionally, "if injured individuals are to receive compensation, and if there is to be deterrence of wrongdoing through federal court liability, it frequently must take the form of suits against the individual officers." ERWIN CHEMIRINSKY, FEDERAL JURISDICTION 494 (3d ed. 1999).

[33] *Ex parte* Young, 209 U.S. 123 (1908). In *Ex parte Young*, the Court permitted a suit for injunctive relief against the Attorney General of Minnesota under the theory that attempting to enforce an unconstitutional act "is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity." *Id.* at 159. The Court continued:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.

Id. at 159-60.

A federal court is not permitted, however, to enjoin a state official from violating state law. Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 124-25 (1984).

[34] *See e.g.*, Milliken v. Bradley, 433 U.S. 267, 289-90 (1977) (concluding that a program that is "'compensatory' in nature does not change the fact that they are part of a plan that operates *prospectively* to bring about the delayed benefits of a unitary school system") *and*

suits against a local government or municipality.[36] Moreover, the possibility of a suit in federal court pursuant to section 1983[37] still remains available as an option to a private individual deprived of federal constitutional or statutory rights. Accordingly, despite the Court's holding in cases like *Board of Trustees of the University of Alabama v. Garrett* and *Kimel v. Florida Board of Regents*, the state employee is left with means to vindicate rights provided for by the Americans with Disabilities Act.

II. STATEMENT OF THE CASE

The United States Supreme Court granted certiorari to resolve a split among

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Edelman v. Jordan, 415 U.S. 651, 666-68 (1974) (differentiating between prospective and retroactive relief available under *Ex parte Young* and concluding that an ancillary effect on the State treasury is permissible, explaining that "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature"). The Court has acknowledged that a distinction between what is prospective and retroactive will not always be clear. *Edelman*, 415 U.S. at 667 ("[T]he difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night."). *Id.*

[35] United States v. Mississippi, 380 U.S. 128, 140-41 (1965) (referring to the Eleventh Amendment, concluding that "nothing in this or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States"); United States v. Texas, 143 U.S. 621, 645-46 (1892) (differentiating a suit brought by an individual and a suit brought by the federal government and concluding that to permit a suit by the United States against a State "does no violence to the inherent nature of sovereignty").

[36] Workman v. New York, 179 U.S. 552, 565 (1900) (concluding that for the purposes of the Eleventh Amendment, "municipal corporations, like individuals, may be sued"); Lincoln County v. Luning, 133 U.S. 529, 530-31 (1890) (authorizing suits by a private individual against a county because "[t]he Eleventh Amendment limits the jurisdiction only as to suits against a State" and noting that a county, city, town or "other municipal corporation" is only remotely "a part of the State").

[37] 42 U.S.C. § 1983 (2001). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any *State* or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id. (emphasis added).

the Courts of Appeals[38] as to whether an individual may sue a State under the ADA for money damages in federal court.[39] In *Board of Trustees of University of Alabama v. Garrett*, the Court held that because Congress did not properly abrogate the States' Eleventh Amendment sovereign immunity when it passed the ADA, a citizen may not sue a State for money damages in federal court for violations of Title I of the ADA.[40]

FACTS

Respondent Patricia Garrett was employed as the Director of Nursing at the University of Alabama in Birmingham Hospital.[41] Diagnosed with breast cancer in 1994, Garrett went through significant treatments, including lumpectomy surgery, radiation treatment and chemotherapy, which caused Garrett to take "substantial" leave from work.[42] When Garrett returned to the hospital permanently in 1995, her supervisor advised her that because of her absence, she would be forced to surrender her position as the Director of Nursing and accept a lower paying position.[43] Claiming violations of both the Rehabilitation Act[44] and the ADA, respondent Patricia Garrett, filed suit in the United States District Court

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[38] *Compare* Reese v. Michigan, No. 99-1173, 2000 U.S. App. LEXIS 27404, at *2 (6th Cir. Oct. 24, 2000) (concluding that the Eleventh Amendment precluded the petitioner from seeking money damages from the State in federal court) *with* Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees, 193 F.3d 1214, 1218 (11th Cir. 1999) (concluding that Congress properly abrogated State Eleventh Amendment immunity when it passed the ADA).

[39] *Garrett*, 531 U.S. at 363.

[40] *Id.* at 360.

[41] *Id.* at 362. Garrett had been employed by University Hospital since 1977. Respondent's Brief at 1, Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001) (No. 99-1240).

[42] *Id.* at 362. Neither the district court opinion nor the Eleventh Circuit opinion discussed the facts extensively, nor did either opinion indicate a time frame for Garrett's absence. *See* Garrett v. Bd. of Trustees of Univ. of Ala. in Birmingham, 989 F. Supp. 1409, 1410-12 (N.D. Ala. 1998) (mem.); Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees, 193 F.3d 1214, 1216-20 (11th Cir. 1999). The Supreme Court only mentions that the absence was to be "substantial." *See Garrett*, 531 U.S. 356 (2001).

[43] *Id.* at 362. One of Garrett's co-workers, however, informed Garrett that her supervisor "didn't like 'sick people' and had a history of getting rid of them." Respondent's Brief at 2, Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001) (No. 99-1240).

[44] 29 U.S.C. §§ 701-961 (1999).

for the District of Alabama.[45]

Respondent Milton Ash was employed by the Alabama Department of Youth Services ("the Department") as a security officer.[46] Ash informed the Department that he suffered from chronic asthma and asked for accommodations that would conform with his doctor's recommendations.[47] Later, Ash was diagnosed with a sleep disorder and requested a schedule modification that would take that condition into account.[48] The Department did not adjust Ash's employment schedule.[49] Ash subsequently filed a formal complaint with the Equal Employment Opportunity Commission ("EEOC"), alleging violations of the Family Medical Leave Act ("FMLA")[50] and the ADA.[51]

PROCEDURAL HISTORY

The United States District Court for the Northern District of Alabama consolidated Garrett and Ash's claims and dismissed the case on summary judgment in favor of the State.[52] The court noted that unlike the Age Discrimination in Employment Act ("ADEA"), Congress did not base the ADA and the Rehabilitation Act solely on the Commerce Clause.[53] However, the district court concluded that although Congress intended to abrogate Alabama's sovereign immunity, Congress exceeded its authority under Section five of the Fourteenth Amendment when it passed the ADA, the Rehabilitation Act, and the FMLA.[54]

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[45] *Garrett*, 531 U.S. at 362.

[46] *Id.*

[47] *Id.* Ash's physician urged Ash to avoid carbon monoxide and cigarette smoke. *Id.*

[48] *Id.*

[49] *Id.*

[50] 29 U.S.C. §§ 2601-2654 (1999).

[51] *Garrett*, 531 U.S. at 362. After Ash filed the complaint with the EEOC, "he noticed that his performance evaluations were lower than those he had received on previous occasions." *Id.*

[52] Garrett v. Bd. of Trustees of Univ. of Ala. in Birmingham, 989 F. Supp. 1409, 1410 (N.D. Ala. 1998) (mem.).

[53] *Id.* (referring to MacPherson v. University of Montevallo, 938 F. Supp. 785 (N.D. Ala. 1996), *aff'd sub nom.* Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998)).

[54] *Id.*

Thus, the district court held that the Acts do not permit a private citizen to seek damages from a State in federal court and granted summary judgment in favor of the State.[55]

Garrett and Ash appealed to the United States Court of Appeals for the Eleventh Circuit.[56] The Eleventh Circuit began its analysis by acknowledging that no State may be subject to a suit in federal court unless Congress has created a right of action to allow a citizen to sue a nonconsenting State.[57] The appellate court initially noted that Congress explicitly intended to abrogate Eleventh Amendment sovereign immunity when it passed both the ADA and the Rehabilitation Act.[58] The court explained that for Congress to abrogate a State's sovereign immunity, Congress must clearly indicate the intent to abrogate Eleventh Amendment immunity in the legislative record and Congress must act according to a valid source of constitutional authority.[59] Although Congress may only abrogate sovereign immunity pursuant to Section five of the Fourteenth Amendment, the court explained that pursuant to its decision in *Kimel v. Florida Board of Regents*,[60] it was "bound by the decision" and concluded that the ADA was a valid exercise of Congress' enforcement power under Section five.[61]

Consequently, the Eleventh Circuit reversed the district court as to the ADA

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[55] *Id.* The court explained that "[t]he Commerce Clause provides a legitimate basis for the congressional enactment of broad remedial legislation applicable to private parties . . . ." *Id.* at 1411. According to the court, however, "Congress cannot stretch Section 5 and the Equal Protection Clause of the Fourteenth Amendment to force a State to provide allegedly *equal* treatment by guaranteeing *special* treatment or 'accommodation' for disabled persons, as is purportedly required by the [ADA]." *Id.* at 1410 (emphasis added). The court also acknowledged that there was a split in the circuits regarding this issue, which the Supreme Court had not yet resolved, although the majority of courts that had dealt with this issue tended to favor the plaintiffs' position. *Id.*

[56] Garrett v. Bd. of Trustees of Univ. of Ala. in Birmingham, 193 F.3d 1214, 1216 (11th Cir. 1999).

[57] *Id.* (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996); Hans v. Louisiana, 134 U.S. 1 (1890)).

[58] *Id.* at 1218-19.

[59] *Id.* (quoting *Seminole Tribe*, 517 U.S. at 55).

[60] 139 F.3d 1426, 1433 (11th Cir. 1998). Comparing the ADA to the ADEA, the Court of Appeals for the Eleventh Circuit in *Kimel* noted that the ADA did contain an "unequivocally clear" statement of abrogation and was a valid exercise of Congress' enforcement power under the Fourteenth Amendment. *Id.*

[61] *Garrett*, 193 F.3d at 1218.

and the Rehabilitation Act and remanded for further proceedings.[62] While admitting that the congressional intent of the FMLA to abrogate sovereign immunity is "less clear" than the intent in the ADA and the Rehabilitation Act, the Court of Appeals nevertheless affirmed the district court's grant of summary judgment as to the FMLA because when it passed the FMLA, Congress "did not have the authority to abrogate the sovereign immunity of the States on claims arising under the [FMLA]."[63]

The Supreme Court granted certiorari to resolve a split in the circuits[64] as to whether a state employee may sue its employer in federal court for violations of the ADA.[65] The Court recognized that Congress may abrogate a State's Eleventh Amendment sovereign immunity by indicating a clear intent to do so and by acting under a grant of constitutional authority.[66] Although Congress enacted the ADA under the authority of Section five of the Fourteenth Amendment, the Court held that Congress acted outside the scope of its authority under the Fourteenth Amendment and concluded that Eleventh Amendment sovereign immunity was not properly abrogated.[67]

III. PRIOR CASE HISTORY

A. THE INTERACTION BETWEEN THE ELEVENTH AND FOURTEENTH AMENDMENT

The United States Supreme Court has addressed congressional abrogation of State Eleventh Amendment sovereign immunity on several occasions.[68] Recent

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[62] *Id.*

[63] *Id.* at 1219. The court noted Congress' lack of authority because there was no discrimination caused by state action in the legislative record/history. *Id.* at 1220. Thus, because the role of Congress under Section five of the Fourteenth Amendment is to remediate previously identified harms and those harms documented in the legislative record were scant and insufficient, the court maintained that there was no foundation for Congress to have the FMLA apply to the States. *Id.*

[64] *See supra* note 38 and accompanying text.

[65] *Garrett*, 531 U.S. at 363. The Supreme Court addressed neither the FMLA nor the Rehabilitation Act.

[66] *Id.*

[67] *Id.* at 374.

[68] *See, e.g.*, Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 72-73 (2000); Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

cases decided by the Court have indicated an insistence on limiting the scope of congressional discretion in passing legislation under Section five of the Fourteenth Amendment.[69] The Court has asserted that the judiciary is "the ultimate guardian of 'separation of powers in the federal balance'"[70] and that the Court is the final arbiter of the Constitution.[71]

It was not until 1976, in *Fitzpatrick v. Bitzer*,[72] that the Court addressed congressional abrogation of the State sovereign immunity and the relationship between the Eleventh Amendment and the enforcement power granted to Congress under Section five of the Fourteenth Amendment.[73] In *Fitzpatrick*, the primary issue for the Court was whether Congress had the power to authorize federal courts to award money damages against a State for violations of Title VII of the Civil Rights Act of 1964.[74] In *Fitzpatrick*, the petitioners were present and retired male employees of the State of Connecticut who alleged that particular sections of Connecticut's retirement benefits program discriminated on the basis of sex, making the program incompatible with Title VII.[75] The petitioners argued that Congress has the authority under Section five of the Fourteenth Amendment to authorize a Title VII suit for damages against a State.[76] Justice Rehnqiust, writing for the majority, agreed with the petitioners and held that Congress was constitutionally permitted to authorize for causes of action against States.[77]

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[69] Brown & Enrich, *supra* note 3 at 8; *see supra* note 5 and accompanying text.

[70] Brown & Enrich, *supra* note 3 at 8.

[71] *See Garrett*, 531 U.S. at 365 ("[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."); *see also* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[72] 427 U.S. 445 (1976).

[73] *Id.* at 456; *see* Royer, *supra* note 5, at 644.

[74] *Fitzpatrick*, 427 U.S. at 447-48. Title VII generally prohibits the discrimination in employment. 42 U.S.C. § 2000e-2(a) (1994).

[75] *Fitzpatrick*, 427 U.S. at 448.

[76] *Id.* at 451. The Court explained that the 1972 amendments to Title VII were intended to bring the States within the scope of its application. *Id.* at 448-49. Additionally, the Court noted that these amendments were passed under Congress' enforcement power pursuant to Section five of the Fourteenth Amendment. *Id.* at 453 n.9.

[77] *Id.* at 448.

The Court recognized the limits of monetary awards set forth in *Edelman v. Jordan*,[78] and explained that the *Fitzpatrick* analysis "begins where *Edelman* ended."[79] The Court then engaged in a discussion of the history of the Fourteenth Amendment and concluded that the Eleventh Amendment was limited by Section five of the Fourteenth Amendment.[80] Consequently, the Court recognized that "appropriate legislation" under the Fourteenth Amendment may permit private actions against States or state officials.[81]

The Court in 1997 created the proportionality requirement for legislation passed under the Fourteenth Amendment.[82] In 1997, in *City of Boerne*,[83] the Supreme Court held that that Congress did not have the authority under Section five of the Fourteenth Amendment to pass the Religious Freedom Restoration Act of 1993 ("RFRA").[84] Plaintiffs, the Boerne zoning board, denied a Catholic

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[78] 415 U.S. 651 (1974). *Edelman* held that "monetary relief awarded by the District Court to welfare plaintiffs, by reason of wrongful denial of benefits which had occurred previous to the entry of the District Court's determination of their wrongfulness, violated the Eleventh Amendment" because it was indistinguishable from a monetary award, which was prohibited. *Fitzpatrick*, 427 U.S. at 451. Additionally, *Edelman* made the important distinction between prospective and retroactive relief available in suits brought under *Ex parte Young*. *Edelman*, 415 U.S. at 666-68.

[79] *Fitzpatrick*, 427 U.S at 452. State respondent did not "contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under s [sic] 5 of the Fourteenth Amendment." *Id.* at 456 n.11.

[80] *Id.* at 456 (citations omitted). The Court maintained that the Fourteenth Amendment was intended to limit the power of the States and increase the authority of Congress. *Id.* at 453-54 (discussing *Ex parte* State of Virginia, 100 U.S. 339, 345 (1880) (noting that congressional enforcement of the Fourteenth Amendment "is no invasion of State sovereignty").

[81] *Id.*

[82] Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 469 n.2.

[83] 521 U.S. 507 (1997).

[84] *Id.* at 511. RFRA was passed by Congress in response to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), which involved a Free Exercise claim. *Id.* In *Smith*, the Court modified the standard of review to be applied to Free Exercise claims from strict scrutiny to rational basis review. *Smith*, 494 U.S. at 884-86.

Subsequent to the Court's decision in *Smith*, Congress enacted RFRA through its enforcement power under Section five of the Fourteenth Amendment, and essentially changed the standard of review back to strict scrutiny. *City of Boerne*, 521 U.S. at 515-16. RFRA provided that "[g]overnment should not substantially burden religious exercise without compelling justifica-

Archbishop a building permit to enlarge the size of a church in Boerne, Texas.[85] The Archbishop filed suit in the United States District Court for the Western District of Texas.[86] The complaint alleged that the zoning board violated RFRA.[87]

According to the Court, Congress' power under the Fourteenth Amendment is solely remedial in nature and thus, is limited and defined.[88] To determine whether RFRA was remedial or substantive in nature, the Court evaluated whether there was "congruence and proportionality" between the means adopted and the legitimate end to be achieved[89] and concluded there was not.[90] Accord-

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tion." *Id.* at 515 (quoting 42 U.S.C. § 2000bb(a) (1994) (RFRA)). Moreover, RFRA was intended "to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* (quoting 42 U.S.C. § 2000bb(b) (1994) (RFRA)). Finally, the Court noted:

> RFRA prohibits "government" from "substantially burdening" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

Id. at 515-16 (quoting 42 U.S.C. § 2000bb-1).

[85] *City of Boerne*, 521 U.S. at 511-12.

[86] *Id.* at 512.

[87] *Id.*

[88] *Id.* at 527. The Court explained that had the framers intended Congress' power to be this broad when it enacted the Fourteenth Amendment, it would have passed the Bingham Amendment which provided:

> [t]he Congress shall *have power to make all laws* which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Id. at 520 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866)).

[89] *City of Boerne*, 521 U.S. at 530, 533. Later, in *Florida Prepaid*, the Court tailored the scope of Congress' authority under Section five and determined that for Congress to invoke § 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 639 (1999).

ing to the Court, RFRA was a substantive measure to alter the nature of the constitutional right involved.[91] Despite the presence of a few modern examples of religious persecution in the United States, the Court indicated that because it was not passed in response to any pattern of unconstitutional behavior, RFRA could not be considered remedial or preventative legislation in nature "if those terms are to have any meaning."[92] Thus, the Court held that in passing RFRA, Congress exceeded its enforcement power under Section five of the Fourteenth Amendment.[93]

More recently, in January 2000, a divided Court concluded in *Kimel v. Florida Board of Regents*,[94] that Congress expressly abrogated State sovereign immunity when it passed the Age Discrimination in Employment Act ("ADEA"),[95] but that the abrogation was not a proper exercise of its enforcement power under Section five of the Fourteenth Amendment.[96] According to the Court, the state employees could not sue the State for money damages in federal court for violations of the ADEA.[97]

In *Kimel*, the petitioners were state employees that alleged violations of the ADEA and filed suit against the State.[98] Justice O'Connor, writing for the ma-

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[90] *City of Boerne*, 521 U.S. at 532.

[91] *Id.*

[92] *Id.* The Court explained that "[p]reventative measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional." *Id.* (referring to City of Rome v. United States, 446 U.S. 156, 177 (1980)).

[93] *City of Boerne*, 521 U.S. at 536 (noting that RFRA contradicts vital principles necessary to maintain separation of powers and a balance of federal power).

[94] 528 U.S. 62 (2000).

[95] 29 U.S.C. §§ 621-34 (1999).

[96] *Kimel*, 528 U.S. at 80.

[97] *See generally, id.* (holding that Congress did not properly abrogate State sovereign immunity when it passed the ADEA). A consequence of the Court's holding in *Kimel* is that a state employee can not sue the state employer in federal court for money damages. *See id.* at 91-92.

[98] *Kimel*, 528 U.S. at 69-71. Roderick MacPherson and Marvin Narz, ages 57 and 58 respectively, filed suit in the United States District Court for the Northern District of Alabama against their employer, the University of Montevallo, alleging that the University had violated the ADEA in retaliation against them for filing a complaint with the Equal Employment Opportunity Commission ("EEOC"). *Id.* at 69. The Court concluded that although there is a

jority, determined that Congress had been "unmistakably clear" regarding abrogation of State immunity when it passed the ADEA.[99] The majority additionally noted that Congress may not abrogate the States' immunity through its Article I power and explained that under the Fourteenth Amendment, Congress is authorized to abrogate Eleventh Amendment immunity.[100]

The *Kimel* Court considered the role of Congress under the Fourteenth Amendment and concluded that Congress' power is limited to enforcing the law and remedying identified constitutional violations; the power to determine the substance of constitutional violations belongs to the Court.[101] Justice O'Connor acknowledged, however, that determining whether legislation is substantive or remedial is often a difficult task.[102] In order for prophylactic legislation to be considered remedial, the Justice explained, legislation must pass the "congruence and proportionality" test.[103] The Court applied the "congruence and proportionality" test to the facts in *Kimel* and concluded that under Section five of the

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clear expression of intent to abrogate sovereign immunity in the ADEA, Congress did not enact the ADEA under Section five. *Id.*

A group of employees, including David Kimel, filed suit in the United States District Court for the Northern District of Florida against their employer, Florida State University, and claimed that the University had violated the ADEA because the University's failure to make previously agreed upon market modifications to salaries because of its disproportionate effect on older employees. *Id.* at 70. The district court concluded that the ADEA properly abrogated Eleventh Amendment immunity. *Id.*

Finally, Wellington Dickson filed suit against his employer, the Florida Department of Corrections ("DOC"), in the United States District Court for the Northern District of Florida, alleging that the DOC failed to promote him both because of his age and because he had reported incidents of age discrimination. *Id.* at 70-71. The court concluded that Congress properly abrogated State sovereign immunity when it passed the ADEA. *Id.* at 71. The Court of Appeals for the Eleventh Circuit consolidated the appeals and concluded that Congress did successfully abrogate the States' immunity when it passed the ADEA. *Id.*

[99] *Kimel*, 528 U.S. at 74.

[100] *Id.* at 80.

[101] *Id.* at 80-81.

[102] *Id.* at 81.

[103] *Id.* at 81-82. Requiring the legislation to be "congruent and proportional" means that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means to be adopted to that end." *Id.* at 81 (quoting City of Boerne v. Flores, 521 U.S. 507, 520 (1997)).

Fourteenth Amendment, the ADEA is not "appropriate legislation."[104]

B. DISABILITY-BASED DISCRIMINATION

To a very limited extent, the Supreme Court has examined disability-based discrimination and clarified the level of scrutiny that will be utilized to examine constitutional challenges made to legislation passed under the Fourteenth Amendment's Equal Protection Clause. In *City of Cleburne v. Cleburne Living Center*,[105] the Supreme Court addressed the proper level of scrutiny that applied to equal protection challenges by the disabled.[106] A local zoning board denied a special use permit to the Cleburne Living Center ("CLC") for the construction of a group home for the mentally retarded pursuant to a local zoning ordinance.[107] The CLC challenged the ordinance and alleged that it was unconstitutional on its face.[108] Because the ordinance discriminated against the mentally retarded, the CLC alleged, the ordinance violated the Fourteenth Amendment by depriving equal protection to the CLC and its potential residents.[109]

The Supreme Court held that the mentally retarded are not a suspect classification for the purposes of the Equal Protection Clause[110] and concluded that rational basis review applies to classifications based on disability.[111] The Court

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[104] *Id.* at 82-83.

[105] 473 U.S. 432 (1985).

[106] *Id.* at 435. Although decided before the enactment of the ADA, *Cleburne* is insightful in the treatment of the disabled.

[107] *Id.* at 436-37. The Cleburne, Texas zoning regulation required "a special use permit, renewable annually, . . . for the construction of 'hospitals for the insane or feeble minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions.'" *Id.* at 436. The City of Cleburne classified the group home for the mentally retarded as "a hospital for the feeble-minded." *Id.* at 436-37.

[108] *Id.* at 437.

[109] *Id.*

[110] U.S. CONST. amend. XIV, § 1. The Equal Protection Clause provides that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* As a practical matter, under the Equal Protection Clause, "all persons similarly situated should be treated alike." *Cleburne*, 473 U.S. at 439.

[111] *See Cleburne*, 473 U.S. at 439-40. The Court maintained that "absent controlling congressional direction . . . [t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* Additionally, the Court explained that "[w]hen social or economic legisla-

declined to use a heightened scrutiny with regard to mental retardation for four fundamental reasons.[112] First, the Court noted that within the class of "mentally retarded," there is still vast diversity, and thus it would mandate "substantive judgments about legislative decisions" that the Court was unwilling to require.[113] Additionally, the Court maintained that both the Federal and State governments have responded to the needs of the disabled and prohibited discrimination against the disabled so that the mentally retarded are not in need of additional protection under the Equal Protection Clause.[114] Similarly, the Court explained, the disabled are not without a political voice.[115] The Court further justified the use of rational basis by explaining that giving the mentally retarded a quasi-suspect or suspect classification would result in a "slippery slope" effect, resulting in a flood of litigation in courts by all groups who may have experienced prejudice from the public seeking a heightened classification, thereby diluting the potency of the suspect classification.[116] Because the mentally retarded do not enjoy heightened scrutiny, discrimination based disability status is given rational basis review and thus the government must prove only that the statute bears a rational relationship to a legitimate governmental purpose.[117]

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tion is at issue, the Equal Protection Clause allows the States wide latitude." *Id.* at 440.

[112] *Id.* at 442-46.

[113] *Id.* at 442-43.

[114] *Id.* at 443-45 (referring, *e.g.*, to the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-96 (1999); Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6100-6083 (1995); Education of the Handicapped Act, 20 U.S.C. § 1412(5)(B) (2000); Mentally Retarded Persons Act of 1977, TEX. REV. CIV. STAT. ANN. art. 5547-300, § 7 (Vernon Supp. 1985)).

[115] *Id.* at 445.

[116] *Id.* at 445-46 (explaining that "the appropriate method of reaching [instances of invidious discrimination against the disabled] . . . is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter." *Id.* The Court explained that it "will not presume that any given legislative action, even one that disadvantages retarded individuals, is rooted in considerations that the Constitution will not tolerate." *Id.*

[117] *Cleburne*, 473 U.S. at 446-47. However, the Court nevertheless invalidated the zoning ordinance, because requiring the mentally retarded to obtain the permit but not requiring other group homes not covered by the ordinance is not rationally justified by the rationales for the ordinance presented by City Council, which included negative attitudes by property owners, location of the facility, and the size of the home. *Id.* at 448-50. The Court noted that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded dif-

IV. *GARRETT*: PROTECTING THE STATES: AN NONCONSENTING STATE MAY NOT BE SUED IN FEDERAL COURT FOR MONEY DAMAGES BY A PRIVATE CITIZEN FOR VIOLATIONS OF THE ADA

The Supreme Court granted certiorari to resolve a split among the Courts of Appeals as to whether an individual may sue a State under the ADA for money damages in federal court and concluded that because Congress did not properly abrogate State sovereign immunity when it passed the ADA, a state employee may not sue the State for violations of the Act for money damages in federal court.[118]

A. CHIEF JUSTICE REHNQUIST'S MAJORITY OPINION

Chief Justice Rehnquist delivered the Supreme Court's 5 - 4 decision in *Board of Trustees of University of Alabama v. Garrett*.[119] First, the Chief Justice reviewed the language and requirements of the ADA.[120] The Court surveyed the Eleventh Amendment to determine what the obligations of Congress are in passing legislation that seeks to abrogate the sovereign immunity of States.[121] Noting that Congress expressed an intent to authorize suits in federal court against States for money damages in the ADA,[122] the Chief Justice questioned whether Congress had the constitutional authority to abrogate State sovereign immunity and permit suits in federal court for money damages against an unconsenting State.[123] Finally, the Court explained that it is the Court's function to determine

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ferently from apartment houses, multiple dwellings, and the like." *Id.* at 448. Thus, "requiring a permit in this case appears to us to rest on an irrational prejudice against the mentally retarded." *Id.* at 450.

[118] Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363, 373-74 (2001).

[119] *Id.* at 360. Justices O'Connor, Scalia, Kennedy, and Thomas joined the majority opinion.

[120] *Id.* at 361-62.

[121] *Id.* at 363.

[122] Section 12202, the section of the ADA that abrogated State immunity, provided that "remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a state." 42 U.S.C. § 12202 (1995).

the substantive guarantees of the Constitution.[124]

The Americans With Disabilities Act

The Court began its analysis by explaining the details of the Americans with Disabilities Act.[125] The Chief Justice noted that the ADA "prohibits certain employers, including the States, from 'discriminating against a qualified individual with a disability because of the disability . . . in regard to job application procedures, the hiring advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.'"[126] Accordingly, under the ADA, employers are required to make "reasonable accommodations" to the known disability of the employee or applicant.[127] The majority opinion also noted that the ADA prohibits an employer from administering employment measures or practices "that have the effect of discrimination on the basis of disability."[128] Finally, the Court explained the boundaries of what constituted a "disability" for the purposes of the ADA and how a disabled individual may be otherwise "qualified" as disabled under the Act.[129]

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[123] *Garrett*, at 365-74.

[124] *Id.* at 374.

[125] *Id.* at 360-61.

[126] *Id.* (quoting 42 U.S.C. §§ 12112(a), 12111(2), (5), (7) (1995)).

[127] *Id.* at 361 (referring to 42 U.S.C. § 12112(b)(5)(A) (1995)). Under the Act, discrimination includes:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

42 U.S.C. § 12112(b)(5)(A).

[128] *Garrett*, 531 U.S. at 361 (quoting 42 U.S.C. § 12112 (b)(3)(A) (1995)). Section 12112 (b)(3)(A) provides that discrimination also includes "utilizing standards, criteria, or methods of administration (A) that have that effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control." *Garrett*, 531 U.S. at 361.

[129] *Id.* at 361. Under the ADA, "disability" is defined as:

The Eleventh Amendment

Next, the Court addressed the petitioner's contention that Congress did not properly abrogate States' Eleventh Amendment sovereign immunity when it passed the ADA because it did not have the constitutional authority to do so.[130] The Chief Justice explained that the Eleventh Amendment ensured the protection of a nonconsenting State from private suit by individuals in federal court.[131] Eleventh Amendment sovereign immunity is properly abrogated, the majority clarified, "when [Congress] both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority."[132] The majority noted that the Court had recently narrowed the scope of constitutional provisions that may be utilized when abrogating Eleventh Amendment sovereign immunity.[133] Thus,

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a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

a record of such an impairment; or

being regarded as having such an impairment.

42 U.S.C. § 12102(2)(A-C) (1995).

Additionally, for the purposes of the ADA, a "qualified individual with a disability" is defined as:

an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . . [C]onsideration shall be given to the employer's judgment as to what functions of a job are essential . . . .

42 U.S.C. § 12111(8) (1995).

Although the opinion did not address whether the plaintiffs were covered by the ADA, the conditions suffered by the plaintiffs were covered by the statutory scheme of the Act and rendered the plaintiffs "disabled." *See Garrett*, 531 U.S. at 361-62.

[130] *Garrett*, 531 U.S. at 363-64.

[131] *Id.* at 363 (citing Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73 (2000)).

[132] *Id.* (quoting *Kimel*, 528 U.S at 73).

[133] *Id.* at 364.

the Court explained, when Congress abrogated State Eleventh Amendment immunity and permitted a State to be sued in federal court for money damages, Congress may have done so only pursuant to the Fourteenth Amendment.[134] Accordingly, the Court maintained that the Act would affect the States, provided that the ADA was "appropriate" legislation under Section five of the Fourteenth Amendment.[135]

Section Five of the Fourteenth Amendment

Chief Justice Rehnquist next analyzed the Fourteenth Amendment in order to determine whether the ADA was a proper exercise of Congress' enforcement power under Section five.[136] While acknowledging that Section five of the Fourteenth Amendment granted Congress the authority to enforce Section one of the same amendment, the majority noted that Congress may only do so through enacting "appropriate legislation."[137] Under Section five, the Court maintained, Congress' power includes that authority to remedy and deter constitutional harms that are protected against by the Constitution.[138] In order to accomplish this goal, the Court explained, Congress may prohibit "a somewhat broader swath of conduct" than that which the Constitution explicitly prohibits.[139]

The Chief Justice subsequently communicated that the Court, not Congress,

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[134] *Id.* The Court had recently announced that Congress may not abrogate Eleventh Amendment immunity pursuant to its Article I powers. *Id.* (citing *Kimel*, 528 U.S. at 79; Alden v. Maine, 527 U.S. 706, 730-33 (1999); College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666, 672 (1999); Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 636 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996)). In *Kimel*, the Court noted that Congress could not abrogate sovereign immunity, thus subjecting an unconsenting State to suit for damages in federal court, under its commerce clause power alone. *Kimel*, 528 U.S. at 79. Additionally, the Court in *Garrett* explained that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Garrett*, 531 U.S. at 364 (quoting *Seminole Tribe*, 517 U.S. at 72-73).

[135] *Garrett*, 531 U.S. at 364.

[136] *Id.* at 365-74.

[137] *Id.* at 365. Section five of the Fourteenth Amendment provides in full "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV, § 5.

[138] *Garrett*, 531 U.S. at 365.

[139] *Id.* (citing *Kimel*, 528 U.S. at 81 (quoting *City of Boerne*, 521 U.S. at 536)).

has the responsibility "to define the substance of constitutional guarantees."[140] It is the authority of Congress, the majority expounded, to enact legislation to enforce those substantive guarantees.[141] The Court explained that generally, Congress may not enact legislation through its Section five enforcement power that exceeds the scope of Section one.[142] According to the Court, when legislation passed pursuant to Section five exceeds the scope of Section one, there must be congruence and proportionality "between the injury to be prevented or remedied and the means adopted to that end."[143]

The Court next inquired into the scope of the constitutional right at issue and examined the limitations placed on States in their treatment of the disabled by Section one of the Fourteenth Amendment.[144] To do so, the majority acknowledged, it would have to consider *Cleburne v. Cleburne Living Center, Inc.*,[145] in which the Court rejected an equal protection challenge by a group home for the mentally retarded and concluded that the mentally retarded are not a suspect classification.[146] Chief Justice Rehnquist reasoned in *Garrett* that as a result of its decision in *Cleburne*, classifications based on disability or mental retardation incur only rational basis review.[147] When defending challenges to a classification scheme based on any disability, the Court explained, the State is only required to show a "rational relationship between the disparity of treatment and some legitimate governmental purpose."[148] The Court concluded that "[s]tates are not required by the Fourteenth Amendment to make special accommodations

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[140] *Id.* (quoting *City of Boerne*, 521 U.S. at 519-24).

[141] *Id.* Congress' enforcement power includes the ability to remedy and deter constitutional violations. *Id.*

[142] *Id.*

[143] *Id.* (quoting *City of Boerne*, 521 U.S. at 520).

[144] *Garrett*, 531 U.S. at 365-66.

[145] 473 U.S. 432 (1985).

[146] *Garrett*, 531 U.S. at 365.

[147] *Id.* at 365-66 (citing *Cleburne*, 473 U.S. at 446).

[148] *Id.* at 367. The Court indicated "the State need not articulate its reasoning at the moment a particular decision is made. Rather, the burden is upon the challenging party to negative 'any reasonably conceivable set of facts that could provide a rational basis for the classification.'" *Id.* (quoting Heller v. Doe, 509 U.S. 312, 320 (1993) (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)).

for the disabled, so long as their actions towards such individuals are rational."[149]

Having concluded that classifications based on disability are entitled only to rational basis review, the majority next addressed the question of whether Congress had the authority to abrogate States' sovereign immunity and subject an unconsenting state to a suit for money damages in federal court for a violation of Title I of the ADA pursuant to its authority under Section five of the Fourteenth Amendment.[150] Because Congress is only permitted to invoke its authority under Section five of the Fourteenth Amendment in response to wrongdoing by the State, the Court explained that for the ADA to have been legitimately passed under Section five, Congress must have identified "a history and pattern of unconstitutional employment discrimination by the States against the disabled."[151] However, the Court pointed out, the legislative record of the ADA does not present a history or pattern of behavior by the States that sufficiently indicates a need for the ADA to apply to the States.[152] The Chief Justice posited that because there was no significant documented pattern of unconstitutional behavior on the part of the States, the Act was not properly passed so as to permit an action in federal court against a State for money damages.[153] Nevertheless, the Court explained, the ADA continued to apply to the States and the States may not discriminate on the basis of one's disability.[154]

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[149] *Id.* The Court rejected Justice Breyer's contention that "state decisionmaking reflecting 'negative attitudes' and 'fear' necessarily runs afoul of the Fourteenth Amendment." *Id.* (quoting *Garrett*, 531 U.S. at 381 (Breyer, J., dissenting)). Chief Justice Rehnquist quoted *Cleburne*, which explained that fear and negative attitudes alone are not enough to treat mentally retarded citizens differently. *Id.* (citing *Cleburne*, 473 U.S. at 448). The Court maintained, however, "state action subject to rational-basis scrutiny does not violate the Fourteenth Amendment when it 'rationally furthers the purpose identified by the State.'" *Id.* (quoting Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976) (per curium)).

[150] *Id.* at 368.

[151] *Id.*

[152] *Garrett*, 531 U.S. at 368.

[153] *Id.* at 370-74. The majority compared the ADA to the Voting Rights Act of 1965 ("VRA"), an act with extensive legislative history documenting extensive state discrimination. *Id.* at 373 (quoting the VRA, 42 U.S.C. §§ 1971-74(e) (1994)). The Court explained that when it sustained the VRA, the Court had before it extensive evidence of serious constitutional violations by the States. *Id.* (referring to South Carolina v. Katzenbach, 383 U.S. 301, 312-13 (1966)).

[154] *Id.* at 374 n.9; Note, *supra* note 7 at 2150-51. The author of that note maintained, "the Court appeared to assume that the ADA would be valid under the Commerce Clause." Note, *supra* note 7 at 2151 n.9. Remedies in law and equity are still available to state employees. 42 U.S.C. § 12202 (1995). Also, under section 12202, remedies available at law and eq-

The Chief Justice acknowledged the argument presented by Garrett that the Court should not limit its inquiry to the constitutional violations of the States alone and quickly disposed of it.[155] The opinion recognized that under the Fourteenth Amendment, local and municipal governments are considered state actors.[156] While this premise may be true, the majority explained, sovereign immunity under the Eleventh Amendment does not extend to local or municipal governments.[157] Thus, the Court maintained, "these entities are subject to private claims for damages under the ADA without Congress' ever having to rely on Section Five of the Fourteenth Amendment to render them so."[158] Accordingly, the Court clarified, "[i]t would make no sense to consider constitutional violations on their part," when the local or municipal governments would not be able to take advantage of the immunity under the Eleventh Amendment anyway.[159]

Finally, the Court articulated that it was ultimately the role of the judiciary to determine the status of the Act.[160] According to the Court, Congress is not authorized to "rewrite the Fourteenth Amendment law laid down . . . in *Cleburne*."[161] The Court suggested that in regard to the ADA, Congress attempted to revamp the scope of the constitutional rights guaranteed by *Cleburne* and the Fourteenth Amendment.[162] Accordingly, the Court maintained that it is not within the province of Congress to rewrite the substantive constitutional law.[163] Because the ADA did not target specific violations committed by the States, the

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uity "are available for such a violation to the same extent as such remedies are available for such violation in an action against any public or private entity other than a State." *Id.* The consequence of this action is that a right of action against a state employer in federal court for money damages is not available to state employees for violations of the Act. *Garrett*, 531 U.S. at 374.

[155] *Id.* at 368-69.

[156] *Id.*

[157] *Id.* at 369.

[158] *Id.*

[159] *Garrett*, 531 U.S. at 369.

[160] *Id.* at 365, 374.

[161] *Id.* at 374.

[162] *Id.* at 374.

[163] *Id.*

majority concluded that Congress exceeded its constitutional authority when it abrogated State sovereign immunity, permitting unconsenting States to be sued by private individuals for money damages for violations of Title I of the ADA and applied it to the States.[164]

B. JUSTICE KENNEDY'S CONCURRENCE

Justice Kennedy, joined by Justice O'Connor, concurred in the majority opinion and maintained that appropriate documentation of a pattern of a constitutional violation was not contained in the legislative history of the ADA and therefore, Congress did not properly create a private cause of action for money damages against the States under the Fourteenth Amendment.[165] The Justice first conceded that the disabled are regularly confronted with discrimination that is the result of both "indifference of insecurity as well as from malicious ill will."[166] The concurrence emphasized, however, the seriousness of alleging that a State or a state official has violated the Constitution.[167] In other words, the Justice posited that there is a difference between suing a citizen of a State for misconceptions and animus towards the disabled and suing the State or a state official "on the assumption that they embody the misconceived or malicious perceptions of some of their citizens."[168] The Justice submitted that "States can, and do, stand apart from the citizenry"[169] and explained that the failure of a State to correct misconceptions of its citizens does not necessarily make out the evidentiary showing required for an Equal Protection violation: purposeful and intentional discrimination.[170] Thus, the concurrence concluded that because there was no "confirming judicial documentation" of State violations of the Fourteenth Amendment toward the disabled, Congress could not force a State to submit to suit by a citizen seeking money damages for violations of the ADA.[171]

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[164] *Id.*

[165] *Garrett*, 531 U.S. at 375-76 (Kennedy, J., concurring).

[166] *Id.* at 375 (Kennedy, J., concurring).

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.* 375-76 (Kennedy, J., concurring).

[171] *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring). The Justice explained that "[t]he predicate for money damages against a nonconsenting State in suits brought by private persons

C. JUSTICE BREYER'S DISSENT

Justice Breyer, writing for the dissent, maintained that abrogating Eleventh Amendment immunity under Title I of the ADA was a proper use of Congress' enforcement power under Section five of the Fourteenth Amendment.[172] The Justice began the opinion by criticizing the majority for "[r]eviewing the congressional record as if it were an administrative agency record."[173] The dissent then reasoned that under the Constitution, Congress is only required to reasonably conclude that "the remedy before us constitutes an 'appropriate' way to enforce [the] basic equal protection requirement."[174] The Justice explained that the application of the ADA to the States satisfied the congruence and proportionality test.[175] Accordingly, the Justice determined that the ADA is not constitutionally defective.[176] The dissenting opinion concluded that the majority's review of Congress' use of its Section five power was "harsh."[177]

Justice Breyer surveyed the legislative record of the ADA and explained that there is sufficient evidence of State discrimination to support Congress' abrogation of Eleventh Amendment sovereign immunity.[178] The legislative record

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must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity. That predicate . . . has not been established." *Id.* (Kennedy, J., concurring).

[172] *Id.* at 376-85 (Breyer, J., dissenting). Justices Stevens, Souter and Ginsburg joined the dissent.

[173] *Id.* at 376 (Breyer, J., dissenting).

[174] *Id.* at 377 (Breyer, J., dissenting).

[175] *Id.* at 385-87 (Breyer, J., dissenting).

[176] *Id.* at 377 (Breyer, J., dissenting).

[177] *Garrett*, 531 U.S. 387 (Breyer, J., dissenting).

[178] *Id.* at 377-82 (Breyer, J., dissenting). In fact, the Justice noted that there were 300 examples of discrimination against the disabled at the hands of the State in the legislative record and outlined those examples in an Appendix to the opinion. *Id.* at 379 (Breyer, J., dissenting). Such examples of state discrimination include failure to make courthouses, restrooms, polling places, public transportation and state university campuses accessible; public elementary school initially denied admission and then charged extra fees to a child with Down's syndrome; state agencies failure to hire applicants with disabilities; not permitting blind and deaf persons take state chiropractic and cosmetology exams without assistance; requiring deaf persons to pay for interpretive services in court; zoning board denied permit for group home for persons with disabilities. *Id.* at 391-424 app. C (Breyer, J., dissenting).

amassed by Congress, the Justice explained, documented the large-scale societal discrimination against persons with all forms of disability.[179] Through the Task Force, the Justice maintained, Congress found that although most were willing and physically able, the majority of disabled Americans of working age were not employed at all.[180] According to the dissent, Congress identified stereotypes and "purposeful unequal treatment" as the origin of the discrimination.[181]

Using the documentation of discrimination in the legislative record as a starting point, Justice Breyer detailed the rationale behind state liability for discrimination against the disabled.[182] First, the Justice explained that the evidence of both societal discrimination by local governments and private individuals incriminates the States, "for state agencies form part of that same larger society."[183] The dissent maintained that the Equal Protection Clause applies to both state and local governments alike, and rejected the majority's absolution of local responsibility.[184] According to the Justice, state and local governments are similarly situated and should be similarly subject to the ADA.[185] Nevertheless, even

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[179] *Id.* at 377-78 (Breyer, J., dissenting) (quoting S. Rep. No. 101-116 at 9-10 (1989) (quoting testimony of Justin Dart, chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities)). The dissent further noted that in support of the ADA, Congress presented materials compiled over the course of 40 years, 13 congressional hearings, and established a task force on discrimination against disabled Americans. *Id.* The dissent explained the functions of the task force that was established, which was known as the Task Force on the Rights and Empowerment of Americans with Disabilities ("Task Force"). *Id.* The Task Force documented incidents of discrimination and held hearings in every State which were attended by over 30,000 people, including those who had personally experienced disability discrimination. *Id.*

[180] *Id.* at 378 (Breyer, J., dissenting). According to the dissent, "two-thirds of all disabled Americans between the ages of 16 and 64 [are] not working at all." *Id.* (quoting S. Rep. No. 101-116, at 9).

[181] *Id.* (quoting the ADA, 42 U.S.C. § 12101(a)(7) (1995)).

[182] *Id.*

[183] *Garrett*, 531 U.S. at 378 (Breyer, J., dissenting).

[184] *Id.* (citing, *e.g.*, City of Richmond v. J. A. Croson Co., 488 U.S. 469, 490-92 (1989) (explaining that the Fourteenth Amendment acts as a constraint on the power of States and political subdivisions and concluding that a minority set-aside program operated as part of the affirmative action plan for the City of Richmond was unconstitutional because the city did not make out the proper showing under the Fourteenth Amendment of past discrimination by the city)).

[185] *Id.*

if the majority were to find that federal and state governments were not similarly situated, the dissent pointed out that "[t]here are roughly 300 examples of discrimination by state governments themselves in the legislative record."[186] Therefore, Justice Breyer insisted, there was sufficient evidence in the legislative record of state-imposed discrimination to justify Congress' use of its Section five enforcement power.[187]

The dissent next addressed the majority opinion's concern that there was no "additional, independent evidence sufficient to prove in court that, in each instance, the discrimination they suffered lacked justification from a judicial standpoint."[188] Justice Breyer posited that evidence proving that the discrimination was unjustified is unnecessary and explained that "a legislature is not a court of law."[189] Consequently, the Justice maintained that Congress should be able to draw general conclusions from the evidence presented to it.[190]

Nevertheless, Justice Breyer posited, the ADA is not unconstitutional for failing to present evidence of discrimination independent of the individual and personal accounts of state-inflicted discrimination that appeared in the legislative record.[191] The dissent criticized the Court for suggesting that a burden of proof applied to congressional legislation and for over-scrutinizing legislative decisions made by Congress when it passed the ADA.[192] Similarly, according to Justice Breyer, it would have been unnecessary for Congress to have had to provide more evidence of state and local discrimination than was already in the legislative record.[193] In rejecting the Act and asking Congress for more evidence than was constitutionally required, the dissent suggested that the Court acted as a "superlegislature."[194] According to Justice Breyer, the congressional findings of discrimination against the disabled set forth in the ADA, were sufficient to jus-

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[186] *Id.* at 379 (Breyer, J., dissenting).

[187] *Id.* at 379-80 (Breyer, J., dissenting).

[188] *Id.* (referring to the Court's declaration that the examples of discriminatory conduct in the legislative record were "'described out of context'").

[189] *Garrett*, 531 U.S. at 379-80 (Breyer, J., dissenting).

[190] *Id.* at 380 (Breyer, J., dissenting).

[191] *Id.* at 380-81 (Breyer, J., dissenting).

[192] *Id.* at 382-83 (Breyer, J., dissenting).

[193] *Id.* at 384 (Breyer, J., dissenting).

[194] *Id.*

tify the abrogation of sovereign immunity under Section five of the Fourteenth Amendment.[195]

Additionally, Justice Breyer asserted, the application of the ADA complied with the congruence and proportionality requirements under the Fourteenth Amendment.[196] In dismissing the majority's conclusion that the Act fails those tests, the Justice adroitly defended the ADA and questioned what power was left to Congress in enforcing the Fourteenth Amendment if the ADA was not deemed a proper exercise of it.[197] The dissent chided the majority's purported deference to congressional determination and insisted that the Court should continue to exercise deference to congressional decisions.[198] It should be sufficient, Justice Breyer maintained, for the Supreme Court "to perceive a basis upon which the Congress might resolve the conflict as it did."[199] Instead, the Justice questioned the level of scrutiny applied by the Court and suggested that the majority did not use rational basis, but instead a higher standard.[200] In its review, the Court, according to the dissent, interpreted Section five in a way that actually provided States with additional protection from suit brought for constitutional violations.[201] This, Justice Breyer emphasized, "saps Section five of independent force, is contradictory to the aim of the Fourteenth Amendment and should not

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[195] *Garrett*, 531 U.S. at 380-81 (Breyer, J., dissenting) (citing the ADA, 42 U.S.C. § 12101(9) (1995)). This section of the ADA identifies the existence of "unnecessary discrimination and prejudice." 42 U.S.C. § 12101(9). The Justice also noted that the *Cleburne* Court held that adverse treatment of the disabled was motivated by unjustified rationales such as fear, negative attitudes, or irrational prejudice and maintained that when it passed the ADA, Congress followed the Court's lead from *Cleburne*. *Id.* at 381 (Breyer, J., dissenting). (quoting City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 447, 448, 450 (1985)).

[196] *Garrett*, 531 U.S. at 385-86 (Breyer, J., dissenting).

[197] *Id.* at 386 (Breyer, J., dissenting). The Justice explained that while what is "reasonable" under the Constitution or a statutory scheme may vary, Section five of the Fourteenth Amendment grants Congress the authority to mandate more than what may be minimally required. *Id.* According to Justice Breyer, the majority opinion in *Garrett* took away the impact of the Fourteenth Amendment on the States. *Id.* at 389 (Breyer, J., dissenting).

[198] *Id.* at 386-87 (Breyer, J., dissenting).

[199] *Id.* at 386 (Breyer, J., dissenting) (quoting Katzenbach v. Morgan, 384 U.S. 641, 653 (1966)).

[200] *Id.* at 387-88 (Breyer, J., dissenting). A higher level of scrutiny, the Justice posited, was appropriate for reviewing legislation concerning race, gender, or a constitutional provision such as the First Amendment. *Id.* at 387 (Breyer, J., dissenting).

[201] *Id.* at 388 (Breyer, J., dissenting).

be given effect."[202] Section five of the Fourteenth Amendment, the Justice concluded, afforded Congress the proper authority to apply the ADA to the States and thus, the law was not invalidated by the Eleventh Amendment in this case.[203]

V. ANALYSIS

One of the important results of the decision in *Board of Trustees of University of Alabama v. Garrett* is a reaffirmation of the role of the judiciary as the final arbiter of the Constitution. First articulated in *Marbury v. Madison*,[204] when Chief Justice John Marshall proclaimed that "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[205] the notion that it is the responsibility of the judiciary to determine the scope and substance of constitutional guarantees has been fundamental to American law and policy.[206] *Garrett* is a reaffirmation of that principle.

Garrett also affects the relationship between the federal and state governments, and defining the confines of state and federal control in the wake of an anti-federalist revival[207] has become a major question for the Court. Until recently, the roles of the federal and state governments have not experienced fundamental change, not since the days of the New Deal and the rise of the administrative state. Traditionally, it had been the function of the federal government, namely Congress, to have "primary responsibility for the country's legislative program and [have] broad authority to both regulate economic activity and to articulate social norms."[208]

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[202] *Garrett*, 531 U.S. at 389 (Breyer, J., dissenting).

[203] *Id.*

[204] 5 U.S. 137 (1803).

[205] *Id.* at 177.

[206] Indeed, judicial review was a recognized doctrine before *Marbury*. During the 1787 debates over ratification of the Constitution, Alexander Hamilton wrote in Federalist No. 78 "[t]he interpretation of the laws is the proper and peculiar province of the courts .... [W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former." THE FEDERALIST NO. 78 (Alexander Hamilton).

[207] GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 224 (13th ed. 1997).

[208] Judith Olans Brown & Peter D. Enrich, *Nostalgic Federalism*, 28 HASTINGS CONST. L.Q. 1, 1 (2000).

Garrett, however, marks the ten year anniversary of the anti-federalist revival that has taken place on the bench.[209] The rise of "new federalism" has challenged the traditional roles of the state and federal governments. The recent trend has tipped the balance of federal and state power and has called Congressional authority into question, especially where rules affecting state autonomy are concerned.[210] Beginning with *New York v. United States*,[211] continuing with *United States v. Lopez*,[212] and most recently evinced in *Garrett*, the trend of the current Supreme Court has been to erode congressional lawmaking authority.[213] This trend has sparked questions about the future of the balance of federalism that cannot yet be answered.

As a practical matter, state employees have been effectively prevented from seeking damages against the State for violations of Title I of the ADA.[214] Nevertheless, the Commerce Clause permits Congress to enact the substantive provisions of the ADA and Title I of the Americans with Disabilities Act continues to apply to the States, especially as long as *Garcia v. San Antonio Metropolitan Transit Authority*[215] remains good law. The *Garrett* Court made this much clear,

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[209] Gunther & Sullivan, *supra* note 207, at 224.

[210] Brown & Enrich, *supra* note 208, at 1.

[211] 505 U.S. 144 (1992) (holding that the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which provided that States failing to provide for waste disposal by a particular date had to take title to the waste and assume responsibility for all damages generated by the waste, was unconstitutional because it impermissibly coerced the States into regulating according to federal standards). *Id.* at 149.

[212] 514 U.S. 549 (1995) (concluding that the Gun-Free School Zones Act of 1990, which was based on Congress' Commerce Clause power, was unconstitutional because there was no showing that the regulation of guns in schools "substantially affected interstate commerce").

[213] *See supra* note 4 and accompanying text.

[214] *See generally*, Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that when it passed the ADA as to the States, thereby giving state employees a right of action for damages against the State in federal court, Congress did not properly abrogate State sovereign immunity).

[215] 469 U.S. 528, 546-47 (1984). In *Garcia*, the Court overruled its decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that had couched state regulatory immunity under the Tenth Amendment in terms of "traditional governmental functions," and held that the State of Texas was required to follow the mandates of federal wage and hour provisions, passed pursuant to Congress' authority under the Commerce Clause. *Id.* The Court further explained that there is no "sacred province of state autonomy" under the Tenth Amendment and mandated State compliance with federal law. *Id.* at 550.

emphasizing that "Title I of the ADA still prescribes standards applicable to the States."[216] Thus, although individual citizens may not sue state employers in federal court for money damages for violations of the ADA, Eleventh Amendment immunity does not permit States to discriminate on the basis of disability.[217]

How else may state employees get into federal court with their discrimination claim?[218] The Eleventh Amendment bars a private suit for money damages from being brought against an unconsenting State.[219] To be sure, *Garrett* does not leave state employee without a means to vindicate the federal rights carved out in the ADA and the Court explicitly states "[o]ur holding here . . . does not mean that persons with disabilities have no federal recourse against discrimination."[220] The Court articulates actions for money damages brought by the United States and suits for injunctive relief under *Ex parte Young* as possible measures by which a state employee may protect her interests under the ADA.[221] All hope is not lost for the state employee.

A. MONEY DAMAGES TO BE PAID BY OFFICERS INDIVIDUALLY

The Eleventh Amendment is a bar to actions for money damages brought against an unconsenting State in either federal or state court.[222] Because the

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[216] *Id.* at 374 n.9; *accord Garcia*, 469 U.S. at 547-50.

[217] *Id.* at 374 n.9; Note, *supra* note 7, at 2150-51. The author of that note maintained that "the Court appeared to assume that the ADA would be valid under the Commerce Clause." Note, *supra* note 7, at 2151 n.9. Remedies in law and equity are still available to state employees. 42 U.S.C. § 12202 (1995). Also, under section 12202, remedies available at law and equity "are available for such a violation to the same extent as such remedies are available for such violation in an action against any public or private entity other than a State." *Id.* The consequence of this action is that a right of action against a state employer in federal court for money damages is not available to state employees for violations of the Act. *Garrett*, 531 U.S. at 360.

[218] A plaintiff may still, of course, use state discrimination laws to vindicate rights in state court. *See Garrett*, 531 U.S. at 374 n.9 (In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.").

[219] *See supra* note 30 and accompanying text.

[220] *Garrett*, 531 U.S. at 374 n.9.

[221] *Id.*

[222] *See supra* note 30 and accompanying text.

Eleventh Amendment doctrine pertains only to suits against States, there is nothing in Eleventh Amendment jurisprudence that prevents an aggrieved state employee from bringing an action against a state officer to be paid by that officer in his or her individual capacity.[223] The suit against the officer in an individual capacity "seeks to impose personal liability upon a government official for actions he takes under color of state law" and seeks to recover judgment against the assets of the individual.[224] Cases against officers in an individual capacity have become important to the vindication of federal rights and it has been noted that "if injured individuals are to receive compensation, and if there is to be deterrence of wrongdoing through federal court liability, it frequently must take the form of suits against the individual officers."[225]

B. *EX PARTE YOUNG* SUITS FOR INJUNCTIVE RELIEF

Under *Ex parte Young*,[226] an aggrieved individual is permitted to seek injunctive relief in federal court to prevent a state officer from taking an allegedly unconstitutional action under the theory that attempting to enforce an unconstitutional act "is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity."[227] Because the officer in this circumstance would come into conflict with the Constitution, the Court reasoned that the officer is stripped of the vestige of official capacity and is "subjected . . . to the consequences of his individual conduct."[228] Injunctive relief against an officer under *Ex parte Young* is permissible, even though compliance with the injunction will affect the implementation of state policy.[229] In addition,

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[223] *See* Kentucky v. Graham, 473 U.S. 159, 165-67 (1985) (emphasizing the differences between suits against an officer in an official capacity and suits against an officer in an individual capacity).

[224] *Id.* at 165. In contrast, a suit against the officer in an official capacity seeks to obtain the judgment from the state treasury and is the functional equivalent of having the State be the real party in interest. *Id.*

[225] CHEMIRINSKY, supra note 32, at 494.

[226] 209 U.S. 123 (1908).

[227] *Id.* at 159-60.

[228] *Id.*

[229] *See, e.g.*, Edelman v. Jordan, 415 U.S. 651, 666-68 (1974) (concluding that an ancillary effect on the State treasury is permissible, explaining that "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature").

although the Eleventh Amendment generally prohibits an individual from obtaining money damages from the State, the Court has distinguished between prospective and retroactive judgments in actions under *Ex parte Young*,[230] and has permitted judgments to come from the state treasury where it is "the necessary result of compliance with decrees which by their terms were prospective in nature. . . ."[231] The Court in *Garrett* explicitly acknowledged the availability of this type of suit.[232]

Under Title I of the ADA, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual" in the course of that individual's employment, including in the hiring, training, promotion, and compensation.[233] For the purposes of the statute, an "employer" is "a person engaged in an industry affecting commerce . . . and *any agent* of such person."[234] Thus, because agents of the State may be also be sued under the Act, President of a State university or the Administrator of a State agency may presumably be defendants in an *Ex parte Young* action.

C. SUITS BY THE UNITED STATES

The majority in *Garrett* explicitly provided for the possibility of a suit by the United States as a means to vindicate rights of the disabled under Title I of the ADA.[235] Suits by the United States have never been barred under Eleventh Amendment doctrine and the Court has held that nothing in the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States.[236] The Disability Rights Section of the Civil Rights Division of

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[230] *Id.* at 666-68 (differentiating between prospective and retroactive relief available *Ex parte Young*).

[231] *Id.*

[232] Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001) ("Those standards can be enforced by . . . as well as by private individuals in actions for injunctive relief under *Ex parte Young*."). *Id.*

[233] 42 U.S.C. § 12112(a) (1995).

[234] 42 U.S.C. § 12111(5)(A) (1995). Additionally, for an employer to be covered, that employer must have "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. . . ." *Id.*

[235] *Garrett*, 531 U.S. at 374 n.9 ("Those standards can be enforced by the United States in actions for money damages. . . .").

[236] United States v. Mississippi, 380 U.S. 128, 140-41 (1965) (referring to the Eleventh Amendment, concluding that "nothing in this or any other provision of the Constitution pre-

the United States Department of Justice ("DOJ") is charged with enforcing the ADA.[237] The Civil Rights Division will generally not address issues unless they are of national importance. As a discreet division of DOJ, the Disability Rights Section, then will require a cause to be of great magnitude and a violation with far-reaching ramifications. Thus, unless violations of Title I by States and state agencies are deemed a major nationwide priority, it is unlikely that the possibility of a suit filed by the United States will successfully vindicate the rights of aggrieved state employees.

D. SUITS AGAINST A LOCAL GOVERNMENT OR MUNICIPALITY

Because the Eleventh Amendment does not affect the ability to sue a municipal or other local government,[238] such a suit brought for violations of Title I of the ADA is not affected by the decision in *Garrett*. In the majority opinion, Chief Justice Rehnquist recognized that under the Fourteenth Amendment, local and municipal governments are considered state actors, but concluded that it was senseless to inquire about the constitutional violations of such groups because the Eleventh Amendment does not extend to local or municipal governments.[239] Municipal and local governments, the Court maintained, "are subject to private claims for damages under the ADA without Congress ever having to rely on § 5 of the Fourteenth Amendment to render them so."[240] According to the Court, "[i]t would make no sense to consider constitutional violations on their part, as well as by the States themselves, when only the States are the beneficiaries of the

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vents or has ever been seriously supposed to prevent a State's being sued by the United States"); United States v. Texas, 143 U.S. 621, 645-46 (1892) (differentiating a suit brought by an individual and a suit brought by the federal government and concluding that to permit a suit by the United States against a State "does no violence to the inherent nature of sovereignty").

[237] Civil Rights Division Activities and Programs, *available at* http://www.usdoj.gov/crt/activity.html (last visited on Jan. 23, 2002).

[238] Workman v. New York, 179 U.S. 552, 565 (1900) (concluding that for the purposes of the Eleventh Amendment, "municipal corporations, like individuals, may be sued"); Lincoln County v. Luning, 133 U.S. 529, 530-31 (1890) (authorizing suits by a private individual against a county because "[t]he Eleventh Amendment limits the jurisdiction only as to suits against a State" and noting that a county, city, town or "other municipal corporation" is only remotely "a part of the State."). *Id.*

[239] *Garrett*, 531 U.S. at 368-69.

[240] *Id.* at 369.

Eleventh Amendment."[241] Thus, local and municipal governments are unaffected by the Eleventh Amendment and may thus be sued for violations of Title I of the ADA.

E. AN ACTION UNDER SECTION 1983

Moreover, the possibility of a suit in federal court pursuant to section 1983[242] still remains available as an option to a private individual deprived of federal constitutional or statutory rights. Under section 1983, a plaintiff must demonstrate that the state official acted "under color of state law."[243] An individual acts under color of state law if the official is acting pursuant to his authority granted by state law.[244] Section 1983 provides a federal remedy against state local officers for violations of federal law and does not require the plaintiff to avail herself of state court remedies first.[245] Like a suit under *Ex parte Young*, this option would implicate state officials such as the President of a State university or the Administrator of a State agency. These state officials, acting pursuant to the state law that created their position, may be sued under section 1983 for violations of the ADA.

VI. CONCLUSION

At first glance, *Board of Trustees of the University of Alabama v. Garrett* appears to provide a great deal of protection to the States as employers and prevent disabled state employees from vindicating their rights secured by the ADA. As a

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[241] *Id.*

[242] 42 U.S.C. § 1983 (2001). Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any *State* or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

[243] *See id.*

[244] Monroe v. Pape, 365 U.S. 167, 184-87 (1961).

[245] *See id.* at 183.

practical matter, however, there are still various ways by which an aggrieved employee can vindicate her rights that are protected by the Americans with Disabilities Act in federal court.