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The Americans with Disabilities Act: The Implications of the Supreme Court's Decision in *Board of Trustees of the University of Alabama v. Garrett.*

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Table of Contents

Synopsis:

In 2001, the Supreme Court ruled in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), that Congress did not validly abrogate states' Eleventh Amendment immunity against damages for violating Title I of the Americans with Disabilities Act. In effect, this meant that plaintiffs who had been subject to discrimination in employment by state governments could no longer bring suits seeking money damages against the states.

The case has several important implications. First, the rights of many people with disabilities have been severely cut back. If states cannot be found liable for money damages, they cannot be held accountable for employment discrimination on the basis of disability. Second, the Court took more power for itself and at the same time, reduced the power of Congress in the area of civil rights law. And lastly, the Court discounted the long history of discrimination against people with disabilities.

Unfortunately, the Court made it very difficult for Congress to go back and pass legislation that would hold states accountable in employment discrimination. The Court said that it would not accept evidence of discrimination by local or county governments, only states. It indicated that historical information was not valid. And it disparaged the information gathered by a Task Force specifically set up by Congress because of its ability to gather information on discrimination. Congress could still pass some kind of legislation at least indicating its understanding and displeasure with the Court's usurping its authority. But the Court has made it very difficult for Congress to actually get back its power to pass civil rights legislation that holds states accountable.

Background and Overview

In February 2001, the Supreme Court decided the case of *Board of Trustees of the University of Alabama v. Garrett*, holding that Congress did not properly exercise its power under Section 5 of the Fourteenth Amendment to pass legislation holding states accountable for damages if they discriminated in employment against people with disabilities. This decision was important for two reasons: 1) it continued the Supreme Court's agenda of curtailing Congressional power to enact civil rights legislation and 2) the Court's reasoning called into question the factual underpinnings of the Americans with Disabilities Act (ADA) and the history of discrimination against individuals with disabilities.

Some may argue that the immediate practical effect of the decision is minimal. Among other reasons, the Court was only ruling on Title I of the ADA, which covers employment. Moreover, the Court took pains to note in a footnote that individuals could still use a very technical legal doctrine to bring an employment discrimination case which would stop the state from continuing to discriminate, but not allow the person with a disability to get damages. This doctrine is called Ex Parte Young, and it means that an individual with a disability can bring the

action against a state official in his or her official capacity. Because the suit is brought against the individual and not the state, the rule of sovereign immunity does not apply. That rule says that you cannot sue a state for damages in federal court. The rule can only be overcome by Congress if it is acting under one of its specific powers. *Garrett* looked at whether Congress could overcome the rule of sovereign immunity using Section 5 of the Fourteenth Amendment, which gives Congress the power to enforce equal protection of the laws or prevent discrimination.[1]

It may also be possible to bring suit under the ADA in state court under the theory that the state has waived its immunity by consenting to suit under similar state anti-discrimination laws. Finally, Section 504 of the Rehabilitation Act is still available as a cause of action for employment discrimination claims against states and provides for some damages. Congress passed Section 504 pursuant to its authority under the Spending Clause, which gives Congress the right to set conditions for spending federal money.[2]

On the other hand, the *Garrett* decision has ongoing repercussion. The Supreme Court recently granted certiorari to decide whether Congress had the authority to abrogate immunity under Title II of the ADA . Some defendants have challenged use of the *Ex Parte Young* doctrine in ADA cases. They have raised claims under *Idaho v. Coeur d'Alene Tribe of Idaho*.[3] In that case, the Court refused to permit an Indian Tribe's claims against state officials for ownership of state-held lands and waters. Part of the opinion, which did not have a majority, suggested that *Ex Parte Young* doctrine was not applicable because of the special state interests at issue. This argument has been raised in cases involving disability based discrimination.[4] Thus far, the courts have rejected the argument, but there may be more cases in the future as this legal doctrine of state sovereignty continues to develop. Defendants have also raised challenges to using *Ex Parte Young* on the grounds that Congress did not intend to authorize *Ex Parte Young* actions against state officials because the duties under the act are not the sort performed by individual state officials, thus, precluding use of the doctrine.[5] In addition, defendants have argued that the ADA's language focusing on "public entities" precludes suits against public officials because an official is not an entity. These claims have also generally been rejected.[6] There also have been several appellate cases challenging Congressional Spending Clause authority under Section 504 and this issue also may reach the Supreme Court.[7] The Spending Clause of the Constitution is another specific delegation of Congressional power and gives Congress the ability to pass some statutes. Should the Court continue on its current course of changing the balance of power between Congress and the Courts and strike down Section 504 and Congress's spending authority, there would be a significant curtailment of civil rights claims on behalf of individuals with disabilities.

The *Garrett* decision also has enormous significance because the Court failed to recognize and minimized the historical and current experience of discrimination against individuals with disabilities that is the cornerstone of all federal policy efforts in the disability

field. Such a blatant disregard for history and social context and for the unique role of Congress must be addressed.

I. Prior Supreme Court Precedent:

The *Garrett* decision and the legislative history of the Americans with Disabilities Act is best understood in the context of Supreme Court precedent at the time the Act was passed. At the time, the Court had held that Congress had the power to pass legislation like the ADA and hold states accountable for damages under its Commerce Clause powers.[8] Under the Commerce Clause, Congress can pass legislation regarding interstate commerce and since employment affects commerce, Title I was seen as valid legislation and not much thought was put into establishing an alternative theory of Congressional power, like Section 5 of the Fourteenth Amendment.

Then the Court changed course and decided that the Commerce Clause could not be the basis of Congressional action which would affect states by making them liable for damages.[9] As a result plaintiffs under several statutes now had to argue that Congress had the power to pass legislation under Section 5 of the Fourteenth Amendment. In several cases prior to Garrett, the Supreme Court struck down laws as not meeting its stringent tests under the Fourteenth Amendment. These tests required that Congress establish a record of discrimination by states and that the resulting legislation was "congruent and proportional" to the discrimination that Congress found. This means that the scope of the remedy Congress imposed had to correspond to the record that it compiled. So if the record was thin, then the remedy could not be very much. The Court then made it very difficult to establish a record by stating that most information did not count. Accordingly, the remedy is similarly narrowed, so much so as to strike down most statutes.

For example, in *Kimel v. Florida Board of Regents*, *et al*.,[10] the Court addressed whether Congress had the authority to hold states accountable for damages for age discrimination under its power pursuant to Section 5 of the Fourteenth Amendment. The Court found that Congress lacked such authority because "the substantive requirements the ADEA [Age Discrimination in Employment Act] imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[11] The Court noted that age discrimination does not receive heightened scrutiny under the Section 5 or the Equal Protection Clause because "[O]lder persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'"[12]

The Court characterized the record compiled by Congress as "isolated sentences clipped from floor debates and legislative reports."[13] It then dismissed a 1966 report on age discrimination in California state employment, stating that the report did not establish unconstitutional conduct and could not support legislation affecting all of the states. *Id.* Finally, the Court rejected the United States' argument relying on findings of unconstitutional age

discrimination by the private sector. The Court expressed doubts about whether Congress could extrapolate findings from the private sector to the states, but in this case it was sufficient to note that Congress failed to identify a pattern of age discrimination by the states. *Id.*

Shortly after *Kimel* was decided, the Supreme Court turned to the Americans With Disabilities Act. On April 17, 2000, four months after the Court decided *Kimel*, it granted certiorari in *Garrett*. While some were very pessimistic after the *Kimel* decision, others pointed to the extensive legislative record before Congress of discrimination based on disability.[14]

II. The *Garrett* Decision:

Ms. Garrett and Mr. Ash filed separate lawsuits against the State of Alabama in federal district court alleging violations of the Americans with Disabilities Act. The District Court ruled on both cases in a single opinion holding that Congress did not have the power or authority to hold states accountable for damages under the ADA (also known as abrogating state sovereign immunity). The cases were consolidated on appeal to the Eleventh Circuit, which ruled in favor of Garrett and Ash. The State of Alabama sought review in the Supreme Court and it was granted.

A. The Majority Opinion

1. The facts

The majority opinion, written by Justice Rehnquist (joined by Justices O'Connor, Scalia, Kennedy, and Thomas), begins with a very brief overview of the ADA, the facts, and the procedural history of the case[15]. The Court described Patricia Garrett's facts as follows: Ms. Garrett is a registered nurse, who was employed as Director of Nursing, OB/Gyn/Neonatal Services, for the University of Alabama Birmingham Hospital. Ms. Garrett was diagnosed with breast cancer and took a leave of absence for treatment. Upon returning to work, her supervisor informed her that she would have to relinquish her director position. Ms. Garrett applied for and received a transfer to a lower paying position as a nurse manager.

It similarly provided a brief factual summation for Milton Ash: Mr. Ash was employed as a security officer for the Alabama Department of Youth Services. Mr. Ash informed the Department that he had asthma and based on his doctor's recommendation, he asked for a modification of duties to minimize exposure. He later was diagnosed with sleep apnea and asked for assignment to a daytime shift. All of his requests were denied and after filing a charge, his performance evaluations were lower than those he had received previously.

The brief filed on behalf of Ms. Garrett and Mr. Ash included much more evidence of the prejudice and discrimination that they experienced because of their disabilities. For example, Ms. Garrett's leave of absence was caused by constant harassment from her supervisor to take

leave or transfer to another job. Her supervisor went so far as to post Ms. Garrett's job as "being recruited" and solicited one of her subordinates to assume her duties while she was transferred to a temporary position in a satellite hospital. A fellow employee told Garrett that her supervisor did not like "sick people" and had a history of getting rid of them. The stress of the adverse actions by her supervisors caused Ms. Garrett to take leave. Ms. Garrett returned from leave and performed her duties. But two weeks after her return, her supervisor told her that her options were to quit, accept a demotion to the nursing pool, or be discharged. Ms. Garrett found another position in a convalescent home and transferred to that job, at a pay loss of $13,000.

Mr. Ash has severe asthma and is vulnerable to attacks that require hospitalization. Mr. Ash sought two accommodations. He requested that: 1) the agency enforce its no smoking rule in the Gatehouse, where he was confined with other employees who smoked in violation of the rule; and 2) the agency repair the vehicles that he was required to drive so they did not emit carbon monoxide into the passenger compartment. His requests were denied and his health deteriorated. His supervisor suggested that he quit and just draw disability. Mr. Ash was then diagnosed with sleep apnea and requested a transfer to the day shift. The agency agreed that it would do so when a vacancy became available on that shift. After Mr. Ash filed his EEOC charge, two openings occurred on the day shift and the agency transferred two officers junior to Ash who had not requested medical transfers.

The Court's clipped rendition of the facts and omission of key allegations indicating prejudice and ill will toward Garrett and Ash on the basis of their disabilities portends the Court's later dismissal of disability based discrimination in general.

2. The Supreme Court's Reasoning

The Court began with a review of its recent caselaw in this area of the law. Two critical principles were reiterated: 1) "it is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees," and 2) "§ 5 legislation reaching beyond the scope of § 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[16]

Accordingly, the Court began by defining the constitutional right at issue. It extensively discussed *City of Cleburne v. Cleburne Living Center, Inc*.,[17] one of the most important prior decisions addressing a claim for disability discrimination under the Fourteenth Amendment.

Under the Fourteenth Amendment, citizens are entitled to equal protection under the laws. Although it is not written in the Amendment, the Supreme Court has stated that certain groups of individuals get more protection because they have been subjected to a history of discrimination. So when a case involving race comes before the Supreme Court, the Court will look at the policy or statute in question with "strict scrutiny" because race is generally not relevant. This means that any distinction based on race is suspect and the defendant has a heavy

burden. Gender receives intermediate scrutiny or an intermediate level of review because there is a history of discrimination against women and gender is generally not relevant, but the Court recognizes that there are some situations where gender may be relevant. In *Cleburne*, plaintiffs were arguing that they should get a heightened standard of review too because of the history of discrimination against people with disabilities, instead of rational review which is accorded the lowest level of scrutiny because distinctions are seen as generally relevant. With rational review, defendants have a very low burden and only have to demonstrate a reason for the policy.

In *Cleburne*, the Supreme Court said that disability should be given only rational review, but the standard of review actually used in the case is often characterized as rational-plus or rational with teeth, recognizing that the Court closely scrutinized each rationale advanced by the defendants in that case and did not merely accept any reasons at face value. It was clear that the *Cleburne* Court was keenly aware that most of the defendants' reasons for insisting on a special use permit were based on an underlying prejudice against individuals with mental retardation.

Garrett and Ash had argued in their brief that *Cleburne* supports the principle that the Equal Protection Clause forbids conduct motivated by negative attitudes or vague fears and focused much of their brief on numerous reports and citations in the record showing that these attitudes and fears led to adverse actions against individuals with disabilities.

The Supreme Court responded by reading *Cleburne* very narrowly and stating that it was not enough to show fear and animus, a plaintiff also had to show that there was no rational reason that could support the decision. Thus, the Court rendered much of the evidence that Garrett and Ash relied upon as useless as it was in the form of reports and personal accounts that did not contain additional evidence proving that no rational reason could have possibly existed for the actions at issue. Of course, as the dissent points out later, Congress does not amass evidence in such a manner.

The Court's crabbed reading of *Cleburne* foreshadows the rest of the opinion, which continues to limit the evidence that Congress can consider. Given the breadth of the legislative record here, the Court had to go further than earlier decisions and reject most of the evidence. It did so by dictating in great detail to Congress about how it was to gather information to survive this Court's scrutiny and rejecting the legislative branches typical practices. The breadth of these instructions and their lack of awareness of the workings of a co-equal branch of government marks a significant turning point in constitutional law and a considerable shift in the power of these institutions.

First, the Court held that Congress could not rely on a record of unconstitutional conduct by local governments, such as cities and counties. The Court did not articulate any reason that states would be expected to behave differently than local governments, but instead relied upon the formalistic distinction that local entities are not covered by the Eleventh Amendment.

The Court acknowledged that Congress made general findings of discrimination and stated that the record supported such general findings. However, the Court insisted on a formalistic record of state discrimination, without giving any indication of why individuals in state government would behave differently than their private counterparts.

The Court concluded that there were only a half dozen examples from the record that did involve states. In a significant footnote, the Court acknowledged the influence of the eugenics movement in some states, which instituted sterilization of people with disabilities. However, the Court noted that there is no evidence that these activities continued in 1990, when the ADA was passed. This footnote suggests that Congress may not rely on historical information to meet the Supreme Court's standards. The Court then held that the small number of incidents in the context of millions of Americans with Disabilities indicates a lack of a pattern of discrimination.

Finally, and perhaps most troubling, the Court dismissed the volumes of information gathered by the Task Force on the Rights and Empowerment of Americans With Disabilities. The Court characterized the information presented by the Task Force as "unexamined, anecdotal accounts of 'adverse, disparate treatment by state officials.'"[18] Moreover, the Court noted that these accounts were submitted to the Task Force and not directly to Congress. In a related footnote, the Court stated that these anecdotes primarily involved discrimination in public services and accommodations, not employment.

The Court failed to consider the major role of the Task Force in the development of the Americans with Disabilities Act. The Task Force was appointed by Congress to conduct hearings nationwide and report on its findings. Justin Dart and his colleagues did an enormous amount of work gathering information nationally, including holding 63 public hearings and submitting a voluminous documentary record of personal accounts of discrimination based on disability. Given the difficulty and expense for some individuals with disabilities to travel to Washington D.C., it was an important source of national information. Moreover, Mr. Dart and others working for the Task Force had national reputations in the disability field and were able to reach a large section of the community of individuals with disabilities, thus they had some unique advantages in gathering this information. The Court did not even consider whether such Task Forces had institutional value to Congress and instead, appeared to be telling Congress that it may not use such means to collect evidence that will survive this Court's scrutiny.

After reviewing the legislative record, the Court concluded by noting that even if there was a pattern of employment discrimination by states, the ADA was not a congruent and proportional remedy. The "congruence and proportionality" doctrine, which is not in the Fourteenth Amendment itself, but wholly created by the court, means that if the Court discounts the record, it can then find that any remedy goes too far because the remedy is now linked to the Court's impressions of the record. In *Garrett*, the Court held that the ADA's requirements of accessible facilities, reasonable accommodations, and standards that do not disparately affect individuals with disabilities exceeded constitutional requirements and were not justified in light

of the lack of evidence of state conduct. The Court contrasted the ADA's record of state action with that of the Voting Rights Act and found that in the latter, Congress had documented a pattern of activities by states.

In analyzing *Garrett*, there are several theories that can be advanced to explain the Court's decision. These include the notion of separation of powers and the Court's desire to assert its domination over Congress.[19] It can also be argued that the Court's formalistic requirement of evidence of state activity reflects the Court's belief in federalism or state sovereignty and its desire to protect the states from intrusion by Congress.[20] Or, the *Garrett* decision may have been driven by the Court's concerns about employment discrimination cases and the burdens of legislation on employers or more generally, been motivated by a general antipathy to antidiscrimination legislation.[21] However, the Court's narrow interpretation of *Cleburne*, its complete dismissal of the Congressional record here, and its characterization of the Task Force's extensive collection of personal accounts indicates a Court that is reluctant to recognize the historical, societal, and current discrimination animated by fear and prejudice against people with disabilities and a Court that is substituting its judgment for that of Congress in enacting civil rights legislation.

B. The Concurrence

Justice O'Connor issued a concurring opinion, which was joined by Justice Kennedy. While ultimately agreeing with the majority, the concurrence does take pains to note that the "Americans with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society."[22]

The concurrence seeks to differentiate the state from its citizenry. The opinion suggests that it is not permissible to hold states in violation of the Constitution on the "assumption that they embody the misconceived or malicious perceptions of some of their citizens."[23] Moreover, the opinion characterizes the historical prejudice against people with disabilities as the function of "insensitivity," "indifference" or "insecurity" and notes that states should not be held liable for failure to revise policies that are now seen to be incorrect under a new understanding of proper policy. Finally, the opinion reasons that if states were engaged in employment discrimination, one would expect to find significant caselaw and discussion of constitutional violations by states.

The opinion's continued emphasis on a history of "benign" discrimination is belied by the eugenics movement discussed by the majority. The opinion also cites to no evidence or reasoning which would justify differentiating a state from its citizenry. While this view does reflect an emphasis and reverence for states' rights, it is worth noting that these rights come at the expense of individuals with disabilities and necessitated a minimization of the discrimination directed against such individuals.

C. The Dissent

The dissent begins by chastising the majority for "reviewing the Congressional record as if it were an administrative agency record...."[24] It disagrees unequivocally with the majority's conclusion that the evidence of unconstitutional activity was "minimal," and instead, characterizes it as "vast." The dissent also points out that Congress had forty years of experience over which it contemplated and acted upon similar legislation.

The opinion then notes that the powerful evidence of discrimination was found to permeate society and state agencies are part of the same larger society. The dissent finds no reason to believe that states are immune from Congress's findings of "stereotypical assumptions" and "purposeful unequal treatment."[25] Nor is there a distinction between local and state governments, which are both subject to the Equal Protection Clause.

The dissent notes that it found roughly 300 examples of discrimination by state agencies in the record. A complete list of such actions was provided as an appendix to the decision. The dissent also disagrees with the majority's characterization of the Task Force record, noting that it did not contain a mere "half a dozen" instances of discrimination," but hundreds of instances of adverse treatment by state officials.

Importantly, the opinion criticizes some of the majority's attempts to dictate the type of evidence that Congress may consider. The dissent acknowledges that those who presented evidence of discrimination to Congress did not provide independent evidence sufficient to make a judicial determination. However, the dissent notes that:

> A legislature is not a court of law. And Congress, unlike courts, must, and does, routinely draw general conclusions—for example, of likely motive or of likely relationship to legitimate need—from anecdotal and opinion-based evidence of this kind, particularly when the evidence lacks strong refutation ...[26]

The dissent argues that the majority's demands regarding the evidentiary record are unprecedented and the Court has never required Congress to make specific findings regarding the state, or to break down the evidence by category.[27]

However, even by the majority's standards, the dissent concludes that Congress found sufficient evidence of unjustifiable discrimination against people with disabilities. The dissent cited *Cleburne* for its conclusion that adverse treatment that rests upon negative attitudes or fear is discrimination. The dissent then found abundant evidence in the record of actions motivated by such attitudes or fear. Unlike the majority, the dissent gave credence to all sources of information, including reports submitted and considered by Congress which showed patterns of discrimination by states.

After setting forth the doctrine of judicial restraint, the dissent turned to the institutional differences between courts and Congress that render Congress more capable of determining the need for Section 5 legislation and the proper remedy. The dissent notes that members of Congress can directly obtain information from constituents and that such members are elected officials. Treating Congress as a lower court and subjecting it to judicial standards violates the underlying principle for judicial restraint.

The dissent then discusses whether the ADA is a congruent and proportional response to the problem of discrimination against people with disabilities. The dissent finds that reasonable accommodation falls within the scope of permissible remedies and that proper deference to Congress would uphold the ADA as proper legislation under Section 5 of the Fourteenth Amendment.

The dissent concludes by characterizing the majority's treatment of Congress as reminiscent of the now discredited line of cases imposing limits on Congressional Commerce Clause power. The dissent notes that the Civil War Amendments were specifically passed to intrude on state sovereignty, so the Court's insistence on federalism is at odds with the Constitution. Moreover, since Congress is prevented from passing such statutes as the ADA, it will be more likely to rely on more draconian measures which may be more harmful to states' interests and federalism.

The dissent sums up its arguments succinctly, "the Court, through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress."[28]

III. The Post-*Garrett* Caselaw

A. Congressional Power to Hold States Accountable Under Section 5 of the Fourteenth Amendment with respect to Title II of the ADA

Since *Garrett,* at least seven appellate courts have issued decisions deciding whether Congress has the authority to abrogate states' immunity to suits brought under Title II pursuant to its authority under Section 5 of the Fourteenth Amendment. To date, no consensus has emerged on the question and the Supreme Court recently granted certiorari in *Hason v. Medical Board of California*[29] to resolve the split in the circuits.

There are currently three possibilities: 1) the ADA had a sufficient legislative record to support Title II and damage actions against states in its entirety; 2) Congress did not amass a sufficient record to support damage actions against states under Title II and thus, all of Title II is invalid in this respect; and 3) the legislative record is sufficient to support some aspects of Title II. This may include areas of the law that implicate fundamental rights such as voting and access

to the courts. It may also include other areas of constitutional rights such as the rights of prisoners to humane treatment.

If the Supreme Court finds that Title II is valid Section 5 legislation in its entirety, then the *Garrett* decision will be less troubling and there may be some guidance given as to how Congress can go back and establish a sufficient record for Title I. If the Court strikes down Title II as a whole, then *Garrett* becomes even more important as the first indication of a dangerous trend that significantly curtails the civil rights of individuals with disabilities. This will indicate a critical need for public education and an even greater emphasis on judicial nominations, particularly those to the Supreme Court. It will also lead to additional judicial challenges to other Congressional sources of authority in an effort to undermine Section 504 and other statutes. So, for example, there will be additional cases filed challenging Congress's authority under the Spending Clause to pass Section 504 and hold states liable under that statute.

If the Court splits the baby, so to speak, and rules that some parts of Title II are valid legislation and others are not, there will be a great deal of litigation regarding each part of Title II and alternative sources of power such as the Spending Clause for each area of the law where Title II is no longer valid. Moreover, in this scenario, there may be some guidance given as to whether Congress can go back and create a sufficient record for the areas of Title II that are found wanting. If the decision focuses on the nature of the right (i.e. fundamental rights, prisoners's rights, etc.) and not the extent of the record, then it is less likely that Congress can go back and pass legislation that will survive judicial review.

The circuit court opinions rendered on this issue give further guidance and detail on the possible outcomes of *Hason* in the Supreme Court. The Court agreed to review the Ninth Circuit's opinion in *Hason.*[30] In that case, the Ninth Circuit held unequivocally that Title II was valid Section 5 legislation. The court relied upon its decisions pre-*Garrett* that so held, and noted that the Supreme Court had made clear in *Garrett* that it was not deciding the Title II issue. Dr. Hason had sued the Medical Board of California on the grounds that it had denied him a license because of his mental disability and history of having such a disability.

In contrast, three circuit courts have held that Congress did not have the authority to hold states accountable under Title II. In *Reickenbacker v. Foster*,[31] the Fifth Circuit re-examined its precedent on the issue in light of *Garrett*, which it characterized as tightening the law. Applying the reasoning set forth in *Garrett*, the court reversed its prior decision and unequivocally held that Congress did not have the power to allow damage actions against states under the statute.

Importantly, the Fifth Circuit added its own interpretation to the Supreme Court's requirement that Congress make findings of unconstitutional discrimination. The Fifth Circuit argued that the appendix to Justice Breyer's dissent in *Garrett*, which was offered to show the extensive record of discrimination by the states, is actually more helpful to states than plaintiffs. The court noted:

> "Inaccessible" appears over 250 times in Justice Breyer's list of "roughly 300 examples of discrimination by state governments." The plaintiffs cite to this list as providing life to their claim that there are sufficient Congressional findings of discrimination in public accommodation. In fact, this list is fatal to the plaintiffs' case, because it catalogs presumptively constitutional state action.[32]

The court then turned to the "proportional and congruent" test and held that Title II far exceeded constitutional boundaries and failed to meet that test.[33]

The Tenth Circuit also has held that Congress did not validly abrogate state sovereign immunity with respect to Title II. In *Thompson v. Colorado*,[34] the court applied the tests set forth in *Garrett* and concluded that Congress did not identify a history and pattern of unconstitutional discrimination by the states against individuals with disabilities, nor could the court find extensive caselaw on constitutional violations. Given its finding of minimal evidence, the court then held that Title II cannot be considered preventive or remedial legislation and "the accommodation requirement appears to be an attempt to prescribe a new federal standard for the treatment of the disabled rather than an attempt to combat unconstitutional discrimination."[35]

The Fourth Circuit in *Wessel v. Glendening*,[36] conducted a similar analysis and also concluded that Title II exceeded Congressional authority to abrogate under the Fourteenth Amendment. The court concluded that it must evaluate Title II as a whole given the broad statutory language. It then reviewed all of the evidence before Congress and concluded that much of it involved local, not state entities. The court also found that several of the examples in the record were anecdotal and did not indicate irrational, unconstitutional conduct, including inaccessible polling places and other state activities. Based on its dismissal of the evidence, the Court held that Congress had not established a sufficient record to allow abrogation under Section 5 of the Fourteenth Amendment.

In addition to these unequivocal decisions, several courts have held that Title II validly abrogates a state's immunity under certain circumstances. In *Garcia v. SUNY Health Services Center of Brooklyn*,[37] the court found that several aspects of Title II exceed Congressional authority, particularly the requirement that public entities make reasonable modifications. Although the court found that Title II in its entirety exceeds Congressional authority, it did not end its inquiry there. Instead, it held that Title II need only comport with Section 5 authority with respect to damage actions against states. For that reason, the court can restrict the availability of Title II monetary suits against states in a manner that is consistent with Congress's Section 5 authority. To do so, the court "require[d] plaintiffs bringing such suits to establish that the Title II violation was motivated by discriminatory animus or ill will based on plaintiffs' disability."[38] Recognizing that direct proof of such animus is often lacking, the court allowed plaintiffs to rely on a burden shifting technique or motivating factor analysis. *Id.*

The Sixth Circuit added yet another perspective on the question of whether Congress had authority to abrogate immunity under Section 5. In *Popovich v. Cuyahoga County Court of Common Pleas*,[39] the court, in a deeply divided 7-6 decision, looked at the ADA as applied to the particular case at hand and held that due process, rather than equal protection violations were the unconstitutional conduct needed to justify abrogation. Because the plaintiff alleged that failure to accommodate his hearing impairment impaired his ability to meaningfully participate in a child custody case, he was able to state a claim relying on due process violations to support abrogation and the case was remanded for a new trial on those grounds.

Finally, the First Circuit, in *Kiman v New Hampshire Department of Correction*,[40] issued an opinion which was later vacated by the en banc court and held in abeyance until *Hason* is decided.[41] It is instructional, however, to look at the original opinion because the court took what it described as a "middle path" similar to that articulated in *Garcia* and *Popovich*. The court held that Congress acted within its powers of abrogation "at least as that Title is applied to cases in which the court identifies a constitutional violation by the state."[42] Since Kiman's complaint of mistreatment by officers alleged facts that if true, showed a violation of the Eighth Amendment prohibition on cruel and unusual punishment, then Eleventh Amendment immunity did not apply. The court declined to decide whether Title II as a whole was a valid exercise of Congressional authority or whether Congress's power "extended to some of Title II's nonconstitutional rules but not to others."[43]

The Supreme Court's decision in *Hason* will give some guidance on the breadth and extent of *Garrett* and the Court's federalism jurisprudence. Regardless of the decision, however, it is prudent to begin considering alternatives to Section 5 power. As previously noted, the Supreme Court has already held that Congressional authority under the Commerce Clause cannot be used to abrogate Eleventh Amendment immunity. *See Seminole Tribe*. If the Supreme Court extends its reasoning in *Garrett* to Title II so that Congress cannot abrogate with respect to Section 5, the only remaining source of Congressional power for damage claims against states is the Spending Clause.

B. Congressional Authority Under the Spending Clause

In *South Dakota v. Dole*,[44] the majority opinion discusses the Court's Spending Clause powers while Justice O'Connor's dissent raises some issues which may become increasingly important if the Court takes new cases in this area. South Dakota had challenged the constitutionality of a statute which directed the Secretary of Transportation to withhold a percentage of federal highway funds from a state if the legal drinking age was under twenty one years of age.

The Court stated that the exercise of such power must be in pursuit of "the general welfare," and the Court gives substantial deference to Congress in answering this question. Second, Congress must condition the funds "unambiguously...., enabl[ing] the States to exercise

their choice knowingly, cognizant of the consequences of their participation."[45] Third, conditions on federal grants may be illegitimate if they are unrelated to the federal interest in the particular project or program. Finally, other constitutional provisions may prevent the conditioning of federal funds. The Court interpreted this last requirement as a prohibition on Congress conditioning grants on unconstitutional conduct such as invidious discrimination or cruel and unusual punishment. Although it did not single it out as a separate requirement, the Court also considered whether the financial inducement was so coercive as to be compulsive.

The Court rejected South Dakota's arguments as to each of these factors, finding that the general welfare was clearly implicated by traffic safety and Congress found that the differing drinking age in the states provided an incentive for young persons to cross state lines to get access to alcohol, creating a dangerous situation. The conditions are clearly stated by Congress in the Act. And the condition imposed is directly related to one of the main purposes for the funds, safe interstate travel. In a significant footnote, the Court noted that its prior cases have not required it to define the boundaries of "germaneness" and "relatedness," meaning it has not had to decide just how close a relationship must exist between the condition and the purpose of the money. The Court expressly declined Amici's invitation to do so in this case. The Court was not going to establish that a condition of federal funds is legitimate only if it relates directly to the purpose of the expenditure in this particular case.[46]

In her dissent, Justice O'Connor focused on the issue of "relatedness." She noted that if the purpose of the statute is to deter drunk driving, it is both over and under inclusive because it is likely to affect teens who are not going to drive on the interstate and teenagers are a small part of the drunk driving problem nationally. She further stated:

> When Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one. But it is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety.[47]

Justice O'Connor would seek to distinguish whether the spending requirement is a condition of the grant or is in fact an attempt to regulate other areas of activity. She noted that if the Spending power is only limited by Congress's notion of general welfare, then given the vast resources of the federal government, Congress would have unrestricted power. She would strike down the statute because in her view, it had nothing to do with how the appropriated funds are expended and instead, regulates who shall be able to drink liquor.

Since *Dole*, there has not been much guidance from the Supreme Court on Congressional Spending Clause power, but the issue is being litigated in the appellate courts.[48] Several circuit courts have ruled on the constitutionality of Section 504. These cases raise all of the issues discussed above, including clear notice to states, coercion and relatedness.[49] For example, the

Eighth Circuit, sitting en banc, held that Section 504 was a valid exercise of Congress's spending power.[50] The en banc court held that 504's mandate was not too broad because Arkansas could avoid the effect of the statute on the Department of Education by eschewing funds for that particular department. The court interpreted the Rehabilitation Act as applying to all of the activities of the particular agency, but not to all of the activities and departments of the state. The court pointed out that the sacrifice of funds would only be 12 percent of the state education budget, which may be politically painful, but still leaves the state with a choice. Moreover, the court held that the language of the Rehabilitation Act's waiver provision provided clear notice to the state of Congressional intent to require a waiver of immunity as a condition for funding.

The dissent strongly disagreed. First, it noted that the amount of money at stake was very significant for Arkansas and represented 100 percent of Arkansas' federal funding for education. This amount would not be easy to replace, turning pressure into compulsion and invalidating the waiver. Citing Justice O'Connor's opinion in *Dole*, the dissent focused on the argument that the Spending Clause must have limits or Congress would have unrestricted power, which is inconsistent with the Framers' plan for enumerated powers. It argued that any conditions placed on federal grants must be related to the federal interest in that particular project. The dissent stated that unlike *Dole*, in this case the condition (a waiver of federal immunity from suit) had no relationship to the purpose of the money for education. While Congress may permissibly condition grants made specifically for rehabilitation on such a waiver, it could not do so for unrelated money for education. The dissent closed by stating that its position was the natural result of the Supreme Court's recent restrictions on the power of Congress and "if our Court will not take a hard look at the anomaly created by a 'spending power uber alles' mentality, perhaps the Supreme Court will."[51]

Other circuit courts and the Supreme Court are expected to confront the Spending Clause issues. Recently, the district court in *Garrett*, which was on remand to decide the Section 504 issue after the Supreme Court struck down the ADA, dismissed Patricia Garrett's case on the ground that Congress could not compel Alabama to waive its immunity from suit through its Spending Clause powers.[52] The district court began the opinion by noting, "the above-entitled case seems destined to stay in the courts a while longer. It will probably show up again on the calendar of the Supreme Court of the United States..."[53]

The district court held that there is no difference between abrogation (where Congress takes away state sovereign immunity) and waiver (where states are required to give up their sovereign immunity) and since the Supreme Court has held that Title I powers cannot be used to abrogate state immunity, the Spending Clause cannot be used to accomplish the same ends through a waiver. The district court also relied on language in *Barnes v. Gorman*,[54] which described Spending Clause legislation as a contract and stated that a contract must be in accordance with community standards of fairness. The district court in *Garrett* found that the waiver terms in Section 504 of the Rehabilitation Act do not comport with such standards. Finally, the district court found that the waiver is ambiguous because the language in Section

504 is not limited to states, nor does it say anything to make it absolutely clear to state agencies that they are waiving immunity for other fellow state entities.

This recent decision in *Garrett* highlights the relationship between Congressional powers under Section 5 of the Fourteenth Amendment and the Spending Clause and necessitates a discussion of both powers when considering legislative fixes to the more general problem of the evisceration of civil rights laws protecting individuals with disabilities.[55]

Post Script

Ms. Garrett has subsequently retired from her position with the State of Alabama, in part as a consequence of the discrimination she experienced. Thus, she has taken another reduction in income, in addition to the decrease she was forced to accept when she transferred to another position, rather than be dismissed by a supervisor who sought her removal because of her disability.

The National Council on Disability wishes to acknowledge the contributions of Mary Giliberti, senior attorney at the Bazelon Center for Mental Health Law to this topic paper. This paper also draws upon the work of Jennifer Mathis of the Bazelon Center, Sharon Masling of the National Association of Protection and Advocacy Systems, Brian East of Advocacy Inc., and Professor Robert Burgdorf of the University of the District of Columbia, David A. Clarke School of Law.

1.The Supreme Court recently decided *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 122 S.Ct. 1753 (2002), in which it reaffirmed the *Ex Parte Young* doctrine in cases against state officials when the complaint alleges a violation of federal law and the relief is properly characterized as prospective.

2.The Supreme Court recently held that punitive damages are not available under Section 504. *Barnes v. Gorman*, 122 S.Ct. 2097 (2002).

3.521 U.S. 261 (1997)

4.See e.g. *J. B. ex rel Hart v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999)(no special sovereignty interest in administering welfare program funded in part by federal money); *Marie O. v. Edgar*, 131 F.3d 610, 616-17 &n.13 (7th Cir. 1997 (no special sovereignty interest in administering early intervention services; *Robinson v. Kansas*, 117 F. Supp. 2d 1124, 1136-37 (D.Kan. 2000); *Lewis v. New Mexico Department of Health*, 261 F.3d 970 (10th Cir. 2001); *Neiberger v. Hawkins*, 70 F. Supp. 2d 1177, 1189-90 (D. Colo. 1999)(no special sovereignty interest in welfare of NGRI patients).

5.This argument is based on a footnote in *Seminole Tribes*, 517 U.S. at 75 n.17, suggesting that Congress did not intend to authorize *Ex Parte Young* in that statute because the duties were not

likely to be carried out by state officers. The argument is very unpersuasive given the footnote in *Garrett* suggesting that actions could still be brought under the ADA using the *Ex Parte Young* doctrine. 121 S.Ct. at 968 n.9.

6. The argument that Title II entities are not public officials has been accepted by one circuit court. *Walker v. Snyder*, 213 F.3d 344, 346-47 (7th Cir. 2000), but rejected by several others, *see e.g. Carten v. Kent State University*, 282 F.3d 391, 396-97 (6th Cir. 2002); *Randolph v. Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001).

7. *See e.g. Jim C. v. Arkansas Dept. of Education*, 235 F.3d 1079 (8th Cir. 2000); *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, 280 F.3d 98 (2nd Cir. 2001).

8.*Pennsylvania v. Union Gas Co.*, 109 S.Ct. 2273.

9.*Seminole Tribe of Florida vs. Florida, et al*, 116 S.Ct. 1114 (1996),

10.120 S.Ct. 631 (2000).

11.*Id.* at 645.

12.*Id.*. (citations omitted).

13.120 S.Ct. at 649.

14.*See* for example, Seth P.Waxman, *Foreword: Does the Solicitor General Matter*?, 53 Stan. L. Rev. 1115 (2001)(noting more complete legislative record in *Garrett* and the fact that the Court's precedents in the area of disability discrimination were better, offering an opportunity to reach a different result or slow down the progression of the Section 5 rulings.).

15.121 S.Ct. at 961-963.

16.*Id*. at 963 (citations omitted).

17.105 S.Ct. 3249 (1985).

18.*Id*. at 966.

19.*See* Remarks of Evan Caminker, American Enterprise Institute: Federalism Project Conference: *Is Federalism Passe? The Supreme Court's 2001-2002 Term* (July 8, 2002)(suggesting that the Court is motivated by a disdain for Congress).

20.*See* Robert Post and Riva Siegal, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 Yale L.J. 441 (2000)(arguing that neither federalism

nor separation of powers values requires the Court's recent sovereign immunity jurisprudence).

21.*See* Jed Rubenfeld, the Anti-Discrimination Agenda, 111 Yale L. J. 1141 (2002)(arguing a variation of this argument that the Court's Section 5 jurisprudence indicates a hostility to an anti-discrimination agenda and a view that the liberal anti-discrimination movement has taken off in a mistaken direction).

22.*Id*. at 968.

23. *Id*.

24.*Id.* at 969.

25.*Id.* at 970.

26.*Id.* at 971.

27.*Id*. at 971.

28.*Id*. at 975-76.

29.71 USLW 3247 (Nov. 18, 2002).

30.*Hason v. Medical Board of California*, 279 F.3d 1167 (9th Cir. 2002).

31.274 F.3d 974 (5th Cir. 2001).

32.*Id.* at 982 n.62 (citation omitted).

33.*Id*. at 983.

34.278 F.3d 1020 (10th Cir. 2001).

35. *Id*. at 1034.

36.306 F.3d 203 (4th Cir. 2002).

37.280 F.3d 98 (2d. Cir. 2001).

38.*Id.* at 111.

39.276 F.3d 808 (6th Cir. 2002)(en banc).

40.301 F.3d 13 (1st Cir. 2002).

41.311 F.3d 439 (1st Cir. 2002).

42.*Id.* at 10.

43. *Id.*

44.107 S.Ct. 2793 (1987).

45. *Id.* (*quoting Pennhurst State School and Hospital v. Halderman*, 101 S.Ct. at 1540).

46.*Id.* at 2792 n3.

47.*Id*. at 2800.

48.The Court is currently hearing a case which raises the Congressional Spending Clause issue, among others. In *Pierce County v. Guillen*, the Court is considering a challenge to a federal statute that protects certain documents compiled in connection with federal highway safety programs from being discovered or admitted in federal or state trials. (Docket No. 01-1229). It is unclear whether the Court will use this case to explicate its Spending Clause jurisprudence further.

49.In addition to these challenges, a new argument against Congressional Spending Clause power has begun to surface in the lower courts. In *Westside Mothers v. Haveman*, the district court dismissed a case brought to enforce Medicaid because legislation passed pursuant to Congress's Spending Clause authority is merely in the nature of a contract, and federal law is supreme only when enacted as part of Congress' enumerated powers. 133 F. Supp.2d 549, 561-562 (E.D. Mich. 2001). The Sixth Circuit reversed this decision, 289 F.3d 82 (6th Circ. 2002), but it has been raised in several other district courts and may continue to be argued.

50.*Jim C. V. Ark. Dep't of Ed*., 235 F.3d 1079 (8th Cir. 2000).

51.*Id*. at 1085. For additional cases finding waiver of immunity under 504, *see* Carten v. Kent State University, 282 F.3d 391, 398 (6th Cir. 2002); Douglas v. California Dept. of Youth Authority, 271 F.3d 812, 819-821 (9th Cir. 2001) (and cases cited); *Sandoval v. Hagan*, 197 F.3d 484, 492 (11th Cir. 1999), *rev'd on other grounds, Alexander v. Sandoval*, 2001 WL 408983 (Apr. 24, 2001); *Pederson v. Louisiana State University*, 213 F.3d 858, 875-76 (5th Cir. 2000); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Litman v. George Mason University*, 186 F.3d 544, 549 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1220 (2000); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997), *cert. denied,* 524 U.S. 937 (1998); *Mrs. C. v. Wheaton,* 916 F.2d 69, 75-76 (2d Cir. 1990); *but see* Garcia v. SUNY Health Sciences Center of Brooklyn, 280 F.3d 98, 113-115 (2d Cir.2001) (holding that New York did not knowingly waive its sovereign immunity because prior to the Supreme Court's decision in Seminole Tribes, it was clear that the Commerce Clause allowed abrogation from Section 504 claims so in accepting the funds, New

York had no reason to believe it was giving up anything.)

52.2002 WL 31005200 (N.D.Ala. 2002).

53.*Id.*

54.122 S.Ct. 2097 (2002).

55.*See* Rebecca E. Zietlow, *Federalism's Paradox: The Spending Power and Waiver of Sovereign Immunity*, 37 Wake Forest L.Rev. 141 (2002)(suggesting that the Court may be willing to revisit its Spending Clause jurisprudence in light of its recent jurisprudence on sovereign immunity and noting that a number of conservative scholars have attacked the Court's current Spending Clause jurisprudence as creating a loophole to the newly established protection of state sovereignty).