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# ENFORCING FEDERAL CIVIL RIGHTS AGAINST PUBLIC ENTITIES AFTER *GARRETT*

ROGER C. HARTLEY\*

[T]he [C]ourt's doctrinal realignment of the federal-state structure is of little interest to most Americans. It recalls memories of dreary high school civics classes, and for the most part fascinates only legal scholars, who regularly churn out a welter of arcane, impenetrable tomes on the subject, which they call federalism.\*\*

## I. INTRODUCTION

In *Board of Trustees of the University of Alabama v. Garrett*<sup>1</sup> the Supreme Court ruled that a private individual may not recover money damages against a state in a suit brought under Title I of the Americans With Disabilities Act (ADA) because Congress did not validly abrogate the States' sovereign immunity in that title of the ADA.<sup>2</sup> *Garrett* is the seventh Supreme Court decision in the past six terms to have so dispatched a federal statute that endeavored to abrogate state immunity from suit in federal court.<sup>3</sup> Together,

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\*\* Aaron Epstein, High Court Shifting Balance of Power: Conservative Rulings Advance States' Rights, *THE SAN DIEGO UNION-TRIB.*, June 28, 1999, at A1.

1. 121 S. Ct. 955 (2001).

2. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12111-12117 (1994). Title I bars disability-based discrimination in employment by both private employers and public entities. In the lower courts, *Garrett* had alleged violations of both ADA Titles I and II. Whether Title II of the ADA, dealing with "services, programs, or activities of a public entity," 42 U.S.C. § 12132 (1994), is available to public employees for claims of disability-based employment discrimination is unsettled.

See *Garrett*, 121 S. Ct. at 960 n.1. Because the parties had not briefed the statutory issue, the Supreme Court in *Garrett*, which had granted certiorari on the constitutionality under Section 5 of both ADA Titles I and II, dismissed the Title II portion of the writ as improvidently granted. See *id.*

3. In addition to *Garrett*, see, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (Violence Against Women Act of 1994 (VAWA), 42 U.S.C. § 13981 (1994)); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 630 (b) (1994)); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (two Sections of the Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271(h), 296(a) (1994)) [hereinafter *College Savings Bank I*]; *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (The Trademark Act of 1946 (Lanham Act), 15 U.S.C. § 1125(a) (1994)) [hereinafter *College Savings Bank II*]; *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000(bb) (1994)); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (Indian Gaming Regulatory Act, 25 U.S.C. § 2701-21; 18 U.S.C. § 1166-68 (1994)). In addition, in *Alden v. Maine*, 527 U.S. 706 (1999), the Court

these cases have rewritten the rules regulating Congress' abrogation authority under Section 5 of the Fourteenth Amendment.<sup>4</sup> That alone is remarkable. In addition to these seven cases, the Court in recent years has declared twice that Congress exceeded its Commerce Clause power by regulating non-economic intrastate activity touching areas of traditional local concern.<sup>5</sup> Moreover, the Court twice has struck down federal statutes on the ground that Congress unconstitutionally had "commandeered" either state legislative<sup>6</sup> or executive processes<sup>7</sup> as a means of enforcing federal law.<sup>8</sup>

More than just a Section 5 case, *Garrett* is the most recent chapter in a federalism revival.<sup>9</sup> The cases in this string of remarkable and ambitious federalism decisions have all been decided by a slim but sturdy five-member

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held that state judicial immunity also extends to suits against the state in its own courts. See discussion *infra* notes 22-23 and accompanying text.

4. U.S. CONST. amend. XIV, § 5. This Section provides, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." These cases represent a recent retreat from the lenient judicial scrutiny Congress previously enjoyed when enacting legislation enforcing Section 5 of the Fourteenth Amendment. Compare *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (holding that the Section 5 power empowers the Congress to proscribe activities not themselves violations of equal protection of the laws when the proscription is reasonably calculated to remedy or prevent other violations of equal protection) with *Boerne*, 521 U.S. at 508 (holding that while the Section 5 power is not limited just to proscribing state action already barred by the Fourteenth Amendment, Congress lacks power to use the Section 5 power for any other purpose unless the activity regulated has a "congruence and proportionality" to behavior the Fourteenth Amendment prohibits).

5. The Court's recent Commerce Clause cases of *United States v. Lopez*, 514 U.S. 549 (1995) and *Morrison*, 529 U.S. at 598, depart from the longstanding deference to Congress' exercise of its commerce power. See, e.g., *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981) (discussing that Congress possesses the power to regulate intrastate activities through its power to regulate interstate commerce when the Congress has a rational basis for concluding that the intrastate activity substantially burdens interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (stating that the well-established commerce power doctrine holds that to establish the rational basis for concluding that an activity substantially burdens commerce, Congress may aggregate the individual adverse effects on commerce produced by each actor within the class of actors that a particular federal statute regulates); see also *Heart of Atlanta Hotel v. United States*, 379 U.S. 241 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942).

6. See *New York v. United States*, 505 U.S. 144 (1992) (holding Congress cannot compel the states to enact a federal regulatory program).

7. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress cannot "issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.").

8. See Matthew D. Adler, *State Sovereignty and the Anti-Commandeering Cases*, in *THE SUPREME COURT'S FEDERALISM: REAL OR IMAGINED*, *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 158, 158-70 (Frank Goodman ed., 2001).

9. Richard Fallon has demonstrated that the court also has used a federalist interpretive framework to penetrate the law regulating res judicata, collateral estoppel, and habeas corpus. See Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1172-87 (1988). The Court's 1971 decision in *Younger v. Harris*, 401 U.S. 37 (1971), marks the beginning of this revival. See Fallon at 1168-69. See also Ann Althouse, *Inside the Federalism Cases: Concern About the Federal Courts*, in *THE SUPREME COURT'S FED-*

conservative majority.<sup>10</sup> They are a striking departure from the Court's previous understanding of the Constitution's architecture distributing power between the federal and state governments.<sup>11</sup> Their common theme is that the congressional actions the Court has repudiated are "fundamentally incompatible with our constitutional system of dual sovereignty."<sup>12</sup> To mix metaphors, this federalism train has left the station and is on a fast track.

Understanding the new federalism is not for the faint of heart. How best to police the boundaries of federal and state authority within "our system of dual sovereignty" is a challenge as old as the Constitution.<sup>13</sup> The effort has been characterized as a "national neurosis."<sup>14</sup> Some have found the resulting twists and turns impenetrable.<sup>15</sup> That said, there are some markers to guide one. In this article, I focus on the Section 5 branch of the federalism revival, the branch that was at issue in *Garrett* and the one that is most likely to arise when litigating on behalf of or against an arm of state government.

In order to position *Garrett* doctrinally, I first describe the conceptual framework that determines the validity of Congress' effort to abrogate state judicial sovereignty. This is an abridged version since more complete histories have been reported widely, both recently in these pages,<sup>16</sup> and in many other journals.<sup>17</sup> I then turn to *Garrett's* holding and the Court's reasoning in

ERALISM: REAL OR IMAGINED, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 137 (Frank Goodman ed., 2001).

10. That majority is composed of Chief Justice William Rehnquist and Justices Anthony Kennedy, Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas.

11. See discussion and authorities cited *supra* notes 4 - 5, 8.

12. *Printz*, 521 U.S. at 935.

13. Justice O'Connor has called this "the oldest question of constitutional law." *New York v. United States*, 505 U.S. 144, 149 (1992). Her observation inspired the title of Professor H. Jefferson Powell's classic federalism article, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993). Recently, Professor Ana Maria Merico-Stephens, has perpetuated this play on the words. See Ana Maria Merico-Stephens, *Of Maine's Sovereignty, Alden's Federalism, and the Myth of Absolute Principles: the Newest Oldest Question of Constitutional Law*, 33 U.C. DAVIS L. REV. 325, 327 (2000).

14. See Edward Rubin & Malcolm Feeley, *Federalism: Notes on a National Neuroses*, 41 UCLA L. REV. 903, 950 (1994).

15. See, e.g., Merico-Stephens, *supra* note 13, at 327 (describing federalism as a "mystical world [accentuated by] an abstruse and bewildering labyrinth of categorical principles discernible only to five spellbound members of our current Supreme Court."). Robert Nagel has even argued that "it is not too much to say that the principle of federalism is so conflicted and ambiguous that it *cannot* be enforced in any sustained and coherent way." Robert F. Nagel, *Judicial Power and the Restoration of Federalism*, in THE SUPREME COURT'S FEDERALISM: REAL OR IMAGINED, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 52, 55 (Frank Goodman ed., 2001) (emphasis in the original).

16. See Ana Marie Merico-Stephens, *United States v. Morrison and the Emperor's New Clothes*, 27 J.C. & U.L. 735 (2001); Timothy S. McFadden, *The New Age of the Eleventh Amendment: A Survey of the Supreme Court's Eleventh Amendment Jurisprudence and a Review of Kimel v. Florida Board of Regents*, 27 J.C. & U.L. 519 (2000).

17. See Roger C. Hartley, *The Alden Trilogy: Praise and Protest*, 23 HARV. J.L. & PUB. POL'Y 323, 328-336 (2000) (citing authority); Roger C. Hartley, *The New Federalism and the ADA: State Sovereign Immunity From Private Damage Suits After Boerne*, N.Y.U. REV. L. & SOC. CHANGE 481, 486-96 (1998) (citing authority).

*Garrett* to demonstrate that *Garrett* raised the bar making it more problematic than ever that Congress will be able to deploy Section 5 to abrogate state judicial immunity. I shall argue that the outcome in *Garrett* was dictated neither by precedent nor by the rational basis standard of judicial review accorded disability-based discrimination.<sup>18</sup> After evaluating the Court's decision in *Garrett*, I evaluate some options for enforcing federal rights that have survived *Garrett*.<sup>19</sup> I finish with a discussion of some likely repercussions we might expect from *Garrett*.<sup>20</sup>

## II. PREREQUISITES FOR VALID EXERCISE OF THE SECTION 5 POWER: BACKGROUND AND BASICS

The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."<sup>21</sup> By its terms, the Eleventh Amendment would suggest the following conclusions about its scope — *all of which are incorrect under Supreme Court precedent*:

- *That state judicial immunity is limited to suits in federal court.* In *Allden v. Maine*,<sup>22</sup> the Court held that the Constitution provides the States immunity from suit in their own courts without their consent. The text of the Eleventh Amendment is no impediment to this conclusion because, in the Court's view, the concept of Eleventh Amendment sovereign immunity is "something of a misnomer" since "sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment."<sup>23</sup> It derives instead from the history and structure of the Constitution.
- *That judicial immunity is limited to suits brought by a citizen of another state — either in a diversity action brought in federal court when a state is a defendant or, perhaps, also to federal question suits brought in federal court against a state by a diverse plaintiff.* In fact, for over one-hundred years, state judicial immunity has been interpreted also to extend to cases in federal court against a state brought by one of its own citizens asserting a federal right.<sup>24</sup>

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18. See discussion *infra* notes 83-97 and accompanying text.

19. See discussion *infra* notes 98-229 and accompanying text.

20. See discussion *infra* notes 230-308 and accompanying text.

21. U.S. CONST. amend. XI. The Eleventh Amendment reversed *Chisolm v. Georgia*, 2 U.S. 419 (1793) (upholding the Supreme Court's original jurisdiction to hear a diversity action brought on a state claim).

22. 527 U.S. 706 (1999).

23. *Id.* at 713. The Court interprets the Eleventh Amendment "to stand not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991).

24. See *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000) ("[O]ur cases have extended [state judicial sovereignty] to suits by citizens against their own states."). *Accord* *Hans v. Louisiana*, 134 U.S. 1 (1890).

- *That judicial immunity is limited to suits brought either by a citizen of the United States or a citizen or subject of a foreign state.* In fact, the States also are protected from unconsented suits brought by foreign states<sup>25</sup> or brought by an Indian Tribe.<sup>26</sup>
- *That judicial immunity is limited to suits brought in law or equity.* In fact, state judicial sovereignty also extends to admiralty suits.<sup>27</sup>

State judicial sovereignty does not extend to several important categories of litigation, however. First, it does not bar a suit against a state brought in Federal court by another state.<sup>28</sup> It does not bar suits brought by the United States.<sup>29</sup> It does not bar private actions against a state that are brought in the state court of another state on a state law cause of action.<sup>30</sup> And, it does not extend to certain federal court suits against state officers.<sup>31</sup>

State judicial immunity is qualified in two additional important ways. First, it can be relinquished through waiver manifested by “express language” or by “overwhelming implication.”<sup>32</sup> Moreover, Congress possesses authority to abrogate state judicial immunity “when it both unequivocally intends to do so and act[s] pursuant to a valid grant of constitutional authority.”<sup>33</sup> Prior to the 1996 Supreme Court decision in *Seminole Tribe of Florida v. Florida*,<sup>34</sup> Congress possessed two such “valid grant[s] of constitutional authority.” Congress could rely on the Commerce Power<sup>35</sup> or on the Section 5 power.<sup>36</sup> *Seminole Tribe* expressly rejected the Commerce Clause as a source of abrogation authority, and that decision is now cited for the broader proposition that “Congress may not . . . base its abrogation of the States’ Eleventh Amendment immunity upon the power enumerated in Article I.”<sup>37</sup> *Seminole Tribe* thus left only the Section 5 power as a source of abrogation authority.

25. See *Monaco v. Mississippi*, 292 U.S. 31 (1934).

26. See *Blatchford*, 501 U.S. at 775.

27. See *Ex parte New York*, 256 U.S. 490 (1921).

28. See *Kansas v. Colorado*, 206 U.S. 46 (1907).

29. See *United States v. Mississippi*, 380 U.S. 128 (1965); *United States v. Texas*, 143 U.S. 621 (1892).

30. See *Nevada v. Hall*, 440 U.S. 410 (1979).

31. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (discussing damages actions brought pursuant to 42 U.S.C. § 1983 against state officers sued in their individual capacity) (See discussion *infra* notes 181-99 and accompanying text); *Ex parte Young*, 209 U.S. 123 (1908) (discussing actions for prospective relief against state officers sued in their official capacity) (See discussion *infra* notes 200-29 and accompanying text).

32. *Edelman v. Jordan*, 415 U.S. 651, 673 (1974).

33. *Garrett*, 121 S. Ct. at 962.

34. 517 U.S. 44 (1996) [hereinafter *Seminole Tribe*].

35. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19-20 (1989) (plurality opinion).

36. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 452-56 (1976).

37. Cf. *Hood v. Tennessee Student Assistance Corp.* (*In re Hood*), 262 B.R. 412 (6th Cir. BAP 2001) (Bankruptcy Appellate Panel) (holding that States cannot invoke their sovereign immunity in bankruptcy discharge proceedings because the States ceded their sovereign immunity to the national government by virtue of the authority granted Congress in Article I to establish “uniform laws on the subject of Bankruptcies throughout the United States.”).

*Seminole Tribe* made the scope of the Section 5 power the critical question in abrogation cases. Accordingly, the Court's 1997 decision in *City of Boerne v. Flores*<sup>38</sup> became pivotal since it was the first case after *Seminole Tribe* to explain when Congress' exercise of its Section 5 power is valid. *Boerne* held that Congress lacks authority to apply to the States the provisions of the Religious Freedom Restoration Act of 1993 (RFRA).<sup>39</sup> In *Boerne*, the Court acknowledged an important principle that it has repeated in every Section 5 case since *Boerne*: Congress' Section 5 power to "enforce" the provisions of Section 1 of the Fourteenth Amendment

is not limited to mere legislative repetition of this Court's constitutional jurisprudence. 'Rather, Congress' power 'to enforce' the amendment 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.'<sup>40</sup>

That is to say, Congress may legislate "even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of authority previously reserved to the states.'"<sup>41</sup> It was necessary that the Court in *Boerne* acknowledge Congress' authority to add overbreadth to its Section 5 legislation because otherwise the Court would have had to overrule every Section 5 case the Court had ever decided. The reason is that Section-5-based legislation always contains overbreadth: Congress has never legislated under Section 5 just to proscribe legislatively only what the Fourteenth Amendment already prohibits.<sup>42</sup>

However, the Court in *Boerne* expressed great distress over this overbreadth principle.<sup>43</sup> Its apprehension was that permitting Congress to ban through the Section 5 power more conduct than Section 1 of the Fourteenth Amendment proscribes might result in Congress, rather than the Court, "decre[ing] the substance of the Fourteenth Amendment's restrictions on the

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38. 521 U.S. 507 (1997).

39. 107 Stat. 1488, 42 U.S.C. §§ 2000bb et seq. (1994).

40. *Garrett*, 121 S. Ct. at 963 (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (emphasis added)).

41. *Boerne*, 521 U.S. at 518 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

42. See Michael Gottesman, *Disability, Federalism, and A Court With An Eccentric Mission*, 62 OHIO ST. L.J. 31, 47-67 (2001) (reviewing all of the Court's Section 5 cases prior to *Garrett*).

43. Using the phrase "overbreadth" to describe federal Section 5 legislation that prohibits both unconstitutional behavior and behavior that is not prohibited by the Constitution should not, of course, be confused with the doctrine of First Amendment overbreadth, which relates to the unconstitutionality of legislation that regulates substantially more speech than the First Amendment permits. The latter is a standing doctrine. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973) (holding that for one whose own conduct is not constitutionally protected to have standing to challenge the facial unconstitutionality of legislation regulating speech, one must demonstrate overbreadth that is both real and substantial).

States.”<sup>44</sup> To avoid this risk when Congress adds overbreadth to its Section-5-based legislation, the Court in *Boerne* adopted the restraining principle that overbroad legislation “must exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’”<sup>45</sup> In *Boerne*, and in each of the five post-*Boerne* Section 5 cases, the Court declared unconstitutional Congress’ effort to abrogate state sovereign immunity because the statute at issue failed this congruence and proportionality test. These cases have clarified, somewhat, how properly to analyze “congruence and proportionality” but they also leave considerable uncertainty.

It now is clear that, at a minimum, Section 5-based legislation is not “congruent” with the prohibitions of Section 1 of the Fourteenth Amendment unless the aim of the Section 5 legislation is the elimination of conduct the Supreme Court is prepared to conclude is unconstitutional. The federal District Court for the Middle District of Alabama put it this way:

The teaching of *Boerne* is that there must be a substantial constitutional hook: The principal object of the legislation must be to address rights that are judicially recognized; Congress can prohibit conduct that is not unconstitutional, but such legislation must be nothing more than incidental to a primary effort of prohibiting conduct that is unconstitutional. . . . [T]he prohibited constitutional conduct must be, at most, always a bridesmaid and never the bride; the bride must always be the unconstitutional conduct.<sup>46</sup>

RFRA, the federal statute at issue in *Boerne*, may have been the poster child of a federal statute whose aim was something other than prohibiting conduct the Supreme Court considered unconstitutional. This at least seemed to be the Court’s view when it held that “RFRA cannot be considered remedial, preventative legislation if those terms are to have any meaning.”<sup>47</sup> RFRA provided that laws that “substantially burden” the exercise of religion are unlawful unless they advance a “compelling governmental interest” and are “the least restrictive means of furthering that compelling governmental interest.”<sup>48</sup> RFRA thus created rights greater than those the Constitution provides because laws that burden religious expression can be challenged on Free Exercise grounds only if they are targeted at religious

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44. *Boerne*, 521 U.S. at 519. The Court emphasized that “[l]egislation which alters the meaning of the [a constitutional Clause] cannot be said to be enforcing the Clause.” *Id.* “Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation.” *Id.* Congress’ power is “corrective or preventive, not definitional.” *Id.* at 525.

45. *Garrett*, 121 S. Ct. at 963 (citing *Boerne*, 521 U.S. at 520).

46. Supp. 2d 1092, 1108 (M.D. Ala. 1998).

47. *Boerne*, 521 U.S. at 532 (“RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears instead to attempt a substantive change in constitutional protections.”).

48. 42 U.S.C. §2000bb 1(a), (b).



practices.<sup>49</sup> The legislative process in RFRA failed to demonstrate any contemporary evidence of state-sponsored targeting of religious practices in American society.<sup>50</sup> Thus, the Court concluded, RFRA's aim could not have been the eradication of a pattern of unconstitutional religious persecution. Accordingly, the provision in RFRA abrogating state sovereign immunity was not a valid exercise of the Section 5 power.

The next two Section 5 cases arose from a 1994 lawsuit that the College Savings Bank brought against the Florida Prepaid Postsecondary Education Expense Board, an entity the parties agreed was an arm of the state of Florida.<sup>51</sup> In *College Savings Bank I*, plaintiffs had alleged patent infringement.<sup>52</sup> The Supreme Court agreed that patents are property protected from deprivation by a state without due process of law.<sup>53</sup> But, the Court found, Congress did not enact the patent laws to target state deprivation of patents without due process of law. Rather, "Congress appears to have enacted this legislation in response to a handful of instances of state patent infringement that do not necessarily violate the Constitution."<sup>54</sup>

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49. Congress enacted RFRA to reverse a 1990 Supreme Court decision, *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, members of the Native American Church presented the claim that a state law barring the use of peyote violated their religious freedom since for them peyote was a sacrament. *Smith* held that the Free Exercise Clause of the First Amendment does not provide protection from the incidental burdens on religious expression that may result from the nondiscriminatory application of facially neutral laws of general application. After *Smith*, laws that burden religious expression can be challenged on Free Exercise grounds only if targeted at religious practices.

50. To the contrary, the Court found that "[t]he history of [religious] persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years." *Boerne*, 521 U.S. at 530. This "absence of more recent episodes," RFRA's proponents testified, is explained by the fact that "deliberate persecution is not the usual problem in this country" and "[l]aws targeting religious practices have become increasingly rare." *Id.*

51. See *College Savings Bank I*, 527 U.S. at 633 n.3.

52. The College Savings Bank alleged a violation of 35 U.S.C. §271(a) (1994).

53. See *College Savings Bank I*, 527 U.S. at 642 ("Patents . . . have long been considered a species of property."). In its companion case, *College Savings Bank II*, the Court never addressed the Section 5 analysis required by *Boerne*. That suit alleged state violation of the Trademark Act of 1946 (Lanham Act). In *College Savings Bank II*, the Court rejected that Congress enacted the false advertising provisions of the Lanham Act to enforce the requirements of Due Process because it rejected that the right not to be victimized by false advertising is a property right. 527 U.S. at 673. Nor is the act of engaging in business, the interest that false advertising impinges, a species of property. *Id.* at 675.

54. *College Savings Bank I*, 527 U.S. at 645-46. The Court drew this conclusion from an examination of the legislative record, which revealed no evidence of a pattern of patent infringement by state governments, undermining the "proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the [patent laws]." *Id.* at 642. In addition, "Congress . . . barely considered the availability of state remedies for patent infringement . . ." *Id.* at 643. Since the due process violation arises "only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent[.]" this failure by Congress to examine state remedies undercuts the assertion that the aim of the patent laws was to eradicate deprivation of patent rights without due process of law. *Id.* at 643.

*Kimel v. Florida Board of Regents*<sup>55</sup> was next. *Kimel* invalidated the provisions of the ADEA that authorize private damage remedies against the state in federal court. In *EEOC v. Wyoming*,<sup>56</sup> the Court had held that the ADEA was enacted pursuant to a valid exercise of the Commerce Power. *Kimel* reaffirmed that conclusion.<sup>57</sup> The issue in *Kimel* was remedy: the validity of ADEA's abrogation of state sovereign immunity to provide for a private suit for damages against the States in federal court. By the time *Kimel* reached the Court, it was clear that such a remedy is valid only if the Congress unequivocally manifests an intent to exercise its Section 5 power and if the exercise was valid in the circumstances.<sup>58</sup> The Court in *Kimel* held that Congress had made a clear statement of its intent to deploy its Section 5 power but concluded that the deployment was invalid.<sup>59</sup>

*Kimel* is useful analytically because it clarifies the importance of isolating the Fourteenth Amendment right that Section 5 legislation purports to enforce. Until this is done, one cannot determine if the legislation contains overbreadth – creates rights that exceed those provided in Section 1 of the Fourteenth Amendment. If the legislation contains overbreadth, Congress possesses Section 5 authority to enact it only if the principal aim of the legislation is to deter or remedy unconstitutional conduct.

The Fourteenth Amendment right implicated by the ADEA is age discrimination. In three previous cases, the Court had held that the age classifications are presumptively constitutional and will be upheld if rationally related to a legitimate governmental interest.<sup>60</sup> Accordingly, the Constitution permits a state to make generalizations about age and use age as a proxy for other qualities, abilities, or characteristics that are relevant to a state's legitimate interests. None of this is irrational.<sup>61</sup> But because the ADEA prohibits such generalizations,<sup>62</sup> it prohibits conduct that is constitutional. The ADEA thus contains substantial overbreadth.

Since the Court found that the ADEA contains a significant amount of overbreadth, it next inquired into whether the principal purpose of the ADEA was to deter or remedy unconstitutional age discrimination. The Court found this was not ADEA's aim. That conclusion was grounded on the Court's finding that the ADEA's extension to the States was "an unwarranted response to a perhaps inconsequential problem."<sup>63</sup> The evidence in the legislative record to the contrary was "short of the mark."<sup>64</sup> Since the

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55. 528 U.S. 62 (2000).

56. 460 U.S. 226, 243 (1983).

57. See *Kimel*, 528 U.S. at 78.

58. See discussion *supra* notes 33-37 and accompanying text.

59. See *Kimel*, 528 U.S. at 73-74.

60. See *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam).

61. See *Kimel*, 528 U.S. at 83-85.

62. See *id.* at 87.

63. *Id.* at 89.

64. *Id.* The Court concluded: Congress made no legislative findings of unconstitutional age discrimination by the states. *Id.* at 90. Moreover, that record "reveals that Congress had virtually no reason to believe that state and local governments were

aim of the ADEA was other than to deter or remedy unconstitutional age discrimination, the statute failed to satisfy *Boerne's* congruence and proportionality test. Thus, Congress lacked Section 5 power to enact the overbreadth in the ADEA.

*United States v. Morrison*<sup>65</sup> was decided only a few months after *Kimel* and was the last Section 5 decision by the Court prior to *Garrett*.<sup>66</sup> Even if one were to conclude that *Boerne*, *College Savings Bank I*, and *Kimel* are unremarkable because in each the record was barren of evidence that the aim of the statute was to deter or remedy unconstitutional conduct, *Morrison* was different.

The 1994 Violence Against Women Act (VAWA) created a new civil right. It provided victims of gender-motivated crimes a federal private right of action to sue perpetrators for damages in federal court. Thirty-eight states supported VAWA when the bill was before the Congress and thirty-six states joined an amicus brief in support of VAWA when *Morrison* was heard by the Court.<sup>67</sup> Unlike the previous Section 5 cases, the legislative record in *Morrison* was replete with examples of unconstitutional behavior – a conspicuous pattern of under-enforcement of state criminal law intended to protect women from domestic violence.<sup>68</sup> VAWA was aimed at remedying (and perhaps deterring) this failure of law enforcement. VAWA's strategy was to remedy the States' discriminatory response to gender-motivated crimes by conferring on the victims of gender-based violence a federal self-help tort claim against perpetrators of that violence. In addition, in light of the publicity these suits would generate, state officials might begin to enforce state law in a more gender-neutral manner.

The Court challenged neither the adequacy of Congress' demonstration of a pattern of unconstitutionality nor the efficacy of VAWA's strategy for deterring and remedying it. VAWA was declared unconstitutional, nevertheless, to the extent that it "is directed not at any State or state actor, but at

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unconstitutionally discriminating against their employees on the basis of age." *Id.* at 91. "Congress never identified any pattern of discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Id.* at 89. Unconstitutional age discrimination was not "a problem of national import." *Id.* at 90.

65. 529 U.S. 598 (2000).

66. Before reaching the Section 5 issue, the Court first held that Congress lacked authority under the Commerce Clause to enact VAWA. See discussion *supra* note 5.

67. See Herman Schwartz, *The Supreme Court's Federalism: Fig Leaf for Conservatives*, in *THE SUPREME COURT'S FEDERALISM: REAL OR IMAGINED, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE* 119, 124-25 (Frank Goodman ed., 2001).

68. The Court acknowledged:

[the] voluminous . . . record [documenting] that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions [that] often result in insufficient investigation and prosecution of gender-motivated crime, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence.

*Morrison*, 529 U.S. at 620.

individuals who have committed criminal acts motivated by gender bias.”<sup>69</sup> Citing the *Civil Rights Cases* decided over a century ago,<sup>70</sup> the Court ruled that Section 5 empowers Congress to regulate conduct of state officials but not private conduct.<sup>71</sup> Then, possibly adding an additional hurdle for Congress, the Court noted that in any event VAWA is applicable nationwide but “Congress’ findings indicate that the problem of discrimination against the victims of gender-motivated crimes does not exist in all states, or even most States.”<sup>72</sup> The Court’s observation seems to suggest that Congress may lack Section 5 authority to enact legislation having nationwide applicability if Congress fails to establish that the unconstitutional conduct it seeks to redress or remedy occurs nationwide.<sup>73</sup>

In sum, *Boerne*, *College Savings Bank I*, *Kimel*, and *Morrison* together establish the following principles to guide one in determining whether legislation is a valid exercise of the Section 5 power to “enforce” the provisions of Section 1 of the Fourteenth Amendment.<sup>74</sup>

- In addition to proscribing unconstitutional conduct, Congress’ power “to enforce” the Fourteenth Amendment includes the authority both to remedy or to deter the violation of rights guaranteed thereunder by prohibiting conduct that is not itself forbidden by Section 1 of the Fourteenth Amendment.
- When Section 5 legislation prohibits conduct that is not itself forbidden by the Fourteenth Amendment’s text (and this can only be ascertained by a clear understanding of the Amendment’s substantive reach in varying contexts), the legislation must exhibit “congruence and proportionality” to the constitutional violation to be deterred or remedied.
- This requires, at a minimum, that the principal object of the legislation, its aim, must be deterring or remedying conduct the judiciary would find is prohibited by the Fourteenth Amendment.
- Satisfaction of this “principal object” test requires, at a minimum, a demonstration that, at the time of the enactment, Congress was aware of a contemporaneous pattern of unconstitutional conduct of the type that the legislation is said to be either deterring or remedy-

69. *Id.* at 626.

70. *See The Civil Rights Cases*, 109 U.S. 3 (1883).

71. *See Morrison*, 529 U.S. at 621-22.

72. *Id.* at 626.

73. *But see Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding provisions of the Voting Rights Act of 1965 having nationwide application although the evil addressed was not present nationwide; *see also* Robert C. Post & Reya B. Siegel, *Equal Protection Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 *YALE L.J.* 441, 478-80 (2000) (advancing the argument that nationwide application is preferable because: 1) it lessens risk that federal law will be perceived as discriminating against certain states or certain parts of the country; 2) it facilitates interstate travel by reducing the concern that travel to another state will cause a loss of federally protected rights; 3) it will avoid the necessity of line drawing, which may be problematic in close cases; and 4) it communicates the nationwide importance of addressing the problem.).

74. *See* discussion *supra* notes 45, 53-54, 63, 71-72 and accompanying text.

ing (a conclusion that also requires a clear understanding of the Fourteenth Amendment's reach). The primary, though not exclusive, source of this demonstration of primary purpose will be congressional findings and the legislative facts developed in the legislative history.<sup>75</sup>

- If Congress' aim in a given statute is found to be eradication of unconstitutional state action, the means chosen must not be disproportionate to that end.
- Federal law that is designed to deter or remedy unconstitutional conduct may not do so by regulating private conduct.
- And perhaps, Congress may not attempt to deter or remedy unconstitutional conduct by making federal law applicable nationwide when Congress has failed to show that the unconstitutional condition being deterred or remedied exists in most states.

This then is the legal landscape in which the parties litigated the *Garrett* case. I show next how the ADA could have been interpreted to satisfy these prerequisites if the Court properly understood, and had been willing to endorse, Congress' strategy in the ADA for eradicating disability-based discrimination. I also show that the Court in *Garrett* placed several new limits on Congress' exercise of the Section 5 power. These new restrictions nullified Congress' ADA strategy and created new hurdles the ADA could not surmount.

### III. THE COURT'S REASONING IN *GARRETT* AND ITS FAILURE TO ADDRESS THE "REAL" ADA

The ADA was the best litigation vehicle among the Court's recent Section 5 cases to establish the validity of Congress' exercise of its Section 5 power. Like VAWA, and unlike the other Section 5 cases, the ADA's legislative record makes an overwhelming case demonstrating a pattern of invidious discrimination. This pattern consists of societal discrimination against persons with disabilities generally and a pattern of unconstitutional state and local disability-based discrimination in particular.<sup>76</sup> And, unlike the VAWA dispute in *Morrison*, the Section 5 issue in *Garrett* arose in litigation against a state, so there was no distraction of Congress using Section 5 to regulate private conduct.

Nevertheless, the customary five-member majority of the Court held that the ADA foundered initially on the now familiar obstacle that "in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the

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75. On the centrality of legislative findings see *Cherry v. University of Wisconsin System Board of Regents*, 265 F.3d 541, 553 (7th Cir. 2001) (holding that while the legislative record is an "important factor," "the lack of legislative support in the record is not determinative of the [S]ec. 5 inquiry." (citing *Kimel*, 528 U.S. at 91).

76. See discussion *infra* notes 120-25 and accompanying text.

Fourteenth Amendment . . . .”<sup>77</sup> First, examining the legislative facts Congress assembled, the Court held they “simply fail[ ] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.” Respondents’ brief, the majority found, contained only a “half a dozen examples [of unconstitutional employment discrimination] from the [legislative] record that . . . involve States.”<sup>78</sup> “[E]ven if it were to be determined that each incident upon fuller examination showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting a pattern of unconstitutional discrimination on which § 5 legislation must be based.”<sup>79</sup>

Turning next to Congress’ findings in the ADA, the Court conceded that Congress made findings of “pervasive,” societal discrimination against the disabled, but the Court found fault in Congress’ failure to include any findings that the States had engaged in a pattern of unconstitutional disability-based employment discrimination.<sup>80</sup> To the contrary, the Court noted that the principal Senate and House committees made findings of disability-based employment discrimination only with respect to “*employment in the private sector*.”<sup>81</sup> The majority drew from this the negative implication that “Congress’ failure to mention States in its legislative findings addressing discrimination in employment reflects that body’s judgment that no pattern of unconstitutional state action [in employment] had been documented.”<sup>82</sup>

The Court’s decision in *Garrett* thus rests primarily on Congress’ failure to identify the requisite “pattern” of unconstitutionality when enacting the ADA.<sup>83</sup> More particularly, the decision rests squarely on the assumption that

77. *Garrett*, 121 S. Ct. at 967-68. Earlier in the opinion, the Court established that the ADA prohibits more than what the Constitution prohibits. An example is the ADA’s requirement that employers make a reasonable accommodation to otherwise qualified individuals with a disability. The Court counters that “States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. They could quite hard-headedly – and perhaps hardheartedly – hold to job-qualification requirements which do not make allowance for the disabled.” *Id.* at 964. *Accord id.* at 967. By further example, the Court later pointed out that the ADA’s prohibitions on using job criteria that have a disparate impact on persons with disabilities exceeds the mandates of the Fourteenth Amendment. *See discussion id.* at 967.

78. *Id.* at 965. The Court dismissed the States’ active participation in the eugenics movement, noting first that the Court had upheld these laws in *Buck v. Bell*, 274 U.S. 200 (1927) and, in any event, “there is no indication that any State had persisted in requiring such harsh measures as of 1990 when the ADA was adopted.” *Id.* at n.6.

79. *Garrett*, 121 S. Ct. at 965. In addition, the majority reasoned, “[i]t is telling . . . that given the[ ] large numbers [of public employees employed by state governments], Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.” *Id.* at 965-966.

80. *See id.* at 966.

81. *Id.* (emphasis in the original).

82. *Id.*

83. The Court added that even if somehow it were possible to “squeeze out of these examples of unconstitutional [disability-based employment] discrimination by the States[.]” the ADA’s overbreadth is too excessive for it to be considered a congruent and proportionate response. *Id.* at 966. The Court cited the ADA’s provisions for reasonable

the “pattern of unconstitutional discrimination on which § 5 legislation must be based”<sup>84</sup> for ADA Title I to be constitutional is a pattern of State employment discrimination, and no other pattern of unconstitutional behavior may be considered. Two momentous policy decisions are built into this conclusion.

First, by defining “pattern” as a pattern of *state* discrimination in employment, the Court refused to consider any evidence of unconstitutional behavior by units of local government (cities and counties) when measuring whether Congress established the required pattern of unconstitutionality.<sup>85</sup> This appears to represent a change from the Court’s approach in *Kimel*, decided just about a year before *Garrett*.<sup>86</sup>

Second, by defining “pattern” as a pattern of state discrimination in *employment*, the Court refused to consider any evidence of unconstitutional state behavior other than employment discrimination. Justice Breyer, writing for the dissent, appended a 16-page appendix to his dissenting opinion. It lists approximately 300 examples from the ADA’s legislative history documenting discriminatory actions by state and local governments against the disabled.<sup>87</sup> In response, the majority stated that:

only a fraction [‘somewhere around 50’] relates to state discrimination against the disabled in employment. . . . The overwhelming majority of these accounts [of discrimination against the disabled] pertain to alleged discrimination [other than employment discrimination] by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA.<sup>88</sup>

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accommodation and prohibitions against work rules that have a disparate impact on persons with disabilities.

84. *Id.* at 965.

85. “It 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 Eleventh Amendment.” *Id.* at 965.

86. In *Kimel*, Justice O’Connor, writing for the majority, stated that Congress had failed to find a pattern of unconstitutional age discrimination by the States. *See Kimel v. Florida Bd. of Regents* 528 U.S. 62, 89 (2000) (“Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.”); *Id.* at 90-91 (“Congress failed to identify a widespread pattern of age discrimination by the States.”). But Justice O’Connor seems to define the “States” in this context as both the States and their political subdivisions, for the *Kimel* opinion concludes that “[a] review of the ADEA’s legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state *and local governments* were unconstitutionally discriminating against their employees on the basis of age.” *Id.* at 91 (emphasis added).

87. *Id.* at 977-993 (Breyer J., dissenting).

88. In addition, the Court refused to consider any evidence of societal discrimination when considering whether Congress established the required pattern of unconstitutionality. Relying on negative implications from the congressional findings contained in the ADA, the Court refused to consider the possibility of an inference that state government likewise participated in the “pervasive” discriminatory conduct Congress uncovered. (*See discussion supra* notes 80-82 and accompanying text.).

It is useful to keep in mind, therefore, that *Garrett* contains no holding that Congress failed to identify a pattern of unconstitutional conduct directed against persons with disabilities. The Court rather held that there was an absence of a *particular kind* of pattern of unconstitutionality, namely, the absence of a pattern of *state* disability-based *employment* discrimination. The soundness of the *Garrett* decision thus rests on whether so constricting the definition of “pattern” is warranted. In other words, is it defensible to make the ADA’s constitutionality depend on the presence or absence of a pattern of state unconstitutional employment discrimination and refuse to consider any other pattern of unconstitutionality? This is a critical question because the case for the constitutionality of Title I is strengthened significantly by redefining slightly the definition of “pattern of unconstitutionality.” This is easily demonstrated.

The ADA has been characterized as a “second-generation” civil rights statute.<sup>89</sup> Typically, civil rights statutes attempt to deter and remedy invidious discrimination by proscribing it. The ADA also proscribes invidious discrimination.<sup>90</sup> In addition, as a means of deterring and remedying invidious discrimination, the ADA also requires covered entities to take affirmative steps to integrate persons with disabilities into the mainstream of American social and economic life.<sup>91</sup>

Congress’ strategy in the ADA is built upon two findings, each of which Congress self-consciously adopted and supported factually in the legislative record. First, Congress found a “pervasive” pattern of invidious discrimination, directed against persons with disabilities, engaged in by both state and local government.<sup>92</sup> The invidious discrimination by state and local government permeates not only employment but also delivery of a wide array of government services and public accommodations.<sup>93</sup> It is systemic. The *Garrett* majority never disputes, nor could it, that Congress did make adequate findings of such a pattern of unconstitutional state and local system-wide dis-

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89. See Robert L. Burgdorf Jr., *The Americans With Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413 (1991).

90. See discussion *infra* notes 141-78 and accompanying text.

91. See Burgdorf, *supra* note 89, at 460-62 (discussing the ADA requirement to make reasonable accommodations that do not create an undue hardship).

92. In the ADA statement of findings, Congress concluded: 1) that “historically, society has tended to isolate and segregate individuals with disabilities [a problem that] continue[s] to be a serious and pervasive social problem.” 42 U.S.C. §12101(a)(2). This “discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication . . . institutionalization, health services, voting, and access to public services.” ADA §12101(a)(3). The discrimination suffered by persons with disabilities includes “a history of purposeful unequal treatment[.]” ADA §12101(a)(7), as well as “outright intentional exclusion, . . . segregation, and relegation to lesser services, programs, activities, benefits, jobs, and other opportunities.” ADA §12101(a)(5). Accordingly, Congress enacted the ADA to “provide a . . . national mandate for the elimination of discrimination against individuals with disabilities.” ADA §12101(b)(1).

93. See authority cited *id.*



crimination (a conclusion the Breyer opinion's appendix certainly demonstrates).

The second finding upon which the ADA is built relates to the question of how best to deter and remedy this "pervasive" pattern of systemic unconstitutional discrimination, which includes a pattern of unconstitutional disability-based discrimination by state and local government. Congress' choice was to integrate persons with disabilities into the economic and social mainstream of American life and thereby deter future unconstitutional discrimination by attacking its cause - the prejudice arising from isolation of the disabled.<sup>94</sup> The legislative record demonstrates that Congress self-consciously adopted the view that usually the most disabling part of being disabled is the negative reaction of others.<sup>95</sup> The academic literature overwhelmingly supports the conclusion upon which the ADA is built - that the most efficacious way to remedy the prejudice of others against persons with disabilities is to integrate disabled persons into the mainstream of economic and social life.<sup>96</sup> This attacks a systemic problem systemically. The strategy's efficacy requires that federal legislation attack each component of the overall pattern of invidious discrimination including state and local governments' employment discrimination and discrimination in delivery of public services. Congress concluded that only by prohibiting all invidious discrimination directed against persons with disabilities, and only by requiring as complete an integration as possible of persons with disabilities, could the war on prejudice be won.

This vision of the ADA as a second generation civil rights statute never made an appearance in the *Garrett* majority opinion. Indeed, if one were to read just the *Garrett* majority opinion one would have no understanding that the statute found unconstitutional in *Garrett* was designed to eradicate the

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94. I have detailed this strategy elsewhere. See Hartley, *The New Federalism*, *supra* note 17, at 524-28. Respondents in *Garrett* brought this strategy to the Court's attention. See Brief for Respondent at 47-48, Bd. of Trustees of the Univ. of Ala. v. *Garrett*, 2000 WL 1593420 (Aug. 11, 2000) (No. 99-1240).

95. See Hartley, *supra* note 17, at 524-25 (quoting the legislative ADA history and particularly the official position of the first Bush administration expressed by its representatives' testimony before Congress showing that the consensus was that the most efficacious way to attack invidious disability-based discrimination is to reshape attitudes of the non-disabled community through the process of integration of the disabled community into the mainstream of society.). See also Brief for Respondent at 47-48, Bd. of Trustees of the Univ. of Ala. v. *Garrett*, 2000 WL 1593420 (Aug. 11, 2000) (No. 99-1240) (citing extensive evidence from the legislative record demonstrating that Congress' conviction that as:

employers became exposed to persons with disabilities through compliance with the ADA, they would be educated out of the stereotypes, prejudices, and discomfort that had become entrenched due to the absence of such persons in the workplace [with the result that] [o]ver time . . . employers would hire persons with disabilities because they recognized their capabilities and were not discomforted, and not simply to avoid violating the ADA."

*Id.*

96. See discussion Hartley, *supra* note 17, at 525-28 (demonstrating that integration erodes prejudice in diverse and psychologically complex ways and also works by helping persons with disabilities form bonds with non-disabled persons that assist persons with disabilities to learn to conform to the cultural norms of the non-disabled community).

pattern of unconstitutional disability-based discrimination Congress documented by integrating the disabled into American economic, social, and political life. The Court states that the only conclusion one can draw from Congress' failure to make a specific legislative finding of a pattern of *state* disability-based *employment* discrimination is that Congress found no such pattern and if there were no *such pattern* then providing private Title I damage actions against the States is unconstitutional. By so framing the analysis, the Court avoids addressing the central question that requires resolution: even if there were no pattern of state employment discrimination, does Section 5 nevertheless authorize Congress to enlist the States in the effort to remedy the pattern of unconstitutional conduct Congress did document – an overall pattern of unconstitutional behavior by state and local government across a wide spectrum of activities – when the only way to deter and remedy *this pattern* of unconstitutional conduct is to integrate the disabled into State employment?<sup>97</sup>

In other words, *Garrett* leaves unanswered the most interesting and important issue the case presented: *Why* is Congress without authority to abrogate state judicial immunity regarding employment policies that harm persons with disabilities 1) when there are legislative facts showing a pervasive pattern of unconstitutional disability-based discrimination (if one includes the totality of state and local governments' behavior) and 2) when Congress concludes, based on those facts, that integration of the disabled into society is the key to deterring and remedying the prejudice causing this pervasive pattern of unconstitutional discrimination, and 3) when the only efficacious way to integrate the disabled into society is to integrate them into all segments of society, including all aspects of public sector employment?

This is the central question that Title I's abrogation provisions pose and it is unfortunate that *Garrett* avoids it. If there is no principled basis to deny Congress' Section 5 power to abrogate state judicial immunity when the legislative record supports each of the three conditions stated above – and one is

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97. When the question is posed this way, eliminating local government from the calculation of pattern makes little sense. First, the pattern-of-unconstitutionality requirement found in the Court's recent Section 5 cases exists to provide comfort to the Court that Congress is not attempting "to rewrite the Fourteenth Amendment law laid down by this Court . . ." *Garrett*, 121 S. Ct. at 968. Local government need not be eliminated from the pattern calculation for pattern to serve this separation-of-powers function since both state and local governments are regulated by the Fourteenth Amendment. Moreover, when the issue is whether the Congress may enlist the States to redress a pattern of unconstitutionality created through the combined acts of both state and local governments, it begs the issue to deny Congress Section 5 power by insisting that the pattern not include unconstitutional behavior by local government.

Similarly, the *Garrett* opinion also engages in question-begging when the Court demands that only unconstitutional employment discrimination, and no other, be considered in calculating pattern. For the requisite pattern of unconstitutionality needs to include all unconstitutional disability-based discrimination when the question is not whether Congress had power to eradicate a pattern of employment discrimination, but whether Congress may regulate the States' employment practices as a means of integrating persons with disabilities in order to deter and remedy the pattern of system-wide disability-based unconstitutional discrimination that Congress did uncover.

at a loss to imagine what that basis might be – then *Garrett* was decided incorrectly. If, notwithstanding the pattern of unconstitutionality that Congress did document and notwithstanding the need to integrate the disabled that Congress did demonstrate, there still is no Section 5 power, one would think that we deserve to know why. *Garrett* provides not a clue.

#### IV. OPTIONS STILL AVAILABLE AFTER *GARRETT* TO REDRESS DISABILITY-BASED DISCRIMINATION

*Garrett* addressed remedy: When may Congress authorize individuals to recover money damages against the States? That issue ought not be confused with the question of whether Title I of the ADA imposes enforceable limitations on the States. As to that question the Court's answer in *Garrett* is an emphatic yes.<sup>98</sup> Accordingly, Title I's requirements "can be enforced by the United States in actions for money damages . . . ."<sup>99</sup> States also may waive

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98. See *Garrett*, 121 S. Ct. at 968 n.9 ("Title I of the ADA still prescribes standards applicable to the States."). In concurrence, Justice Kennedy commented:

It must be noted . . . that what is in question is not whether the Congress, acting pursuant to a power granted to it by the Constitution, can compel the States to act. What is involved is only the question whether the States can be subjected to liability in suits brought not by the Federal Government (to which the States have consented . . .), but by private persons seeking to collect moneys from the state treasury without the consent of the State.

*Id.* at 969.

99. *Id.* I have argued elsewhere that the government enforcement model for enforcing federal rights may indeed be "whimsy" as alleged by the dissenters in *Alden v. Maine*. See *Alden v. Maine*, 527 U.S. 706, 810 (1999) (Souter, J., dissenting). The defect in the model resides in the lack of federal resources and the absence of political will. See Hartley, *The Alden Trilogy*, *supra* note 17, at 373-76. See also *Civil Rights Commission Report Deplores Inadequate Funding*, 37 Fair Empl. Prac. Cas. (BNA) 35 (March 15, 2001) (summarizing a report issued by the United States Civil Rights Commission concluding that funding and staffing levels for civil rights enforcement remain inadequate, detrimentally affecting those agencies' ability to fulfill their missions); *Funding For Civil Rights Decreased in Recent Years*, 36 Fair Empl. Prac. Cas. (BNA) 130 (Oct. 26, 2000) (reporting conclusions of the United States Civil Rights Commission that the six major federal civil rights enforcement agencies have suffered a steady drop in funding and staffing over the past five years); *NCD Report Faults Federal Agencies' Enforcement Activities Under ADA*, 18 DISABILITY COMP. BULL. (LRP) 5 (Aug. 10, 2000) (reporting the findings of the cabinet-level independent federal agency, The National Council on Disabilities, in its report, *Promises to Keep: A Decade of Federal Enforcement of the Americans With Disabilities Act* that the ADA's impact has been "seriously diminished" by an enforcement scheme that is beset by under-funding, lack of leadership, absence of coherence, and delay caused by multiple review levels).

An ADA money suit brought by the United States in behalf of individuals may not constitute an effective alternative to individual suits even when there is adequate political will and financial resources. In *United States v. Mississippi Department of Public Safety*, 153 F. Supp.2d (S.D. Miss. 2001), the Justice Department brought an ADA Title II suit in behalf of an individual who had been dismissed from the Mississippi Department of Public Safety training academy, allegedly in violation of the ADA. The court dismissed both the claim for money damages and the request for injunctive relief. With respect to money damages, the court held that when the United States is not alleging a "pattern or practice" of discrimination, the "United States seeks only to vindicate the rights of an individual[,] . . . step[s] into the shoes of a private individual[,] [and] [i]n this capacity has no more

their sovereign immunity and permit themselves to be sued by individuals for money damages.<sup>100</sup> These options are beyond the control of individual plaintiffs and their efficacy is subject to reasonable doubt.<sup>101</sup> But *Garrett* preserves other options that public employees may deploy in their discretion to remedy violations of ADA rights. They are: 1) ADA Title I suits against local government for money damages; 2) the continuing ability to sue states for money damages to redress ADA violations arising from invidious discrimination; and 3) suits against state officers. These remedies are discussed next. In addition, *Garrett* does not address Congress' ability to purchase a waiver of a state's judicial immunity through the federal government's spending power, a point analyzed in Part V within a larger discussion of potential political responses to *Garrett*.

#### A. *ADA Suits Against Local Government for Money Damages*

State sovereign immunity applies only to the state, state agencies, and other entities considered arms of the state.<sup>102</sup> State sovereign immunity does not extend, however, to a state's political subdivisions.<sup>103</sup> Accordingly, *Garrett* does not affect private ADA Title I damage actions against many units of local government.<sup>104</sup> The apparent simplicity of the arm of the state/state

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power to sue a state than the individual it represents." *Id.* at \*2. With respect to the request for injunctive relief, the court held that in non-pattern-and-practice suits the "United States has no more power to sue a state than the individual it represents," and since the individual's right to injunctive relief requires naming a state officer as defendant in the litigation (see discussion *infra* notes 181-87 and accompanying text), the United States injunction request must be dismissed since the suit named only the state agency as a defendant. *Id.* at \*3. It is plain that if this reasoning were to take root in the appellate courts, the alternative of a suit brought by the United States would remove *Garrett's* adverse affect on the vindication of individual ADA rights only in pattern and practice suits brought by the government.

100. Though state courts have concurrent jurisdiction to enforce the ADA, Congress is powerless to compel states to provide their courts jurisdiction to hear suits against the state to enforce federal statutory rights. See *Alden*, 527 U.S. 706, 706 (1999). States are free to decide when to consent to suit in either federal or state court and on what terms absent "evidence that the State has manipulated its immunity in a systematic fashion to discriminate against federal causes of action." *Id.* at 758. The current evidence is that few states have consented to suit for money damages by private individuals asserting federal rights. See Hartley, *The Alden Trilogy*, *supra* note 17, at 367-370. See also *Minnesota Responds to Garrett Decision, Other States Consider Waiving Immunity to ADA Lawsuits*, 167 Lab. Rel. Rep. (BNA) 233 (June 25, 2001) (reporting a mixed political response to efforts to convince states to waive their sovereign immunity to ADA suits).

101. See discussion *supra* notes 99-100.

102. It is clear that a statewide agency of state government is an arm of the state. See *Edelman v. Jordan*, 415 U.S. 651 (1974).

103. See *Lincoln County v. Luning*, 133 U.S. 529 (1890) (stating that the Eleventh Amendment is no bar to federal suit against county to collect debt); *Workman v. New York*, 179 U.S. 552, 563-66 (1900) (discussing that this is the same with respect to cities). See also *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 89 n.34 (1984) ("[T]he Eleventh Amendment does not apply to 'counties and similar municipal corporations,'" (quoting *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280 (1977))).

104. See, e.g., *Parker v. Anne Arundel County*, No. Civ.A. WMN-00-850, 2001 WL 282695 (D. Md. Mar. 19, 2001) (discussing that *Garrett* is not applicable to ADA suit for

political subdivision dichotomy can be misleading. In fact, its application has befuddled many courts<sup>105</sup> and has generated considerable criticism.<sup>106</sup> The dichotomy creates practical difficulties for a variety of reasons.

First, many governmental entities are not clearly either an arm of the state or a state political subdivision since they possess attributes of both.<sup>107</sup> "Even the more traditional state-created bodies, such as public universities, school districts, and highway and transit agencies, cannot always be placed squarely in the alter ego-political subdivision dichotomy."<sup>108</sup> Second, the Supreme Court has not articulated coherent and workable standards, with the result that the lower courts tend to craft their own dissimilar, multi-factor tests.<sup>109</sup> Third, *McMillon v. Monroe County, Alabama*<sup>110</sup> held that a county sheriff, locally elected and compensated from local funds, was a state official primarily because he enforced state law. Since many local officials enforce state law, *McMillon* opens a potentially wide loophole through which local governing bodies may be able to claim their state's immunity.

To the extent that one can generalize a prevailing approach to deciding arm-of-the-state issues, the courts seem to focus primarily on three consider-

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damages against county fire department.). The ability to sue county and city governments in federal court represents a significant limit on *Garrett's* practical impact. Because so many important social services are provided by local governing bodies, such as police and fire protection and education, citizens are most likely to interact with government at the local level. These interactions create fertile opportunities for conflict with resultant allegations of federal law violation. See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 406 (1999).

105. See JOHN V. ORTH, *THE JUDICIAL POWER OF THE UNITED STATES* 119 (1987) ("[T]he distinction in Eleventh Amendment law between cities and counties on the one hand and states on the other produces bizarre results.").

106. See *id.* See also Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 57 n.23 (1990) (stating that the distinction is seen as a "doctrinal anomaly"); Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 756 (1978) (stating the distinction is anomalous). In fact, a strong case has been made that the dichotomy cannot be defended based on functional differences between a state and its political subdivisions. See RICHARD H. FALLON ET. AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1057 (1996) ("Since a local government is a creature of the state, it is hard to see any functional basis for distinguishing the two.").

107. See Alex E. Rogers, *Clothing State Governmental Entities With Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*, 92 COLUM. L. REV. 1243, 1243 (1992).

108. *Id.* But the "vast majority" of appellate cases have found that state universities share in their states' immunity. See *Sherman v. Curators of Univ. of Mo.*, 16 F.3d 860, 863 n.3 (8th Cir. 1994) (listing appellate decisions finding state universities or colleges immune from suit in federal court).

109. See Rogers, *supra* note 107, at 1243-44 (by "vary[ing] . . . the relative weight of each factor, [the lower courts] . . . generate conflicting results."). The contradictory results produced by the lower courts' application of arm-of-the-state standards is widely acknowledged. See, e.g., CHERMERINSKY, *supra* note 104, at 407-08; 13 CHARLES ALAN WRIGHT, EDWARD H. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3531.11 (3d ed. 1998).

110. 520 U.S. 781 (1997).

ations, all of which vary depending on the vagaries of each state's law.<sup>111</sup> First is the likely impact of the litigation on the state's treasury. The courts will accord a governing entity judicial immunity when the relief granted would run directly against the state.<sup>112</sup> The crucial factors are the level of state cooperation between state and local officials anticipated by state law, and whether the source of funding comes exclusively or primarily from the state.<sup>113</sup> In most cases the source of funding of a judgment is the predominant issue<sup>114</sup> and the answer depends entirely on state law - usually whether the governing entity has independent authority to generate revenue.<sup>115</sup> In state university cases, the state university's financial dependence on the state usually is the crucial inquiry<sup>116</sup> but when the degree of that dependence is uncertain close questions can arise whether a university is an in arm of the state enjoying the state's sovereign immunity.<sup>117</sup> In addition to examining

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111. See Ivan E. Bodensteiner & Rosalie B. Levinson, *Litigating Age and Disability Claims Against State and Local Government Employers in the New "Federalism" Era*, 22 BERKELEY J. EMP. & LAB. L. 99, 103 n.28 ("Determining the status of state agencies requires a careful review of state law . . .").

112. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 123 n.34 (1984).

113. See *id.* at 123-24; See also *Crane v. Texas*, 759 F.2d 412, 417-18 (5th Cir. 1985) ("[T]he most crucial factor to be considered in determining the County's status is 'whether the funds to defray any award would be derived from the state treasury.'" (quoting *Laje v. R.E. Thomason General Hosp.*, 665 F.2d 724, 727 (5th Cir. 1982))).

114. See, e.g., *Dover Elevator Co. v. Arkansas State Univ.*, 64 F.3d 442, 446 (8th Cir. 1995) ("The critical factor in [determining whether a suit is in reality a suit against the state] is 'whether any judgment rendered against the [agency] would ultimately come out of state funds.'" (quoting *Sherman v. Curators of Univ. of Mo.*, 16 F.3d 860, 863 (8th Cir. 1994))); *Parker v. Anne Arundel County*, No. Civ.A. WMN-00-850, 2001 WL 282695 at \*3 (D. Md. Mar. 19, 2001) (stating that the county fire department may be sued for damages in an ADA action, with the court finding that in deciding arm-of-the-state issues, "the first, and key, question is whether the state treasury will be affected."); accord *Bodensteiner & Levinson*, *supra* note 111, at 104-05 n.29 (demonstrating that source of funds that will satisfy any judgment is an important threshold question in arm-of-the-state litigation). See also *Access Living Metro v. Chicago Transit Auth.*, No. 00 C 0770, 2001 WL 818789 (N.D. Ill. Mar. 12, 2001) (discussing in an ADA suit where the court denied transit authority's arm-of-the-state status: the extent of the entity's financial autonomy from the state is critical along with its legal status under state law and whether it serves the entire state or only a specific region).

115. See, e.g., *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 280-81 (1977) (discussing that the school district is not an arm of the state because, among other things, under state law the district possessed power to issue bonds and levy taxes).

116. See, e.g., *Dover Elevator*, 64 F.3d at 446-47 (discussing that the state university is an arm of the state because spending dependent on state appropriation); *Hutsell v. Sayre*, 5 F.3d 996, 999-1002 (6th Cir. 1993) (stating the University of Kentucky is an arm of the state: university budget set by state and judgments would be paid by state); *Bunch v. City Univ. of New York*, No. 98 CIV. 1172(AKH), 2000 WL 1457078 (S.D.N.Y. Sept. 28, 2000) (stating the university and affiliated research institute are entitled to sovereign immunity on ADA claim because state was responsible for paying any resulting judgments).

117. See *Sherman*, 16 F.3d at 863 (remanding to ascertain whether payment of judgment will in fact come from state appropriation in light of allegation that two-thirds of university budget is not financed by state appropriation).

University bookstore cases can present interesting sovereign immunity issues. In *Swallows v. Barnes & Noble Book Stores*, 128 F.3d 990 (6th Cir. 1997), the Tennessee

the source of funds to satisfy judgments, courts also examine the autonomy of the governing body from the state. Significant autonomy evidences that the entity is not an arm of the state.<sup>118</sup> Lastly, how the state characterizes a local governing entity under state law, its relationship with the state, and the function the entity serves also are probative of whether the entity is an arm of the state.<sup>119</sup>

### B. ADA Suits Based on Invidious Discrimination

Even when an action is a suit against the state, *Garrett* may preserve some private ADA Title I damage actions – those that allege state disability-based discrimination of such severity that it violates the Constitution. Those who have read *Garrett* carefully might wince at this assertion since *Garrett* contains language that could lead one to conclude, perhaps correctly, that no ADA Title I suit for money damages may be brought against the States following *Garrett*. Writing for the majority, Chief Justice Rehnquist posed the issue in *Garrett* as “whether employees of the State of Alabama may recover money damages by reason of the State’s failure to comply with the provisions of Title I of the [ADA]. We hold that such suits are barred by the Eleventh Amendment.”<sup>120</sup> Literally read, this language bars all private Title I actions for damages against the States, including actions alleging an ADA violation that constitutes state action that also is unconstitutional. It is useful, how-

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Technological University had turned over its bookstore operation to a private corporation. In an ADA and ADEA action brought by three employees, the court held that the private corporation and not the state university was the employer, rejecting the argument that the two were an integrated enterprise. The court looked to: 1) interrelation of operations, 2) evidence of common management, 3) evidence that the university controlled the bookstore employees’ labor relations, and 4) evidence of common ownership or financial control. *Swallows* raises the interesting question of whether the bookstore would have enjoyed the state university’s sovereign immunity if the court had held the two were an integrated enterprise.

118. See, e.g., *Parker*, 2001 WL 282695 at \*3 (finding that county fire department not an arm of the state in part because state sets only minimum standards and county otherwise is free to make independent judgments).

119. See, e.g., *Mt. Healthy City Sch. Dist.*, 429 U.S. at 280-81 (focusing on characterization of school district under state law as a political subdivision and not an arm of the state); *Rounds v. Oregon State Bd. of Higher Educ.*, 166 F.3d 1032, 1035-36 (9th Cir. 1999) (finding university is arm of the state because of the central governmental functions it performs under the control of the state); *Chafetz v. Roosevelt Island Operating Corp.*, No. 97 Civ. 0761(NRB), 2000 WL 1277337 (S.D.N.Y. Sept. 8, 2000) (examining traditional state powers a state gave to a public corporation, the governor’s power to remove members from entity’s governing board, and the state’s responsibility for the corporation’s operations and governance in addition to the consideration of the state obligation to indemnify).

120. *Garrett*, 121 S. Ct. at 960. Later, the Court posed the issue as “whether an individual may sue a State for money damages in federal court under the ADA.” *Id.* at 961 (citation omitted). The Court held no because “Congress did not validly abrogate the States’ sovereign immunity from suit by private individuals for money damages under Title I . . . .” *Id.* at 968 n.9. See also *Garrett*, 121 S. Ct. at 969 (Kennedy, J., concurring) (“the predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity.”).

ever, to pause and consider whether all of the justices who voted with the majority in *Garrett* likely intended this overarching result.<sup>121</sup>

If private ADA Title I suits for damages that allege unconstitutional disability-based discrimination by the States do not survive *Garrett*, why is this so? One possibility is that *Garrett* stands for the underlying, unstated proposition that Congress may not legislate through its Section 5 power, even to proscribe unconstitutional state action, unless Congress first identifies a pattern of unconstitutionality. This reading of *Garrett* is not defensible. First, this would be an extreme departure from any holding or rationale in any previous Section 5 case the Court has decided.<sup>122</sup> Second, no lower court has ever held that Congress may not exercise its Section 5 power to prohibit conduct the Constitution proscribes, unless Congress first demonstrates a pattern of unconstitutionality. Third, the *Garrett* case was briefed by both sides as a case focusing on the issue of whether Congress could proscribe in the ADA, conduct that is not itself unconstitutional.<sup>123</sup> Fourth, the only provisions of

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121. The point is not merely academic. The Fourteenth Amendment does not provide a self-enforcing private right of action and the States are not “persons” under 42 U.S.C. § 1983. See *Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989). It is true that one may always obtain injunctive relief against state officers responsible for violating constitutional rights. See *Ex parte Young*, 209 U.S. 123 (1908) (Eleventh Amendment no bar to actions for prospective relief against state officers sued in their official capacity). But *Young* does not provide a mechanism for recovery of money damages. It also is true that § 1983 money damage suits may be brought against state officers, sued in their individual capacities, who violate one’s constitutional rights. See authority cited *infra* notes 189-93. The efficacy of such suits is severely limited, however, by the doctrine of qualified immunity. See discussion *infra* notes 197-99 and accompanying text. Plus recovery is against the state officer individually, possibly making enforcement of a money judgment problematic except when a state indemnifies its state officers. See discussion *infra* note 184 and accompanying text.

122. See Gottesman, *supra* note 42, at 47-67 (reviewing all of the Court’s Section 5 cases prior to *Garrett*). To read into *Garrett* an overarching requirement that Congress identify a pattern of unconstitutionality as a prerequisite for any valid exercise of its Section 5 power leads to the extravagant claim that, absent such a pattern, Congress could not even enact legislation that parrots the precise wording of the Fourteenth Amendment. Yet Congress’ power to prohibit what the judiciary would find is unconstitutional always has been understood to be the irreducible minimum scope of the Section 5 power. See *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000). (“Congress’ § 5 power is not confined to enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment.”). In *Garrett* itself, the majority began its Section 5 analysis by reiterating that the Congress’ Section 5 power to “enforce” the provisions of Section 1 of the Fourteenth Amendment “is not limited to mere legislative repetition of this Court’s constitutional jurisprudence,” suggesting again that the Section 5 power certainly includes the power to enact a “mere repetition” of constitutional guarantees. *Garrett*, 121 S. Ct. at 963.

123. See Brief for Petitioner at 29, *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 2000 WL 821035 (June 22, 2000) (No. 99-1240) (arguing that extending the ADA to the States is unconstitutional because “Judicial review under the ADA is far more rigorous than it is under the Equal Protection Clause,” citing the ADA’s provisions requiring reasonable accommodations, prohibiting employment standards that have a disparate impact, and proscribing the refusal to make reasonable modifications in public services.); Brief for Respondent at 13, 2000 WL 1593420 (Aug. 11, 2000) (No. 99-1240) (arguing that the Court’s prior decisions “at the least” permit Congress to prevent conduct transgressing the Fourteenth Amendment, and the only “complex” issue is the scope of the Congress’ power



the ADA that the Court in *Garrett* cited with disapproval were sections whose proscriptions substantially exceed those in the Constitution.<sup>124</sup> Finally, and more fundamentally, the reason for requiring a pattern of state unconstitutional conduct in Section 5 cases is to confirm that the real aim of the legislation is eradication of unconstitutional behavior and not “Congress[‘s] . . . rewrit[ing] the Fourteenth Amendment law laid down by th[e] Court . . . .”<sup>125</sup> By definition, federal legislation that proscribes only unconstitutional state action does not threaten this separation-of-powers principle.<sup>126</sup>

Another possible explanation that would permit the *Garrett* majority’s broad language to be read literally, but without rewriting Section 5 doctrine, is that the unconstitutionality of Title I’s overbreadth rendered all Title I private suits for money damages unenforceable against the States as a matter of statutory construction. That is to say, the Court’s broad language might be read as stating an implicit conclusion that because most private Title I suits against the States for money damages are unconstitutional after *Garrett*, Congress did not intend to retain any Title I private money damage actions against the States.<sup>127</sup> This reading of *Garrett* seems strained and highly problematic. First, the *Garrett* majority opinion makes no reference to such a congressional intent. Nor would one think that all the members of the Court who supported the *Garrett* majority opinion would *sub silentio* conclude such

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to enact broader legislation using the “congruent/proportional prong” of the analytical framework developed by *Boerne* and its progeny).

124. See *Garrett*, 121 S. Ct. at 967 (citing ADA Sections requiring that facilities be made “readily accessible” and that employers provide “reasonable accommodations,” and citing the ADA’s ban on certain employment standards or criteria that result in a disparate impact on persons with a disability).

125. *Id.* at 968. See also *Kimel*, 528 U.S. at 88 (“Our task is to determine whether the ADEA is in fact [a regulation of constitutional conduct as] an appropriate remedy [for unconstitutional conduct] or, instead, merely an attempt to substantively redefine the States’ legal obligations with respect to age discrimination.”).

126. This theory has been adopted in at least one post-*Garrett* decision with respect to ADA Title II. See *Garcia v. S.U.N.Y. Health Ctr. Of Brooklyn*, No. 00-9223, 2001 WL 1159970 at \*9 (2d Cir. Sept. 26, 2001) (Even though ADA Title II in its entirety fails to meet the Court’s congruence and proportionality test, “[w]e hold that a private suit for money damages under Title II of the ADA may . . . be maintained against a state [even after *Garrett*] if the plaintiff can establish that the Title II violation was motivated by either discriminatory animus or ill will due to disability.”); *id.* (“To establish discriminatory animus . . . a plaintiff may rely on a burden-shifting technique similar to that adopted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), or a motivating-factor analysis similar to that set out in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-58 (1980).”).

127. The ADA contains a severability clause, §12213, but it is not dispositive of the question. It provides: “[s]hould any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of the chapter, and such action shall not affect the enforceability of the remaining provisions of the chapter.” 42 U.S.C. §12213 (1994). Since the Court in *Garrett* found certain applications of the ADA to be unconstitutional (private damage actions against the States) but did not find any “provision[ ]” of the ADA unconstitutional, the statute’s severability provision is not applicable in this context.

an intent since finding it has such a profound adverse effect on Title I's future efficacy. Moreover, there is nothing in the legislative history of the ADA that remotely suggests such an intent by the Congress. For all of these reasons, a more plausible reading of *Garrett* is that the broad language concerning the termination of all Title I private rights of action against the States for money damages is unintended and not likely a considered consensus of all five members of the *Garrett* majority.<sup>128</sup>

If *Garrett* does preserve a private Title I damage action against the States to remedy unconstitutional disability-based discrimination, one needs to clarify two things: 1) the disability-based discrimination the Fourteenth Amendment prohibits, and 2) the ADA Title I claims that survive *Garrett* because these claims simply constitute proving state action involving such unconstitutional disability-based discrimination.

In *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>129</sup> the Court held that legislative classifications affecting persons with disabilities are not suspect classifications.<sup>130</sup> Accordingly, disability-based discrimination rates only a rational basis standard of judicial review. "The general rule is that [such] 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."<sup>131</sup> This test opens two avenues to argue unconstitutionality.

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128. *Estate of Langan v. Nebraska*, 63 F. Supp. 2d 1025 (D. Neb. 1999), a pre-*Garrett* decision, held that the invalid portions of ADA Title I may not be so severed so as to preserve a private damage action against the States for invidious discrimination. The Court reasoned as follows: 1) The ADA prohibits invidious discrimination only against a "qualified individual with a disability" 42 U.S.C. §12112(a) (1994); 2) the ADA defines "qualified individual with a disability" as one who can perform a job's essential functions "with or without a reasonable accommodation" 42 U.S.C. §12111(b) (1994); 3) ADA discrimination suits cannot be adjudicated therefore without interpreting and applying the term "reasonable accommodation;" 4) the States' sovereign immunity prohibits requiring the States to provide a reasonable accommodation; 5) the constitutional portions of the ADA (the prohibitions against invidious discrimination) cannot therefore function independently from the unconstitutional portions (requiring that the States provide a reasonable accommodation); and 6) therefore, the ADA cannot be severed. *Id.* at 1026-27.

This reasoning cannot sustain scrutiny. First of all, a claim of invidious discrimination does not entail requiring a state to provide a reasonable accommodation; therefore enforcing ADA's prohibitions against invidious discrimination does not even remotely implicate enforcing or even interpreting any unconstitutional provision of the ADA. Second, nothing in a state's sovereign immunity protects it from the federal obligation to provide a reasonable accommodation. Sovereign immunity merely protects a state from a money damage remedy for failure to provide it. See discussion *supra* note 98 and accompanying text. Accordingly, the valid portion of the ADA, prohibiting invidious discrimination, functions independently from the invalid portion of providing a private damage action when a state fails to provide a reasonable accommodation.

129. 473 U.S. 432 (1985).

130. The case specifically addressed individuals with mental disabilities, but in *Garrett*, the Court applied this holding to all categories of people with a disability. See *Garrett*, 121 S. Ct. at 963-64.

131. *Cleburne*, 473 U.S. at 440.

First, the ends must be "legitimate."<sup>132</sup> Thus, the Fourteenth Amendment prohibits invidious discrimination, defined as discrimination "rooted in considerations that the Constitution will not tolerate"<sup>133</sup> such as malice or animus or "a bare . . . desire to harm a politically unpopular group."<sup>134</sup> If the ends sought to be achieved by a state are contrary to the requirements of valid federal law, then, by definition, the Supremacy Clause of the Constitution<sup>135</sup> renders those ends no longer legitimate.<sup>136</sup>

Second, even when the ends are legitimate, under rational basis review States must always use means to achieve those ends that "rationally further the [legitimate] purpose identified by the State."<sup>137</sup> Legislatively chosen means, therefore, that are the product of "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases for treating [persons with disabilities] differently . . . ."<sup>138</sup> The Equal Protection Clause prohibits legislative classifications harming the disabled that are based on "vague, undifferentiated fears."<sup>139</sup> Accordingly, employment decisions made with an indifference to the facts may be unconstitutional when the indifference is based on irrational myths, fears or stereotypes about the disabled.<sup>140</sup>

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132. A classification evaluated under a rational basis standard of review "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Garrett*, 121 S. Ct. at 964 (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

133. *Cleburne*, 473 U.S. at 446.

134. *Id.* at 447 (citing *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)). *Accord* *Romer v. Evans*, 517 U.S. 620 (1996). In *Cleburne*, the Court held unconstitutional a Texas city's denial of a special use permit for a group home for developmentally impaired persons, finding a prejudicial motive primarily from the underinclusiveness of the reasons advanced for denying the permit but also from the city's willingness to accede to the prejudicial attitudes of some local residents. As the Court stated, "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Cleburne*, 473 U.S. at 448 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

135. U.S. CONST. art. VI. ("[T]his Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

136. In this regard it is essential to keep in mind that *Garrett* was a remedy case and did not disturb the States' Title I obligations. *See* discussion *supra* notes 98 & 128 and accompanying text.

137. *Garrett*, 121 S. Ct. at 964 (quoting *Massachusetts Bd. Of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (per curiam)).

138. *Cleburne*, 473 U.S. at 448. In *Garrett*, the Court emphasized that state action based on negative attitudes and fear, without more, is not *a priori* irrational. ("[T]heir presence alone does not a constitutional violation make."). *Garrett*, 121 S. Ct. at 964. It is state action based on negative attitudes or fear "*unsubstantiated by factors which are properly cognizable*" that is impermissible. *Id.* (emphasis added).

139. *Cleburne*, 473 U.S. at 449. *See also* *Olmstead v. L.C.*, 527 U.S. 581, 611 (1999) (Kennedy, J., concurring) ("[A]nimus can lead to false and unjustified stereotypes, and vice versa.").

140. *See* *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[E]ven in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation

At least three types of ADA causes of action for money damages would seem to survive *Garrett* because they each entail proving facts that also make out a violation of the Equal Protection Clause:

The first is adverse action taken against a person with a disability because of animus or irrational myths, fears or stereotypes. ADA section 12112(a) states a general prohibition of discrimination against a qualified individual with a disability “because of the disability.” In addition, ADA section 12112(b)(1) proscribes “limiting, segregating, or classifying a[n] . . . employee in a way that adversely affects the opportunities or status of such . . . employee because of the disability of such . . . employee.” Interpreting the ADA’s legislative history, the EEOC has explained that section 12112(b)(1) is intended to prohibit restricting employment opportunities of persons with disabilities “on the basis of stereotypes and myths about the individual’s disability.”<sup>141</sup> Differential treatment because of one’s status of being disabled, as opposed to differentiation because of any rational understanding of the limitations that one’s disability actually creates, violates these sections and also is unconstitutional when it can be shown to reflect either 1) “prejudice and antipathy – a view that [those being treated differently] are not as worthy or deserving as others,”<sup>142</sup> 2) “mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable,”<sup>143</sup> 3) “vague, undifferentiated fears’ of others,<sup>144</sup> or 4) some other irrational prejudice. In *Cleburne*, the Court explained that disability distinctions are “largely irrelevant unless the [regulated behavior by the disabled] would threaten legitimate interests of the [government] in a way that other permitted [behavior] would not.”<sup>145</sup> Categorical exclusions based on irrational assumptions can never meet this test.<sup>146</sup>

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between the classification adopted and the object to be attained.”) *Id.* at 635 (holding that a rational basis cannot be built on an incorrect belief having an irrational foundation because the constitutionality of “status-based enactment[s]” depends on a “*factual context* from which we could discern a relationship to legitimate states interests. . . .”) (emphasis added).

141. See Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. §1630.5 Appendix (2000) [hereinafter *EEOC Interpretive Guidance*].

142. *Cleburne*, 473 U.S. at 440.

143. *Id.* at 448.

144. *Id.* at 449.

145. *Id.* at 447-48. See also Mark C. Weber, *Beyond the Americans With Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 132 n.46 (1998) (“The essence of invidious discrimination is being treated worse than others because of a trait that one has no control over and that has no just relation to the entitlement at issue.”).

146. This conclusion is not at odds with the observation in *Garrett* that 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 state of facts that could provide a rational basis for the classification.” *Garrett*, 121 S. Ct. at 972 (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993), quoting *FCC v. Beach Comm., Inc.*, 508 U.S. 307, 313 (1993)). This language simply informs the lower courts regarding proper jury instructions on burden of proof. My point is that if, after being instructed properly, the jury concludes that an invidious motive was the actuating force in an adverse employment ac-

ADA suits alleging such irrational bases for adverse employment action are relatively common. For example, the EEOC obtained a verdict for money damages against an employer operating a retail store upon evidence that the regional manager ordered that a newly hired janitor with mental retardation be fired because the employer does not hire "those kinds of people."<sup>147</sup> A plaintiff suffering paraplegia recovered a verdict for money damages against an employer who refused six times to hire the plaintiff because it had "no openings for a person in a wheelchair."<sup>148</sup> A Navy depot in California was ordered to pay a woman money damages because a supervisor refused to permit her to use her wheelchair in the office, thus forcing her to use crutches, refused a request for an "out box," required her to carry heavy files to their destination, ordered other employees not to assist her, and finally fired her.<sup>149</sup> A jury awarded a teacher with muscular dystrophy money damages after rejecting as pretextual a school district's explanation of why it refused to hire the teacher, who had graduated *magna cum laude*, and hired instead a teacher who scored D's and F's in his math curriculum in college. The jury found that the motive for the refusal to hire was the fact that the plaintiff had a disability.<sup>150</sup>

*Garrett* should not affect the outcome of cases such as these when they involve a state government, one of its agencies, or an arm of the state. *Garrett* should permit a suit against the state for money damages when the jury is instructed to find an ADA violation only upon evidence demonstrating that the state had acted out of prejudice and antipathy, or out of mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable, or from vague, undifferentiated fears, or some other irrational basis. Then the ADA cause of action merely is alleging unconstitutional conduct.<sup>151</sup>

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tion then that action is unconstitutional and may be remedied through a Title I damage action against the States.

147. *EEOC Gets \$13 Million Verdict in ADA Employment Case*, 16 Disability Compliance Bull. (LRP) 3 (Nov. 18, 1999).

148. *Man With Paraplegia Wins \$3.5 Million Verdict Against Wal-Mart*, 10 Disability Compliance Bull. (LRP) 3 (Nov. 20, 1997).

149. *See Navy Pays \$300,000 To Woman With Arthritis*, 10 Disability Compliance Bull. (LRP) 2 (Nov. 20, 1997) (reporting that in this action brought under the Rehabilitation Act of 1973, the Department of Navy recommended that the court issue a judgment against it for this behavior).

150. *See Jury: Principal Denied Job To Teacher Because of Disability*, 10 Disability Compliance Bull. (LRP) 3 (Oct. 23, 1997) (reporting that the teacher, who had completed his student teaching at that school, had "recorded the highest grades possible as a student-teacher . . ."). In a non-employment case, a motel agreed to pay \$92,000 to two mothers whose sons were not permitted to stay at the motel because the sons have cerebral palsy and use wheelchairs. The motel, after first registering the mothers, later took back the room key and refunded the money for the room, telling the mothers that "'handicapped persons could not stay at [this motel]." *See Update: The Latest Litigation in Progress and Other News of Note*, 8 Disability Compliance Bull. (LRP) 2 (Sept. 26, 1996).

151. A "cutting edge" ADA legal theory that might therefore survive *Garrett* is one that depends upon a demonstration of a denial of procedural due process. A state university has been sued following its discharge of an employee with a mental disability. The legal theory is that the university's normal employment practice is to provide its employees notice and a hearing prior to discharge. But this practice was abandoned in the case of the

A second ADA Title I cause of action that should survive *Garrett* is one alleging a hostile work environment. Title I's text does not explicitly provide a cause of action for harassment or creating a hostile work environment. Nevertheless, the EEOC and the Department of Justice have maintained in their regulatory materials that harassment based on disability violates the ADA.<sup>152</sup> It was not until the Fifth Circuit's March 2001 decision in *Flowers v. Southern Regional Physicians Services, Inc.*,<sup>153</sup> however, that a circuit court of appeals held that the ADA creates a cause of action for disability-based harassment that creates a hostile work environment.<sup>154</sup> Several weeks later, in *Fox v. General Motors Corp.*, the Fourth Circuit became the second federal court of appeals to so hold.<sup>155</sup>

If the employer in each of these two cases had been a state or arm of a state, the discriminatory acts described in these decisions would likely have constituted a violation of the Equal Protection Clause. In *Flowers*, the plaintiff disclosed to her immediate supervisor that she was HIV-positive. Almost immediately after this disclosure, the supervisor shunned Flowers and began eavesdropping on her conversations and spying on her at work. In addition, the defendant's regional president became cold toward Flowers, refused to shake her hand and openly avoided her at work. Flowers was made to undergo four drug tests in a one week period, despite the fact that she had never tested positive for drug use in the past. Further, she was written up three times in a row, starting one month after her disclosure, each time in a manner that the court likened to an "ambush." After the second write-up, she was placed on ninety days' probation, at the end of which period she was written up again and placed on probation a second time. In addition, she was treated in a hostile manner by the regional president, who went so far as to call her a "bitch." Ultimately, Flowers, who had formerly been considered a good employee, was fired.<sup>156</sup> The court of appeals concluded the evidence

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mentally disabled plaintiff allegedly because the university "saw an opportunity to do so based on [plaintiff's] disability-related limitations." See *Suit: University Forced Resignation Based on Worker's Mental Disability*, 20 Disability Compliance Bull. (LRP) 7 (Apr. 5, 2001). Reduced to its essentials, the suit alleges that the university denied plaintiff an established condition of employment (procedural due process) because he was a person with a disability. Stated as a constitutional theory, the claim is either a denial of procedural due process or a denial of equal protection (disparate treatment trammeling the fundamental constitutional right to procedural due process) because of plaintiff's disability. However viewed, this ADA statutory claim is rooted in an allegation of state action that is unconstitutional.

152. See *Harassment Claims Available Under Different Titles of ADA*, 18 Disability Compliance Bull. (LRP) 9 (Sept. 21, 2000) (citing to EEOC regulations, 29 CFR §1630.12 and Department of Justice Technical Assistance Manual); see also *Disability-Based Harassment Claims Begin to Move Into ADA Spotlight*, 19 Disability Compliance Bull. (LRP) 7 (Jan. 11, 2001) (same).

153. 247 F.3d 229 (5th Cir. 2001).

154. The Third, Sixth, and Seventh Circuits previously had assumed that the ADA creates such a claim and the cause of action had been recognized in district courts in Georgia, Ohio, Puerto Rico, Virginia, and West Virginia. See *id.* at 232-34 (citing authority).

155. 247 F.3d 169 (4th Cir. 2001).

156. *Flowers*, 247 F.3d at 231-32, 236-37.

was sufficient for a jury to find that she was harassed "because of her status as an HIV-positive individual and that this harassment was so severe and pervasive that it unreasonably interfered with her job performance."<sup>157</sup>

The *Fox* decision also makes out a compelling case of Equal Protection violation if the employer had been engaged in state action. There, an employee was placed on light duty after injuring his back. Other supervisors and co-workers, apparently resenting his work assignment, began harassing him and ordering him to perform tasks beyond his medical restrictions. One supervisor was reported to have stated: "I don't need any of you handicapped M - F - s. As far as I am concerned, you can go the H - home."<sup>158</sup> After the employee's physician issued new medical restrictions, a supervisor responded by assigning the employee to a table that was located in a hazardous area and that was far too small for his 6-foot-7-inch height, resulting in aggravating his back condition.<sup>159</sup> There was testimony that a supervisor referred to persons with a disability as "handicapped M [-]F [-]s" and that the plaintiff and other disabled employees were the targets of "constant verbal harassment and insults."<sup>160</sup> One employee testified that a supervisor instructed the employees at the facility not to talk to disabled employees who were treated "like they had a disease."<sup>161</sup> The court noted that supervisors "constantly" directed vulgar and profane language at disabled employees.<sup>162</sup> The court concluded that the evidence fully supported the jury's finding of harassment directly attributable to the employee's disability of such severity and pervasiveness that a reasonable person would have perceived the environment as hostile.<sup>163</sup>

Almost by definition, the hostile environment cases arising out of disability-based harassment creating a hostile work environment entail conduct that a jury, following properly drafted limiting instructions, could find did not advance any legitimate state interest and arose out of prejudice and antipathy, or out of mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable, or from vague, undifferentiated fears, or some other irrational basis. Therefore, most ADA hostile environment cases entail conduct violative of the Equal Protection Clause.<sup>164</sup>

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157. *Id.* at 237.

158. *Fox*, 247 F.3d at 173.

159. *Id.*

160. *See id.* at 174.

161. *Id.*

162. *See id.*

163. *See id.* at 179.

164. A good example might be the jury verdict against the New Jersey Department of Environmental Services. *See Jury Decides Against N.J. in "Hostile Environment" Harassment Case*, 14 Disability Compliance Bull. (LRP) 1 (Feb. 11, 1999). There, the jury awarded money damages to a radio dispatcher with the Bureau of Law Enforcement of the Division of Fish, Game, and Wildlife who had a lifelong history of learning disabilities, including dyslexia. The employee was the target of jokes and ridicule because of his disability. Supervisors and co-workers routinely referred to him as "stupid" and a "moron." Some supervisors mimicked the facial expressions and sounds of mentally retarded people when they talked to him. The taunting escalated to violence when a supervisor chased the employee with pepper spray and discharged the spray in the employee's face. One law enforcement officer working for the employer actually drew his weapon and pointed it

A third ADA private cause of action for money damages that should survive *Garrett* is an ADA action for retaliation brought under ADA section 12203(b).<sup>165</sup> This section is located in Title V, the ADA's miscellaneous provisions, not in Title I.<sup>166</sup> This section prohibits acts that

coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

Public agencies often have been accused of unlawful disability-based retaliation. For example, the Department of Justice sued an Indiana town on behalf of an employee who worked as a dispatcher for the town's police department.<sup>167</sup> The employee had filed an administrative charge against the town in 1997 alleging the town's health insurance plan contravened provisions of the ADA. Thereafter, the town began to subject the employee to "unreasonable scrutiny, reprimands, and suspensions."<sup>168</sup> The employee then filed ADA charges with the EEOC alleging retaliation and was thereafter fired. In such a case, if it could be proved that the employer retaliated against the employee for exercising a right guaranteed by valid federal law, then by definition, the employer's treatment of the employee would not be to accomplish a legitimate state interest.<sup>169</sup> In other words, the conduct would be unconstitutional. Thus even if the employer were a state government and even if the plaintiff were an individual seeking money damages, *Garrett*

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over the employee's head. Other law enforcement officers routinely aimed their pepper spray at the employee and grabbed for their weapons pretending to be about ready to draw the weapon and shoot the plaintiff. When plaintiff asked that the harassment stop, a supervisor responded that he should "get used to the locker room atmosphere." *Id.* at 10. Another supervisor told plaintiff that these things were done to him to relieve their stress and he was their "White Rodney King." *Id.*

165. See 42 U.S.C. § 12203(b).

166. It should be noted that the lower courts are divided on the question of whether compensatory and punitive damages are available for violation of ADA's section 12203. Compensatory and punitive damages are available in ADA litigation by virtue of section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981A. Section 102 provides for damages for several sections of the ADA but does not include Title V, the location of ADA section 12203. One court, therefore, has concluded that damages are not available for unlawful retaliation under the ADA. See *Brown v. Lee's Summit*, Missouri, No. 98-0438-CV-W-2, 1999 U.S. Dist. LEXIS 17671 (W.D. Mo. June 1, 1996). The contrary conclusion has more often prevailed. See, e.g., *Muller v. Costello*, 997 F. Supp. 299, 302-03 (N.D.N.Y. 1998) (collecting cases and holding that compensatory damages are available against a public entity but subject to statutory cap provided in 42 U.S.C. § 1981A(a)(2)); *Ostrach v. Regents of the Univ. of Cal.*, 957 F. Supp. 196 (E.D. Cal. 1997); *Niece v. Fitzner*, 922 F. Supp. 1208 (E.D. Mich. 1996) (ADA Title II action).

167. See *Justice Department Suit Alleges That Town Retaliated Against Worker*, 16 Disability Compliance Bull. (LRP) 3 (Nov. 18, 1999).

168. *Id.*

169. At a minimum, the Constitution's Supremacy Clause renders illegitimate any governmental action designed to victimize one for exercising rights guaranteed by a valid federal law.



should not preclude a federal court from hearing these ADA cases alleging retaliation because they simply entail proving unconstitutional discrimination.

Other retaliation suits have involved allegations of a town firing an employee because he obtained a settlement in an ADA lawsuit against the municipality,<sup>170</sup> of a school board retaliating against a child with Down's Syndrome because the parents of the child had pursued rights protected by the ADA on behalf of the child,<sup>171</sup> and of an employer retaliating against a supervisor who opposed the removal of an accommodation for and the discharge of an employee suffering from epilepsy.<sup>172</sup> When plaintiffs prove such allegations of retaliation for exercising rights protected by federal law, the employer's motive no longer is legitimate. Thus, even if the employer were a state, the discrimination would constitute a violation of Equal Protection because the action cannot be said to be rationally related to the advancement of a legitimate state interest. Accordingly, such causes of action against a state for money damages to remedy retaliation should survive *Garrett*.

The Ninth Circuit's decision in *Demshki v. Monteith*<sup>173</sup> challenges the above conclusion that at least some ADA retaliation claims against the state seeking money damages survive *Garrett*. There, a staff member working for a committee of the California legislature, the California Senate Rules Committee, alleged that he was fired by the Committee the day after he opposed the way the Committee had treated a disabled person who had applied for a job with the Committee. The plaintiff alleged the discharge constituted retaliation in violation of ADA section 12203. Prior to *Garrett*, the district court denied the Committee's Eleventh Amendment immunity defense. The Committee appealed but the court of appeals agreed to a stay until the Supreme Court decided *Garrett*. After *Garrett*, the court of appeals reversed the district court without oral argument.<sup>174</sup> The court held that the Title I holding of *Garrett* applied equally to a Title V claim challenging retaliation pursuant to ADA section 12203 because retaliation claims are predicated on rights protected by Title I. The court reasoned that, as with Title I, Congress did not find a pattern of unconstitutional retaliation when it enacted Title V's proscriptions on retaliation. Accordingly, the court concluded, a plaintiff may not bring an ADA retaliation action for damages against an agency of state government.

The post-*Garrett* decision in *Demshki*, rendered without the benefit of oral argument, never considered the issues raised and analyzed above. First, the

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170. See *DOJ Accuses New Mexico Town of Retaliating Against Employee*, 10 Disability Compliance Bull. (LRP) 7 (Oct. 9, 1997).

171. See *Jury Finds Florida School Liable for Retaliation, Not Discrimination*, 12 Disability Compliance Bull. (LRP) 5 (May 7, 1998).

172. See *Foster v. Time Warner Entm't Co.*, 250 F.3d 1189 (8th Cir. 2001) (holding that a supervisor may not be retaliated against for engaging in activity protected by the ADA, which includes opposing actions against employees that the supervisor has a good faith, reasonable belief violates the ADA).

173. 255 F.3d 986 (9th Cir. 2001).

174. *Id.* at 988.

court never acknowledged that because *Garrett* was a remedy case it does not immunize an arm of state government from its duty to comply with all of the substantive requirements of ADA Title I.<sup>175</sup> Accordingly, ADA section 12203 merely prohibits retaliation for exercising rights still enforceable against the States. Second, the court never addressed the question of whether the alleged retaliation by the Senate Rules Committee violates the Fourteenth Amendment. Third, the court never addressed the pressing question of whether ADA violations that amount to constitutional violations survive *Garrett*. Finally, the Court simply assumed that Congress' Section 5 power to enact section 12203 depends on Congress having identified a pattern of unconstitutional state retaliation. But as explained above, a pattern of unconstitutionality is required only with respect to overbroad Section 5 legislation<sup>176</sup> and most, if not all, ADA section 12203 is not overbroad. Section 12203 actions merely make out a statutory violation based on unconstitutional conduct.<sup>177</sup> For all of these reasons, courts outside the jurisdiction of the Ninth Circuit may properly conclude not to follow *Demshki*.<sup>178</sup>

### C. *Suits Against State Officers – Individual and Official Capacity Suits*

The *Garrett* decision also does not preclude two different types of ADA suits in federal court brought against state officers. The first are damage actions against state officers sued in their individual capacity.<sup>179</sup> The second are suits for prospective relief brought against state officers sued in their official capacity.<sup>180</sup> The distinction between these two types of suits is easily lost

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175. See discussion *supra* note 98 and accompanying text.

176. See discussion *supra* notes 122-26 and accompanying text.

177. See discussion *supra* notes 165-72 and accompanying text.

178. As discussed more fully *infra* notes 189-99, it is important that one not suppose that a § 1983 action alleging constitutional violations is an adequate substitute for an ADA remedy for unconstitutional disability-based discrimination. First, the States cannot be sued under § 1983. *Id.* Second, § 1983 suits against state officers in their official capacity may validly seek only prospective relief, not money damages. *Id.* Third, it is true that plaintiffs may deploy § 1983 to sue state officers in their individual capacity for damages to remedy state officers' unconstitutional conduct. This is because the ADA was intended to supplement and not supplant other legal rights of persons with disabilities. See *Baumgardner v. County of Cook*, 108 F. Supp. 2d 1041, 1045 (N.D. Ill. 2000) (holding that the ADA does not preempt other causes of action, citing ADA section 12201(b) as evidence of Congress' intent to leave intact other remedies for persons with disabilities); see *id.* at 1052-53 (discussing lower court decisions permitting plaintiffs to bring § 1983 actions alleging unconstitutional actions by state officers either concurrent with or in lieu of ADA claims). However, such § 1983 individual capacity officer suits are not an adequate substitute for an ADA suit against the state because: 1) enforcement of a money judgment is more likely when the state is a defendant than when a state officer is a defendant except, perhaps, in states that indemnify state officers and 2) most importantly, states in an ADA action would not have available the qualified immunity defense that usually defeats plaintiffs in § 1983 suits against state officers. *Id.* See discussion *infra* notes 197-99 and accompanying text.

179. See *Scheuer v. Rhodes*, 416 U.S. 232 (1974). (damage actions brought pursuant to 42 U.S.C. § 1983 ).

180. See *Ex parte Young*, 209 U.S. 123 (1908).

resulting in the improper application of Eleventh Amendment doctrine with respect to each.

*Individual Capacity suits:* For over a quarter of a century, Eleventh Amendment doctrine has permitted damage actions against state officers sued in their individual capacity.<sup>181</sup> Such suits are not considered a suit against the state because the state officer, and not the state, is the real party in interest.<sup>182</sup> It is well established that such suits are not barred by the Eleventh Amendment even though the state officials were acting in their official capacity when committing the alleged violation<sup>183</sup> and even though "a suit against a state officer is functionally a suit against the state, for the state defends the action and pays any adverse judgment."<sup>184</sup>

One should resist concluding that individual capacity suits are a meaningful alternative to the private ADA damage action against the state that *Garratt* found to be unconstitutional. No individual capacity suit can be brought unless a federal statute imposes obligations on state officers and consequent liability and the ADA is widely understood as not doing so.<sup>185</sup> This impediment to bringing an individual capacity suit against state officers also is likely to preclude bringing them against state officers under either the ADEA or Title VII.<sup>186</sup> The same is true with respect to individual capacity suits

181. See *Scheuer*, 416 U.S. at 238 (state governor may be sued for damages in federal court pursuant to cause of action created by 42 U.S.C. § 1983 for conduct arising out of his official conduct when the damages are to be paid by the governor himself). See also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (suit against federal officials).

182. Cf. *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945) (stating damage action may not be maintained even though state officers are named defendants when "the action is in essence one for the recovery of money from the state . . .").

183. See *Hafer v. Melo*, 502 U.S. 21 (1991).

184. See John C. Jeffries Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 50 (1998). Indemnification of state officials by the state does not convert an individual capacity suit into a suit against the state for Eleventh Amendment purposes. See *CHEMERINSKY*, *supra* note 104, at 416 n.23, 422-23 n.48 (collecting cases); see Jeffries, *supra*, at 61 ("Whether a state chooses to recognize a right to indemnification surely cannot control the availability of federal remedies or the meaning of federal constitutional guarantees."). See generally *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425 (1997) (stating that an agreement by federal government to indemnify state university did not deprive it of Eleventh Amendment immunity.).

185. See, e.g., *Alsbrook v. Maumelle*, 184 F.3d 999, 1005 n.8 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 1003 (2000), *cert. dismissed on application of both parties*, 120 S. Ct. 1265 (2000) (holding that ADA suit brought against state officers sued in their individual capacity must be dismissed because the ADA provides a private right of action only against entities and not against individuals); *id.* at 1005 n.8 ("[T]hree [circuits] have held that there is no liability under Title I against individuals who do not otherwise qualify as 'employers' under the statutory definition." (citing cases from the 7th, 10th, and 11th Circuits)). *Accord Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir. 1999); *Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999).

186. See, e.g., *Lissau v. Southern Foods, Inc.*, 159 F.3d 177 (4th Cir. 1998) (Title VII); *Matthews v. Kilroy*, 117 F.3d 1420 (6th Cir. 1997) (Title VII); *Dici v. Pennsylvania*, 91 F.3d 542 (3d Cir. 1996) (Title VII); *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995) (Title VII); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (ADEA and Title VII.); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507 (4th Cir.), *cert. denied*, 512 U.S. 1058 (1994)

brought under the 1973 Rehabilitation Act.<sup>187</sup> Other federal labor and civil rights statutes, because of their unique statutory language, do provide for individual capacity suits against state officers.<sup>188</sup>

Section 1983 suits<sup>189</sup> are unlikely to provide an efficacious alternative to bringing ADA money damages suits against states. First of all, a § 1983 suit does not provide a cause of action against the State or its agencies since

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(ADEA); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583 (9th Cir.), *cert. denied*, 510 U.S. 1109 (1994) (ADEA and Title VII).

187. The Rehabilitation Act of 1973, 29 U.S.C. § 794 (1994) (providing suit only against “any program or activity receiving Federal financial assistance”). See *Lollar v. Baker*, 196 F.3d 603, 609 (5th Cir. 1999) (holding that because state agency and not individual state official is the program recipient of the federal financial assistance the Rehabilitation Act provides no right of action against state officials); *Mallet v. Wisconsin Div. of Vocational Rehab.*, 130 F.3d 1245, 1248-51 (7th Cir. 1997) (holding that section 722 of the Rehabilitation Act does not confer a private right of action). *But see Estate of Alcalde v. Deaton Specialty Hosp. Home, Inc.*, 133 F. Supp. 2d 702 (D. Md. 2001) (holding that doctors at a public hospital may be sued individually under section 504 of the Rehabilitation Act if they receive federal funds in their private practice).

188. Examples are the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201 et seq. (1994) [FLSA] and the Family Medical Leave Act, 29 U.S.C. §§ 2601 - 2654 (1994) [FMLA]. Both the FLSA and the FMLA cover employing entities (including state governments) plus “any person who acts directly or indirectly in the interest of an employer.” See FMLA Section 29 U.S.C. § 2611(4)(A)(ii)(I); FLSA Section 29 U.S.C. § 203(d). This language has been interpreted to permit private rights of action against individuals. See *Meara v. Bennett*, 27 F. Supp. 2d 288, 291 (D. Mass. 1998) (adopting the majority view that “[statutory] language clearly suggests that individuals are contemplated as defendants under [the FMLA]” – collecting cases); *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403, 412-413 (M.D. Pa. 1999) (identifying FMLA individual liability as the predominant view with respect to public employee supervisors - collecting cases); *Bryant v. Delbar Prods., Inc.*, 18 F. Supp. 2d 799, 808 (M.D. Tenn. 1998) (same); *Dole v. Solid Waste Serv., Inc.*, 733 F. Supp. 895, 923 (E.D. Pa. 1989) (“The overwhelming weight of authority is that a corporate officer with operational control of a corporation’s covered enterprise is an employer along with the corporation, jointly and severally liable under [the FLSA] for unpaid wages.”), *aff’d mem.* 897 F.2d 521 (3d Cir.), *cert. denied*, 497 U.S. 1024 (1990). *Contra Keene v. Rinaldi*, 127 F. Supp. 2d 770, 774-79 (M.D.N.C. 2000) (holding that public employee supervisors may not be sued individually under the FMLA).

In addition, the copyright laws provide a right of action against state officials in their individual capacity. See *Sony Corp. v. Universal Studios*, 464 U.S. 417, 433 (1984) (“[A]nyone who violates any of the exclusive rights of the copyright owner’s, that is, anyone who trespasses into [the copyright owners’] exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statutes, ‘is an infringer of the copyright.’”) (citing 17 U.S.C. § 501(a)). Officials of state universities are thus subject to individual liability arising out of copyright infringement. See *Richard Anderson Photography v. Brown*, 852 F.2d 114, 122 (4th Cir. 1988) (holding public relations director of state university personally liable for damages for copyright infringement: “[t]he mere fact that [a party’s] conduct was undertaken in the course of . . . State employment does not . . . relieve [the party] of individual liability, even if [the] employer could not be sued for it.”). *Accord Kersavage v. Univ. of Tenn.*, 731 F. Supp. 1327 (N.D. Tenn. 1989).

189. 42 U.S.C. § 1983 (1994). § 1983 does not confer substantive rights; it provides a remedy, that is, a private cause of action, for violation of constitutional rights and rights created by federal statute.

neither is a "person" within the meaning of § 1983.<sup>190</sup> Nor can a § 1983 suit for money damages be asserted against state officers sued in their official capacities because such suit is no different from a suit against the state itself.<sup>191</sup>

It is true that § 1983 damage actions against state officers sued in their individual capacities are available to enforce federal statutory rights.<sup>192</sup> However, the Supreme Court has concluded that plaintiffs may not enforce statutory provisions through § 1983 suits in two situations: "where Congress has foreclosed such enforcement of the statute in the enactment itself and where the statute [does] not create enforceable rights, privileges and immunities within the meaning of Section 1983."<sup>193</sup>

The ADA clearly creates enforceable rights, so the § 1983 cases involving the assertion of statutory rights under the ADA have turned on whether Congress implicitly has foreclosed enforcement of the ADA through a § 1983 suit for money damages brought against a state officer because the ADA contains its own comprehensive remedial scheme.<sup>194</sup> The lower courts generally hold that § 1983 does not provide a cause of action against state officers for damages arising out of alleged ADA violations because the ADA contains such a comprehensive enforcement scheme.<sup>195</sup> Most courts similarly

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190. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 70 (1989). See also *Howlett v. Rose*, 496 U.S. 356, 365 (1990) ("*Will* establishes that the State and arms of the State, which have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under [Section] 1983 in either federal or state court.>").

191. See *Will*, 491 U.S. at 70-71.

192. See *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980).

193. *Wright v. Roanoke Redev. & Hous. Auth.*, 479 U.S. 418, 423 (1987).

194. A statute's remedial scheme may be "sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981). The presumption is that a § 1983 cause of action exists so the burden is on the party claiming it does not. See *Mallett v. Wisconsin Div. of Vocational Rehab.*, 130 F.3d 1245, 1255 n.11 (1997). The Court has held that it would "recognize an exception to the general rule that § 1983 provides a remedy for violation of federal statutory rights only when Congress has affirmatively withdrawn the remedy." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990). Some lower courts have expressed the concern that permitting a § 1983 remedy with respect to federal rights contained in statutes that contain comprehensive administrative remedial measures that must be exhausted would permit plaintiffs to bypass those administrative procedures. See *Baumgardner v. County of Cook*, 108 F. Supp. 2d 1041, 1050-51 (N.D. Ill. 2000) (discussing that concern and distinguishing § 1983 actions alleging disability-based constitutional violations, reasoning that in those 1983 actions "the ADA's administrative scheme is not being bypassed.").

195. See, e.g., *Alsbrook v. Maumelle*, 184 F.3d 999, 1011 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 1003 (2000), *cert. dismissed on application of both parties*, 120 S. Ct. 1265 (2000) ("ADA's comprehensive remedial scheme bars [plaintiff's] § 1983 claim against [state officers] in their individual capacities."); *id.* (ADA's comprehensive scheme "evidences a congressional intent to foreclose resort to § 1983 for remedy of statutory violations."); *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1531 (11th Cir. 1997) (holding that a plaintiff may not maintain a § 1983 action in lieu of, or in addition to, an ADA cause of action if the only alleged deprivation is of employee's rights created by the ADA); *Meara v. Bennett*, 27 F. Supp. 2d 288, 291-92 (D. Mass. 1998) (same — collecting cases). There is a minority, contrary view. See *Frederick L. v. Dep't of Pub. Welfare*, 157 F. Supp. 2d 509 (E.D. Pa.

reject § 1983 actions asserting rights under the Rehabilitation Act.<sup>196</sup>

Further complicating the ability to recover damages against state officers in individual capacity suits is the doctrine of qualified immunity.<sup>197</sup> “[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>198</sup> This qualified immunity doctrine presents most plaintiffs with an insurmountable barrier to recovery.<sup>199</sup>

*Official Capacity Suits:* In *Garrett*, the Court acknowledged that plaintiffs still have “federal recourse against discrimination [prohibited by ADA Title

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2001) (finding insufficient evidence that the ADA’s remedial scheme evidences a congressional intent to foreclose § 1983 relief); *Ransom v. Arizona Bd. of Regents*, 983 F. Supp. 895, 903 (D. Ariz. 1997) (allowing § 1983 action); *Independent Hous. Servs. v. Fillmore Ctr. Ass’n*, 840 F. Supp. 1329 (N.D. Cal. 1993) (same). See also *Wesley v. Vaughn*, No. CIV. A. 99-1228, 2001 WL 210285 at \*4 n.8 (E.D. Pa. Feb. 28, 2001) (collecting contrasting authority).

196. See, e.g., *Lollar v. Baker*, 196 F.3d 603, 609, 610-11 (5th Cir. 1999); *Holbrook v. City of Alpharetta*, 112 F.3d 1522, 1531 (11th Cir. 1997). But see *Mallet*, 130 F.3d at 1251-57 (holding that § 1983 provides a private right of action to enforce the provisions of Title I of the Rehabilitation Act.); *Frederick L. v. Dep’t of Pub. Welfare*, 157 F. Supp.2d 509 (E.D. Pa. 2001) (finding insufficient evidence that the Rehabilitation Act’s remedial scheme evidences a congressional intent to foreclose § 1983 relief).

As discussed *supra* note 121, even if § 1983 is not available to enforce ADA statutory rights, it clearly is available to sue state officers in their individual capacity for disability-based discrimination that amounts to a violation of the Fourteenth Amendment.

197. State officials may invoke either absolute or qualified immunity from personal liability from damages. The immunity available depends on the official’s functions. Officials performing judicial, prosecutorial, or legislative functions are entitled to absolute immunity. See *Mereles v. Waco*, 502 U.S. 9, 11 (1991) (per curiam) (judicial); *Burns v. Reed*, 500 U.S. 478, 486-96 (1991) (prosecutorial); *Lake Country Estates, Inc. v. Tahoe Reg’l Planning Auth.*, 440 U.S. 391, 406 (1979) (legislative). Police officers serving as witnesses also possess absolute immunity. See *CHEMERINSKY*, *supra* note 104, at 500, 510-12. All other state officials may assert qualified immunity. *Id.* at 513. See *Richardson v. McKnight*, 521 U.S. 399 (1997).

198. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

199. See *Hartley, The Alden Trilogy*, *supra* note 17, at 392-404. One study of all federal court cases over a two-year period found that the court sustained the qualified immunity defense in 80 percent of the cases. See *Diana Hassel, Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 145 n.106 (1999). *Id.* at 124 (The “courts’ almost unfettered judgment [that] determines the outcome of the application of the defense.”). Many others have noted the near impossibility of overcoming the qualified immunity defense except for the most battered plaintiffs. See *Hartley, The Alden Trilogy*, *supra* note 17, at 399 n.375 (collecting authority).

An optimist might argue that the threat the qualified immunity doctrine poses to the § 1983 individual capacity suit recedes somewhat when the alleged unlawful conduct by a state officer constitutes unconstitutional conduct such as disability-based harassment or retaliation, conduct that one would imagine is clearly unconstitutional. Pessimists, those who have read dozens of qualified immunity cases that so overwhelmingly result in the denial of the § 1983 claim, are not likely to have their fears quieted just because plaintiff brings a disability-based harassment or retaliation action. Whether the optimists or the pessimists prove more prescient must await judicial developments over the next decade.

I] . . . in actions for injunctive relief under *Ex parte Young* . . . .”<sup>200</sup> *Young* suits are the mirror image of individual capacity suits. They name state officers in their official capacities rendering the defendant state officer the nominal party. The suit is really against the office held by the state official being sued, making the suit one against the state.<sup>201</sup> *Young* suits do relax *Garrett’s* grip to the extent they permit private plaintiffs to enjoin future violations of their Title I rights.<sup>202</sup> But their usefulness in ADA litigation is tempered by a variety of restrictions that need to be understood.<sup>203</sup>

First, Federal courts have jurisdiction over a suit against a state official “when that suit seeks only prospective injunctive relief in order to ‘end a continuing violation of federal law.’”<sup>204</sup> These suits may not be maintained for retroactive relief, however, thus precluding suits for money damages.<sup>205</sup> The prospective/retrospective distinction is hardly self-evident, freeing the courts to exercise considerable discretion. For example, the reason for denying plaintiffs the right to retrospective relief is to protect state treasuries but it is clear that the Eleventh Amendment does not bar *Young* injunction ac-

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200. *Garrett*, 121 S. Ct. at 968 n.9. In *Pennhurst State Sch. & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89 (1984), the Court held that the *Young* exception to a state’s judicial immunity under the Eleventh Amendment does not apply to prospective relief based on state law. Thus the normal rules of federal supplemental jurisdiction do not apply when the state is the defendant. In disability litigation, state claims will be severed and dismissed. *See, e.g., Dover Elevator Co. v. Arkansas State Univ.*, 64 F.3d 442, 447 (8th Cir. 1995) (holding *Young* is “inapplicable in a suit against state officials on the basis of state law” observing that “it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law.”).

201. *See Hafer v. Melo*, 502 U.S. 21, 25 (1991) (“Suits against state officials in their official capacity therefore should be treated as suits against the State.”).

202. But the *Young* suit does not grant compensation for past wrongs. Nor does it deter noncompliance until injunctive relief is granted. The Court’s rationale is “[r]emedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment.” *Green v. Mansour*, 474 U.S. 64, 68 (1985).

203. One important limitation is that ADA plaintiffs suing state officials under a *Young* theory will not be afforded a jury trial. *See Civil Rights Act of 1991*, 42 U.S.C. § 1981 A(b)(4)(c)(1) (jury trial only available to complaining party seeking compensatory or punitive damages). *See also Project Life, Inc. v. Glendening*, 139 F. Supp. 2d 703, 707 (D. Md. 2001) (noting that absent a request for damages, no jury trial is available in an ADA action).

204. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985)). *See Deli v. El Torito Restaurant, Inc.*, No. C 94-3900-CAL, 1997 WL 714866 (N.D. Cal. June 24, 1997) (denying injunctive relief in ADA Title III action because only allegation was of a single incident of past discrimination and plaintiff unable to demonstrate continuing adverse effects.). *Young* suits remain suits against the state for purposes of the state action doctrine but not for purposes of the Eleventh Amendment. This is why the rule has been referred to by the Court as a “fiction.” *See Pennhurst II*, 465 U.S. at 114 n.25 (1984).

205. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (“[A] suit by [a] private part[y] seeking to impose [a] liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.”).

tions even if compliance with the injunction will result in substantial ancillary cost to the states.<sup>206</sup> The language of the law does its magic by characterizing as “damages” those burdens on a state treasury that *Young* does not permit while characterizing as “ancillary” those compliance costs *Young* does permit. But what remedies are “ancillary?” In *Hutto v. Finney*,<sup>207</sup> the Court held the Eleventh Amendment is no bar to the “ancillary” remedy of attorneys’ fees generated in securing a *Young* injunction.<sup>208</sup> What about reinstatement in an ADA discharge case? Is it prospective relief even though it is ordered to remedy a past injury?<sup>209</sup> What about front pay? Now that it is clear that front pay is not subject to the ADA’s compensation cap,<sup>210</sup> the remedy of front pay is likely to be requested more often. Should it be considered “ancillary” to the prospective relief of reinstatement because “courts have ordered front pay as a substitute for reinstatement[?]”<sup>211</sup> *Garrett* will

206. See *id.* See also *Quern v. Jordan*, 440 U.S. 332 (1979); *Milliken v. Bradley*, 433 U.S. 267 (1977). Ironically, the cost of future compliance often exceeds past liability. See CHEMERINSKY, *supra* note 104, at 418.

207. 437 U.S. 678 (1978).

208. A case decided the same term as *Garrett*, but eclipsed by it, is *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services*, 121 S. Ct. 1835 (2001). In that case, the Court held that because a state defendant voluntarily ceased to engage in the conduct that was the subject of an ADA suit seeking declaratory and injunctive relief, and thereby mooted the case, the plaintiff was not the “prevailing party” eligible for an award of attorney fees. The predicate for the award of such fees, the Court held, is either a favorable judgment on the merits or a settlement agreement enforced through a consent decree. See *id.* at 1840. States desiring to avoid attorney fees are provided an incentive by *Buckhannon* to litigate up to the eve of an adverse judgment and then attempt to moot the case through voluntary cessation of the challenged activity. The Court in *Buckhannon* dismissed this risk because “petitioners’ fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant’s change in conduct will not moot the case.” *Id.* at 1842. But, of course, that is not very reassuring for public employees whose only cause of action against the state after *Garrett* may be a claim for equitable relief in actions filed against state officers in their official capacity.

209. See *Isham v. Wilcox*, No. 00-2177, 2001 WL 505235 at \*2 (10th Cir. 2001) (unpublished opinion) (holding that *Young* provides a federal court’s jurisdiction to decide merits of suit against the state in action seeking reinstatement to former employment position).

210. See *Pollard v. E. I. du Pont de Nemours & Co.*, 121 S. Ct. 1946, 1948 (2001) (“[F]ront pay is simply money awarded for lost compensation during the period between judgment and reinstatement or in lieu of reinstatement.”).

211. *Id.* Courts award front pay in cases in which reinstatement is not viable “because of continuing hostility between the plaintiff and the employer or its workers, or because of psychological injuries suffered by the plaintiff as a result of the discrimination . . . .” *Id.* That front pay is compensatory in nature does not answer the question whether it is available as part of a *Young* reinstatement order or in lieu of one. In *Millikan v. Bradley*, 433 U.S. 267 (1977), the Court upheld a desegregation order requiring a school to implement several remedial and compensatory aspects of a school desegregation plan. This portion of the desegregation plan was found to constitute prospective relief. The Court noted:

The educational components, which the District Court ordered into effect *prospectively*, are plainly designed to wipe out continuing conditions of inequality . . . . That the programs are also ‘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.



require the courts to determine more precisely the parameters of *Young*'s prospective/retrospective distinction.

Second, in its decision in *Seminole Tribe*, the Supreme Court limited the availability of *Young* prospective relief by inquiring into whether Congress intended to provide it and finding an intent not to permit this remedy when a statute contains an "intricate remedial scheme."<sup>212</sup> At least one lower court has denied a *Young* remedy in an ADA case, citing this limitation found in the *Seminole Tribe* decision.<sup>213</sup> This clearly is the minority view, however.<sup>214</sup>

Third, there is precedent for the proposition that *Young* remedies are unavailable for a different reason. In *Walker v. Snyder*,<sup>215</sup> the court ruled that the *Young* exception to the Eleventh Amendment is unavailable in an ADA action because "a suit based on *Young* is a suit against state officers as individuals, not against the state itself. We [have held] that the only proper defendant in an action under the provisions of the ADA . . . is the public body as an entity. A suit resting on [*Young*] is not a suit against a public body and therefore cannot support relief."<sup>216</sup> *Walker* was decided prior to *Garrett*, which reaffirmed the availability of a *Young* remedy in ADA litigation.<sup>217</sup> One might anticipate that this guidance in *Garrett* will put *Walker* to rest —

*Id.* at 289-90 (emphasis in the original).

212. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 n.17 (1996) ("We find . . . that Congress did not intend [to authorize federal jurisdiction under *Ex parte Young* in] the Indian Gaming Regulatory Act."). The court explained, "Where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Id.* at 74. It has been suggested that a logical next step for the Court could be to preclude a *Young* remedy except with respect to those statutes containing a clear statement by Congress of an intent to provide it, see Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex parte Young*, 72 N.Y.U. L. REV. 495, 530 (1997), or even to limit *Young* to constitutional, not statutory, violations. See *id.* at 535.

213. See *McGarry v. Dir., Dep't of Revenue, State of Mo.*, No. 96-4249-CV-C-66BA, 1999 WL 33204561 at \*1 (W.D. Mo. Dec. 9, 1999) ("Based on the holding in *Seminole Tribe* . . . , the doctrine of *Ex parte Young* does not apply to suits seeking to enforce a statute that provides exclusive remedies within the statute [and] [t]he ADA contains exclusive remedies.").

214. See, e.g., *Gibson v. Arkansas Dep't of Correction*, 265 F.3d 718, 722 (8th Cir. 2001) (rejecting the argument that the ADA's remedial scheme manifests a congressional intent that no *Young* remedy is available in ADA litigation); *Frazier v. Simmons*, 254 F.3d 1247 at 1253 (10th Cir. 2001) (holding that ADA Title I suits against state officials in their official capacity for prospective relief survive *Garrett* but emphasizing that plaintiffs must request such relief); *Wesley v. Vaughn*, No. CIV.A. 99-1228, 1999 WL 1065209 at \*2 (E.D. Pa. Nov. 18, 1999) (dismissing ADA claim for damages against state officials because of state's sovereign immunity but denying motion to dismiss a claim against officers which sought injunctive relief against officers in their official capacities); *Berthelot v. Stadler*, No. Civ.A. 99-2009, 2000 WL 1568224 (E.D. La. Oct. 19, 2000) (dismissing all ADA claims against prison officials in their individual capacities but holding that claims against them in their official capacities are valid); *Henrietta v. Giuliani*, 81 F. Supp. 2d 425 (E.D.N.Y. 2000) (upholding *Young* remedy in an ADA Title II action).

215. 213 F.3d 344 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1188 (2001).

216. *Id.* at 347.

217. See discussion *supra* note 200 and accompanying text.

perhaps even in the circuit from which it originated. But more fundamentally, *Walker's* reasoning fails because it misconstrues the distinction between individual- and official-capacity suits. It may be that the ADA does not provide for individual capacity suits, as most courts have held.<sup>218</sup> *Young* suits are different. They name the individual officer but only nominally by naming the officer in his or her official capacity as the incumbent in a particular state office. These really are suits against the state, as the Supreme Court has emphasized.<sup>219</sup> So understood, these suits for prospective relief should not be precluded by the absence of a statutory cause of action against the officer for damages when sued in the officer's individual capacity.<sup>220</sup>

Finally, in its 1997 decision in *Idaho v. Coeur d'Alene Tribe*,<sup>221</sup> the Court denied a *Young* remedy because of the effect of the requested relief on the state's treasury and governing autonomy.<sup>222</sup> A minority faction on the Court in the *Coeur d'Alene Tribe* case<sup>223</sup> agreed with the result but proposed a major overhaul of the *Young* doctrine, urging adoption of an *ad hoc* "balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case."<sup>224</sup> To allay concerns of an "expansive application of the *Young* exception,"<sup>225</sup> this faction proposed restricting the exception to cases when "no state forum [is] available to vindicate federal interests"<sup>226</sup> or when a case presents an otherwise compelling need to vindicate federal rights.<sup>227</sup> Were this revision to be adopted, it would represent a wholesale alteration of the role of federal courts in enforcing federal rights against the states.<sup>228</sup>

It would be naive to suppose that there will be no additional efforts to give *Young* a cramped interpretation. *Garrett*, *Kimel*, and the Court's other Sec-

218. See discussion *supra* notes 179-85 and accompanying text.

219. See, e.g., *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State.") (citing *Kentucky v. Graham*, 473 U.S. 159, 166 (1985)).

220. See *Randolph v. Rodgers*, 253 F.3d 342, 348 (8th Cir. 2001) (citing the dicta in *Garrett* and correctly explaining the difference between the individual capacity suit the ADA does not provide and the *Young*-type official capacity suit the ADA affords).

221. 521 U.S. 261 (1997).

222. *Id.* at 262.

223. Chief Justice Rehnquist, joining Justice Kennedy.

224. *Coeur d'Alene Tribe*, 521 U.S. at 278.

225. *Id.* at 274 (citations omitted).

226. See *id.* at 291.

227. See *id.* at 278.

228. A balancing approach in the application of the *Young* exception is beginning to take hold in the lower courts. The Fourth Circuit has noted:

In approaching the question of whether the doctrine of *Ex parte Young* permits [injunctive relief against state officials], we begin with the recognition that the scope of interests that *Ex parte Young* protects in preventing violations of federal law must be carefully circumscribed so as not unduly to erode the important underlying doctrine of sovereign immunity. . . [a]ccordingly, to determine whether *Ex parte Young* authorizes [prospective relief] against State officials, we must evaluate the federal interests served by permitting a federal suit against individual [state officials] . . . [and determine] whether the federal suit would unduly sacrifice the important value of [the State's] sovereign immunity.

tion 5 cases increase the likelihood of *Young* injunctions becoming the remedy of choice in private federal litigation to enforce federal statutory rights against the States. The States, therefore, can be expected increasingly to recoil and call for *Young*'s containment. The claim likely will be that unanticipated federal court litigation brought by individual litigants (even when limited to injunctive relief) poses a continuing threat to the States' own ordering of their governmental processes and their fiscal autonomy, and indeed threatens to deprive the States of the several blessings promised by the federalism revival.<sup>229</sup> The competing concern, as I have attempted to demonstrate, is that with the inability of individuals to enforce federal rights in either state or federal court through suits for money damages, *Young* may be all that keeps federal civil rights that are enforceable against the States from becoming a mockery: a body of rights bereft of meaningful remedies.

## V. LIKELY FALLOUT FROM *GARRETT*

Moving to a discussion of likely effects of a legal development is a bit like moving from the hardpan to the swamp. The ground beneath seems unacceptably soft as one moves away from the prescriptive and proscriptive and into the predictive. But a case like *Garrett* calls for some prediction. I shall limit myself to three areas: *Garrett*'s likely effect on other federal statutes, potential congressional responses to *Garrett*, and some fallout from the federalism revival that could occur beyond the beltway.<sup>230</sup>

### A. *Garrett's Likely Effect on Other Federal Legislation*

The most immediate unanswered question following *Garrett* is its effect on ADA Title II.<sup>231</sup> Actually *Garrett* left two Title II questions unresolved. First, may public employees use Title II to litigate employment discrimina-

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Bell Atl. Md., Inc. v. MCI WorldCom, Inc., 240 F.3d 279, 294-95 (4th Cir.), cert granted in part sub nom. Verizon Md., Inc. v. Pub. Serv. Comm'n, 121 S. Ct.2548 (June 25, 2001) (mem.).

229. *Alden v. Maine*, 527 U.S. 706, 750-52 (1999), listed the following federalism values promoted by upholding States' sovereign immunity: 1) States right to "order the processes of [their] own governance . . ." *Id.* at 752; 2) protection from "an unlimited congressional power to authorize suits . . . [which] could create staggering burdens, giving Congress a power and a leverage over the States that . . . would pose a severe and notorious danger to the States and their resources." *Id.* at 751; and 3) protection from "'unanticipated intervention [of individuals] in the processes of government[.]" thereby upsetting the premise of democratic governance that judgments regarding the allocation of scarce resources be made through each state's political process, "not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Id.* at 750-51 (citing *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 53 (1944)). See also *Alden*, 527 U.S. at 750 (Federal governmental assertion of control "over a State's most fundamental political processes . . . strikes at the heart of political accountability . . ."). *Id.*

230. Washington, D.C. has an interstate highway encircling the city that is referred to as the Capitol Beltway. The phrase "beyond the beltway" refers to events and activities that arise outside of Washington, D.C. and among non-politicians and persons who are not government officials.

231. The Court explicitly left that question for another day. See discussion *supra* note 2. Title I bars disability-based discrimination in employment by both private employers

tion claims or is Title I their exclusive remedy? If Title II is available to remedy disability-based employment discrimination, is the Title I holding in *Garrett* applicable to such Title II suits?

In *Garrett*, the Court acknowledged a split in the circuits on the question of Title II's availability to remedy employment discrimination and chose not to resolve the question.<sup>232</sup> But the Court telegraphed its likely unwillingness in the future to find a congressional intent to provide duplicate remedies in Titles I and II for public employees to challenge employment discrimination.<sup>233</sup> The statutory question aside, it is unlikely in any event that the Court will find that Congress validly abrogated state judicial immunity by providing a Title II remedy for employment discrimination when in *Garrett* it found no such valid exercise of the Section 5 power when Congress enacted Title I.<sup>234</sup>

But what about Title II claims other than those arising out of alleged employment discrimination? Is *Garrett*'s Title I abrogation holding equally to them? *Garrett*'s rationale<sup>235</sup> suggests strongly that the Court will find that Congress did not validly abrogate state judicial immunity when enacting Title II. First, if the Court segments its inquiry into the pattern of unconstitutionality as it did in *Garrett*, Title II likely will fail.<sup>236</sup> Congress did not attempt to parse the systemic disability-based discrimination it uncovered when it enacted the ADA by making findings of a pattern of unconstitutionality with respect to each of the major categories of government programs Title II covers. Even if the Court considers state discrimination in the provision of government services generally when evaluating the existence of the requisite pattern of unconstitutionality, it seems problematic that the Court would conclude Congress documented the requisite pattern of unconstitutional-

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and public entities. Title II of the ADA deals with disability-based discrimination with respect to "services, programs, or activities of a public entity." 42 U.S.C. §12132 (1994).

232. See *Garrett*, 121 S. Ct. at 960 n.1.

233. In *Garrett*, the Court made reference to *Russello v. United States*, 464 U.S. 16 (1983) ("[W]here Congress includes particular language in one Section of a statute but omits it in another Section of the of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion . . .") (citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

234. Since the Court found that Title I does not provide a valid private right of action against the States for money damages because Congress failed to establish a pattern of unconstitutional state employment discrimination when it enacted the ADA, it follows that the Court would reach the same conclusion with regard to a Title II claim for damages to remedy employment discrimination.

235. See discussion *supra* Part III.

236. In *Garrett*, the Court limited its inquiry into the pattern of unconstitutionality by considering only evidence in the legislative record and congressional findings of unconstitutional state employment discrimination. See discussion *supra* notes 78-83 and accompanying text.

ity.<sup>237</sup> Finally, Title II's overbreadth may be too excessive in any event<sup>238</sup> for the Court to find it a congruent and proportionate response to unconstitutional behavior by the states.<sup>239</sup> When Title II does reach the Court, and the Court gets a second bite at the ADA apple, one would hope, as I have argued above,<sup>240</sup> that the Court might be willing to tell us why Congress lacks Section 5 power to enact the ADA 1) when there are legislative facts showing a pervasive pattern of unconstitutional disability-based discrimination (if one includes the totality of state and local governments' behavior), 2) when Con-

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237. In *Garrett*, the majority dismissed the many instances of discrimination noted in the Appendix C to Justice Breyer's dissenting opinion, which he drew from ADA's legislative history, as "anecdotes" that "are so general and brief that no firm conclusion can be drawn." 121 S. Ct. at 966 n.7. See *Thompson v. Colorado*, 258 F.3d 1241, 1254 (10th Cir. 2001) (holding that ADA Title II is not a valid abrogation of the States' Eleventh Amendment immunity because Congress' aim was "to remedy the effects of benign neglect resulting from the invisibility of the disabled" and that "invidious animus . . . was not the focus" (quoting *Helen L. v. DiDario*, 46 F.3d 325, 335 (3d Cir. 1995)).

238. Most of the state action regulated by Title II is not itself unconstitutional. A sampling of cases provides a sense of Title II's overbreadth. A recurring issue is whether Title II can be deployed to prohibit states from charging individuals with disabilities a small fee for parking placards. Compare *Brown v. North Carolina Dep't of Motor Vehicles*, 166 F.3d 698 (4th Cir. 1999) (holding state sovereign immunity prohibits Title II from being used against a state which is charging disabled persons for parking placards) *cert. denied*, 121 S. Ct. 1186 (2001) (mem.) with *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999) (holding that a surcharge for public service on only disabled persons is unequal treatment and contrary to Title II's citizen parity protections). Title II regulations require a public entity that employs fifty or more employees to designate one individual to coordinate efforts and publish grievance procedures providing for the prompt and equitable resolution of complaints. See *University Agrees to Implement Grievance Procedures*, 17 Disability Compliance Bull. (LRP) 24 (May 19, 2000). A mobility impaired plaintiff has prevailed on a Title II claim in a case alleging that a university had failed to provide access to a botanical garden. See *Parker v. Universidad de Puerto Rico*, 225 F.3d 1 (1st Cir. 2000) (Title II imposes an affirmative duty to eliminate barriers that would deny access to individuals with disabilities). Title II's accessibility requirements are extensive. One report concluded that as of 1995, few of the 85,000 state and local governments had come into full compliance with Title II accessibility requirements. See *ADA Deadline on Modifications Passes - But Few Look to Be in Compliance*, 6 Disability Compliance Bull. (LRP) 1 (Feb. 2, 1995). In a class action suit, persons with mobility impairments have gained a preliminary injunction under Title II requiring a city to conform curb ramps to ADA requirements. See *Deck v. City of Toledo*, 29 F. Supp. 2d 431 (N.D. Ohio 1998).

239. See *Garrett*, 121 S. Ct. at 966 (citing the ADA's provisions for reasonable accommodation and prohibitions against work rules that have a disparate impact on persons with disabilities and concluding they render Title I a disproportionate response); *Garcia v. S.U. .Y. Health Ctr. Of Brooklyn*, No. 00-9223, 2001 WL 1159970 at \*7 (2d Cir. Sept. 26, 2001) ("Title II [of ADA] is neither congruent nor proportional [in its entirety] to the proscriptions of the Fourteenth Amendment [citing ADA's requirement that] a state make reasonable modifications in its programs, services or activities . . . [and concluding that] Title II focuses on disparate effects divorced from any inquiry into intent."); *Lieberman v. Delaware*, No. CIV. A. 96-523 GMS, 2001 WL 1000936 at \*4-\*5 (D. Del. Aug. 30, 2001) (holding abrogation in Title II invalid and citing similar post-*Garrett* holdings in several other federal District Courts. *Contra* *Project Life, Inc. v. Parris Glendening*, 139 F. Supp. 2d 703, 703 n.5 (D. Md. 2001) (holding that *Garrett* does not control ADA Title II actions and Congress validly abrogated the States' sovereign immunity when enacting Title II).

240. See discussion *supra* notes 92-97 and accompanying text.

gress concludes, based on those facts, that integration of the disabled into society is the key to deterring and remedying the prejudice causing this pervasive pattern of unconstitutional discrimination, and 3) when the only efficacious way to integrate the disabled into society is to integrate them into all segments of society, including all aspects of public sector services?<sup>241</sup>

What about the abrogation provisions in other federal legislation? As noted above, over the past six Terms the Court has found unconstitutional each of the seven statutes challenged on the basis of Congress' alleged lack of abrogation authority.<sup>242</sup> It is fair to assume that this pattern will continue as additional federal statutes made applicable to the States come before the Court. James Pfander makes a salient point in this regard when he explains that "Congress adopted many of the extant abrogations before *Seminole Tribe* was decided [in 1996] and did not clearly address the Fourteenth Amendment in the course of its legislative findings."<sup>243</sup> This failure to address the Fourteenth Amendment could prove fatal now that the Court requires evidence that overbroad legislation enacted pursuant to Congress' Section 5 power must be shown to have been aimed at eradicating unconstitutional conduct as evidenced by Congress documenting a pattern of such unconstitutional state action. Many of the nation's civil rights statutes that have been made applicable to the States could fail that test. Many already are in trouble in the lower courts.

The damage remedies against the States provided by the Family Medical Leave Act (FMLA)<sup>244</sup> are perhaps the most endangered. Even before *Garrett*, most lower courts, particularly in the more recent decisions, had found Congress lacks Section 5 power to abrogate the States' sovereign immunity in the FMLA.<sup>245</sup> The Equal Pay Act (EPA)<sup>246</sup> has fared better.<sup>247</sup> A strong case can be made that the EPA should survive post-*Garrett* judicial scru-

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241. See discussion *id.*

242. See discussion *supra* note 2 and accompanying text.

243. James E. Pfander, An Intermediate Solution to State Sovereign Immunity: Federal Review of State-Court Judgments After *Seminole Tribe*, 46 UCLA L. REV. 161, 191 n.124 (1998).

244. 29 U.S.C. §§ 2601 - 2654 (1994).

245. See *Townsel v. Missouri*, 233 F.3d 1094, 1095 (8th Cir. 2000) (collecting cases from the 2d, 3rd, 5th, 6th, and 11th circuits); *Cohen v. Nebraska Dep't of Admin. Serv.*, 83 F. Supp. 2d 1042, 1045 (D. Neb. 2000) (noting that of the circuit and district courts to consider the issue since 1998, all have concluded that Congress lacked power to abrogate states' immunity from suit under FMLA); see also *Laro v. New Hampshire*, 259 F.3d 1, 16-17 (1st Cir. 2001) (holding that the personal medical leave provisions of the FMLA do not validly abrogate state sovereign immunity, a result that is "consistent with that of every other circuit that has addressed the issue" (citing cases)).

246. The Equal Pay Act, Pub. L. No. 88-38, 29 U.S.C. § 206(d), was enacted in 1963 and extended to the states in 1974. See Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 6.

247. See Comment, *The Equal Pay Act As Appropriate Legislation Under Section 5 of the Fourteenth Amendment: Can State Employers Be Sued?*, 76 WASH. L. REV. 279-311, 281 (2001) (concluding that "lower courts have . . . upheld the EPA as appropriate Section 5 legislation"); *id.* at 293-95 & nn.138, 143-44 (citing cases).

tiny,<sup>248</sup> though final judgment must await the next round of post-*Garrett* litigation.<sup>249</sup>

The constitutionality of the application to the States of the money damages provided by Title VII of the 1964 Civil Rights Act<sup>250</sup> bears closer attention in the post-*Garrett* era than one initially might think necessary. Somewhat surprisingly, the issue of Congress' Section 5 power to enact Title VII has never been settled at the Supreme Court.<sup>251</sup> The lower courts that have considered the question of Congress' Section 5 power to enact Title VII and apply it to the states have found Congress possesses such power. Most, though not all, of these decisions are pre-*Garrett*, however.<sup>252</sup> There should be no difficulty establishing the constitutionality of applying to the States

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248. The reasons are: 1) The EPA's scope is narrow: it requires equal pay for women for work that entails the same skill, effort and responsibility as work performed by men; 2) The pattern of wage discrimination between male and female jobs is one that is easy to document since it is primarily a statistical demonstration; 3) States are much more constrained by the Fourteenth Amendment when engaging in gender discrimination than when engaging in discrimination based on age or disability. Age and disability discrimination are subject to rational basis review. See discussion *supra* notes 60, 129-31 and accompanying text. By contrast, to withstand constitutional challenge, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives. Moreover, gender may not be used as an:

inaccurate proxy for other, more germane bases of classification. Hence, 'archaic and overbroad' generalizations concerning the financial position of . . . working women [do] not justify use of a gender line in determining eligibility for certain governmental entitlements. Similarly, increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas' [are] rejected as loose-fitting characterizations incapable of supporting state statutory schemes that [are] premised upon their accuracy.

*Craig v. Boren*, 429 U.S. 190, 199 (1976) (internal citations omitted).

For the above reasons, the EPA has been held to "prohibit[ ] very little constitutional conduct." *Varner v. Illinois State Univ.*, 226 F.3d 927, 935 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 2241 (2001). *Accord Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 553 (7th Cir. 2001) (holding that "the EPA essentially targets only unconstitutional gender discrimination").

249. The early returns suggest that the EPA will survive a *Garrett*-type challenge. See *Cherry*, 265 F.3d at 553 (7th Cir. Sept. 7, 2001) (holding Congress validly exercised its Section 5 authority when enacting the EPA); *Siler-Khodr v. Univ. of Tex. Health Sci. Ctr. Ass'n San Antonio*, 261 F.3d 542 (5th Cir. 2001) (same).

250. 42 U.S.C. §§ 2000e et seq. (1994).

251. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the case first establishing the abrogation potential of Section 5, was a Title VII case. *Fitzpatrick* resolved the question of whether the Eleventh Amendment bars a damage remedy against the state but did not litigate whether Congress has Section 5 power to provide such a damage remedy in Title VII. 427 U.S. at 456 n.11 ("Apart from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondent state officials do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under [Section] 5 of the Fourteenth Amendment.").

252. See *Reynolds v. Alabama Dep't of Transp.*, 4 F. Supp. 2d 1092 (M.D. Ala. 1998) (stating Congress did not exceed its Section 5 power when it subjected the States to liability for Title VII disparate impact claims of discrimination); *Carman v. San Francisco United Sch. Dist.*, 982 F. Supp. 1396, 1405 (N.D. Cal. 1997) (stating Congress possesses Section 5 power to abrogate state sovereign immunity from Title VII claims in federal court). *Accord Okruhlik v. Univ. of Ark.*, 255 F.3d 615 (8th Cir. 2001) (holding that Con-

Title VII's prohibitions of overt racial, national origin, and religious discrimination since each is subject to strict judicial scrutiny when litigated as a constitutional issue.<sup>253</sup> Similarly, Title VII's proscriptions of invidious gender discrimination also should survive a *Garrett*-type challenge because gender classifications also receive heightened judicial scrutiny.<sup>254</sup>

Much more problematic are the cases applying Title VII's prohibitions of employment policies causing a disparate impact.<sup>255</sup> The Court has held that Congress intended to apply Title VII's disparate impact rules to the States but has never ruled whether Congress possesses the Section 5 power to do it.<sup>256</sup> The post-*Garrett* disparate impact cases could be difficult to defend because state action causing a disparate impact on racial, gender, or other groups is subject to rational basis judicial review, unless it can be proved that

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gress validly abrogated the Eleventh Amendment for claims of disparate treatment and impact on the basis of race under Title VII).

253. See *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (stating that because suspect classifications are deemed to reflect prejudice and antipathy, such classifications are subjected to strict judicial scrutiny and will be sustained only if the legislation making the classification is narrowly tailored to serve a compelling state interest).

254. . See discussion *supra* note 248 and accompanying text. In *Maitland v. University of Minnesota*, 260 F.3d 959, 964 (8th Cir. 2001), the court even held that Title VII sex discrimination damage claims brought against a state entity in federal court by male employees are not barred by the Eleventh Amendment because Congress validly abrogated state sovereign immunity with respect to those Title VII claims.

255. Under some circumstances, Title VII prohibits employment policies that cause a disparate impact on any of the groups Title VII protects. One of the more actively litigated Title VII disparate impact issues entails rules that employees must speak only English. These rules have a disparate impact based on national origin and the EEOC takes the position that English only rules violate Title VII unless job related and consistent with business necessity. This is the EEOC's theory in an action filed in the Spring of 2001. See *EEOC v. Beauty Enters, Inc.* (D. Conn. Mar. 12, 2001) (reported at *Dictating Spoken and Written Language in the Workplace*, 37 Fair Empl. Prac. Cas. (BNA) 42 (March 29, 2001)). There is judicial support for the EEOC's theory. See *Gutierrez v. Mun. Court of Southeast Judicial Dist.*, 838 F.2d 1031 (9th Cir. 1989), *vacated by* 490 U.S. 1016 (1989). See also *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993) (resolving the allegations of unlawful English-only rules requires a fact specific inquiry that considers the employer's unique needs in each case).

Employment policies can also have an unlawful disparate impact on women. For example, in *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) a district court held that an employer's failure to include prescription contraceptives in its otherwise generally comprehensive prescription drug plan violates Title VII. In another case, the Seventh Circuit has suggested in dicta that an electric utility's refusal to provide bathroom facilities to its female workers who work outside on power lines, may violate Title VII's prohibitions on disparate impact. See *DeClue v. Central Ill. Light Co.*, 223 F.3d 434 (7th Cir. 2000) (holding that policy does not constitute sexual harassment but suggesting it may constitute unlawful disparate impact).

256. See *Connecticut v. Teal*, 457 U.S. 440 (1982) (Employer's acts of racial discrimination in promotions, effected by an examination having disparate impact, rendered the employer liable, under Title VII, for racial discrimination suffered by employees barred from promotion, even if the "bottom line" result of the promotional process was an appropriate racial balance); *Dothard v Rawlinson*, 433 U.S. 321 (1977) (Congress intended to prohibit the disparate effect that the minimum height and weight standards had on female applicants and apply those prohibitions to the states).



the motive for the state action creating the disparate impact is invidious discrimination against the group harmed.<sup>257</sup> Plaintiffs seldom can meet this test.<sup>258</sup> Accordingly, if the Court applies its normal requirement that Congress may not exercise its Section 5 power unless it identifies a pattern of unconstitutional conduct of the type the proposed legislation is regulating, and if the Court requires that the required pattern be a pattern of unconstitutional disparate impact state action, Title VII's disparate impact provisions will not likely meet the test for the simple reason that there are virtually no plaintiff victories in disparate impact constitutional litigation. There is another option. The Court could conclude that, unlike the ADA, Congress did identify a pattern of unconstitutional racial, national origin, religious, and gender state employment discrimination and enacted Title VII to remedy and deter it. And the Court could conclude that prohibiting employment policies that have a disparate impact on these groups is an appropriate way for Congress to remedy or deter the invidious discrimination Congress identified.<sup>259</sup>

The Pregnancy Discrimination Act (PDA),<sup>260</sup> amended Title VII to define sex discrimination to include pregnancy discrimination. This statute is applicable to the States.<sup>261</sup> It may be difficult to defend the PDA in a *Garrett*-type challenge because of the Court's decision in *Geduldig v. Aiello*.<sup>262</sup> There the Court held that discrimination based on the status of being pregnant is not gender discrimination. The pregnancy discrimination in *Aiello* thus was given a rational basis review and held not to violate the Fourteenth Amendment.<sup>263</sup> Since the Court holds that pregnancy discrimination is constitutional if rationally grounded, there does not exist a pattern of unconstitutional state pregnancy discrimination. Given the reasoning in *Garrett*, and the absence of a pattern of unconstitutional state pregnancy discrimination, it is difficult to

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257. See, e.g., *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979) (disparate impact against women); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (disparate impact against the poor); *Washington v. Davis*, 426 U.S. 229 (1976) (disparate impact against racial minorities).

258. For example, in none of the cases cited *supra* note 257 did plaintiffs prevail.

259. See, e.g., *Okruhlik v. Univ. of Arkansas*, 255 F.3d 615, 626 (8th Cir. 2001) (holding that applying the Title VII ban on disparate impact discrimination to the States is a valid exercise of the Section 5 power because disparate impact racial discrimination is functionally equivalent to unconstitutional invidious racial discrimination and its ban, therefore, is a 'prophylactic' response to achieve racial equality).

If the Court concludes that Congress does not possess Section 5 power to apply Title VII's disparate impact prohibitions to the states, then those provisions will continue to be applicable to the States but enforceable by private litigation only through a *Young* suit for prospective relief. See discussion *supra* notes 204-06 and accompanying text.

260. 42 U.S.C. § 2000e(k) (1994).

261. See *Erickson v. Bd. of Governors of State Colls. and Univ. for Northeastern Ill. Univ.*, No. 95-C2541, 1998 WL 748277 at \*1 (N.D. Ill. Sept. 30, 1998), *rev'd on other grounds*, 207 F.3d 945, 947 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1187 (2001) (University successfully challenged on sovereign immunity grounds the ADA's application to it but did not so challenge the PDA.).

262. 417 U.S. 484 (1974).

263. The State had refused to pay for pregnancy-related disabilities when its disability insurance system paid for other disabilities lasting more than eight days but less than twenty-six weeks. *Id.*

see how the PDA's abrogation provisions will be found to be constitutional as long as a majority of the Court clings to the holding in *Aiello*.<sup>264</sup>

Finally, Congress has enacted many statutes prohibiting discrimination in federally financed programs. Examples are: 1) Title VI of the 1964 Civil Rights Act;<sup>265</sup> 2) The Rehabilitation Act of 1973;<sup>266</sup> 3) Title IX of the Education Amendments of 1972;<sup>267</sup> and 4) Individuals With Disabilities Education Act (IDEA).<sup>268</sup> As discussed next, Congress may possess authority through the Federal spending power to induce the States to waive their sovereign immunity by conditioning the States' receipt of federal funds on such a waiver. But at least some of these statutes also are all enacted pursuant to Congress' Section 5 power and those, therefore, need to be evaluated also under *Garrett* principles.

### B. *Potential Congressional Responses to Garrett*

A headline in a disability newsletter published soon after the Court's decision in *Garrett* proclaimed, "Section 504 is 'Next Battleground' Following Ruling in *Garrett* Case."<sup>269</sup> Section 504 of the Rehabilitation Act of 1973<sup>270</sup> was enacted pursuant to Congress' Section 5 power as well as its spending power.<sup>271</sup> Accordingly, section 504 suits raise *Garrett*-type issues as well as the question of whether Congress may coax a state to waive its sovereign immunity "voluntarily" as a condition to receipt of federal funds.<sup>272</sup>

Incident to the Congress' spending power is the power to "attach conditions on the receipt of federal funds . . ." <sup>273</sup> One condition Congress might set is requiring a state to waive its sovereign immunity. Section 504 does that.<sup>274</sup> It provides a private federal court cause of action for damages to redress disability-based discrimination against "any program or activity" that

264. Again, as with disparate impact discrimination under Title VII, the Court could hold that Congress did find a pattern of unconstitutional state employment discrimination based on gender and that the PDA is an appropriate means to deter and remedy that pattern of discrimination. See discussion *supra* notes 255-59 and accompanying text.

265. 42 U.S.C. § 2000d-7(a)(1) (1994).

266. 29 U.S.C. § 794 (1994).

267. 29 U.S.C. § 1681 *et seq.* (1994).

268. 20 U.S.C. §§ 1400-1491 (1998).

269. See Section 504 is 'Next Battleground' Following Ruling in *Garrett Case*, 20 Disability Compliance Bull. (LRP)1 (Mar. 22, 2001).

270. 29 U.S.C. § 794 (1994).

271. See *Estate of Langan v. Nebraska*, 63 F. Supp. 2d 1025, 1026 (D. Neb. 1999).

272. I will not linger discussing the likely outcome of a *Garrett* challenge to the Rehabilitation Act. Section 504's prohibitions are virtually identical to those in Title I of the ADA. There is no reason to believe that the Rehabilitation Act's legislative history better supports a pattern of state employment discrimination than does that of ADA Title I. See *Kilcullen v. New York State Dep't of Labor*, 205 F.3d 77, 80 (2d Cir. 2000) (suggesting that the Rehabilitation Act's legislative history is less compelling than that of the ADA in terms of establishing a pattern of State employment discrimination).

273. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

274. See 42 U.S.C. § 2000d-7 (1994). So do many other statutes. See discussion *supra* notes 265-68 and accompanying text.

receives federal financial assistance.<sup>275</sup> But section 504 covers only the individual state agency or department that accepts or distributes federal funds.<sup>276</sup> Accordingly, section 504's waiver requirement is limited in the same way.<sup>277</sup> The Courts of Appeal generally are in agreement that the waiver of sovereign immunity that section 504 requires is a constitutional exercise of Congress' spending power.<sup>278</sup>

The Supreme Court has not yet ruled, however. When the issue comes before the Court, opponents of section 504's waiver provisions are most

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275. See 29 U.S.C. § 794 (1994).

276. See *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 2591 (2001). ("[T]he State itself as a whole is not a program or activity. '[O]nly the department or agency which receives [or distributes] the aid is covered.' . . . The acceptance of funds by one state agency therefore leaves unaffected both other state agencies and the State as a whole.") *Id.*

277. See *id.*

278. See *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (collecting cases). A panel of the Eighth Circuit reached a contrary result. See *Bradley v. Arkansas Dep't of Educ.*, 189 F.3d 745 (8th Cir. 1999). That decision was later reversed *en banc* in a 6-4 decision *sub nom.*, *Jim C. v. Arkansas Department of Education*, 197 F.3d 958 (8th Cir. 1999). But see *Garcia v. S.U.N.Y. Health Ctr. Of Brooklyn*, No. 00-9223, 2001 WL 1159970 at \*11 (2d Cir. Sept. 26, 2001) (not reaching the issue of congressional power to induce a waiver of sovereign immunity through section 504, because court held that when state accepted federal funds it reasonably, though mistakenly, believed ADA Title II already had abrogated its judicial immunity and, therefore, accepting federal funds cannot be understood to constitute "knowing and intentional waiver" of sovereign immunity); *Pugliese v. Ariz. Dep't of Health & Human Serv.*, 147 F. Supp.2d 985, 990 (D. Ariz. 2001) (not reaching the issue of congressional power to induce a waiver of sovereign immunity through section 504, because holding that section 504 does not place state program on adequate notice that acceptance of federal funds constitutes waiver of sovereign immunity).

On the constitutionality of other congressional efforts to condition grants of funds to the States on the States' consent to waive their immunity from suit see *Cherry v. University of Wisconsin System Board of Regents*, 265 F.3d 541, 553 (7th Cir. 2001) (holding such exercise of the spending power in Title IX of the Education Amendments of 1972 is constitutional, rejecting the argument that since Title IX does not contain an explicit private right of action, it cannot be understood to contain clear notice to the States that acceptance of federal funds constitutes a waiver of state sovereign immunity). *Accord* *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999), *cert. denied*, 526 U.S. 1181 (2000) (stating recipients of Title IX funding held to "clearly understand" two consequences of accepting Title IX funding: "(1) the state must comply with Title IX's Antidiscrimination provisions, and (2) it consents to resolve disputes regarding alleged violations of those provisions in federal court.").

Though it is beyond the scope of this article, it is useful to note that in some cases the court may not reach the judicial immunity issue with respect to spending statutes because the statute does not contain a private right of action to enforce judicially the right being asserted in the case. See, e.g., *Alexander v. Sandoval*, 531 U.S. 1049 (2001) (Title VI of the Civil Rights Act of 1964 creates a private right of action only with respect to the substantive rights contained in section 601 of Title VI and not with respect to the prohibition on disparate impact discrimination contained in the Title VI regulations promulgated pursuant to section 602 of Title VI); *Litman v. George Mason Univ.*, 156 F. Supp. 2d 579, 585 (E.D. Va. 2001) (Title IX of the Education Amendments of 1972 creates a private right of action only with respect to the substantive right contained in Title IX to be free from gender discrimination by recipients of federal spending and not with respect to the prohibition on retaliation contained in the Title IX administrative regulations).

likely to concentrate on two arguments. First is the assertion that the waiver of sovereign immunity in section 504 is not sufficiently related to the purposes of the spending statute that provides federal funds to the state agency sued in any particular case.<sup>279</sup> In *Jim C v. Arkansas Department of Education*,<sup>280</sup> the dissent advanced this argument with respect to a state agency's waiver of immunity from suit alleging disability discrimination as a result of the agency receiving federal education funds. The dissent asserted that section 504's waiver requirement bore no relationship to the purposes of most federal grants to the states for education, namely to improve the overall quality of education.<sup>281</sup> Unless the Supreme Court holds that nondiscriminatory treatment of persons with disabilities always is or never is related to the purposes of most federal spending statutes, the Court will need to develop workable standards for measuring when the requisite relationship exists.<sup>282</sup>

The second argument opponents of section 504 waiver are likely to deploy is that the inducement to waive a state's judicial immunity with respect to section 504 claims is coercive. The Supreme Court has recognized that financial inducement may "pass the point at which 'pressure turns into compulsion.'" <sup>283</sup> In *South Dakota v. Dole*, the States were presented with the choice of raising the drinking age to 21 or losing 5 percent of the federal highway funds to which the state was otherwise entitled.<sup>284</sup> The Court held that putting the States to that choice was not coercive because the States could simply say "no." Section 504, by contrast, threatens a 100 percent loss of federal funding to any state agency whose state government does not agree to waive its sovereign immunity for section 504 suits against that agency. In *Jim C v. Arkansas Department of Education*, the dissenters found that a threatened \$250 million loss of federal education funds, representing twelve percent of the Arkansas Department of Education's annual budget, was coercive.<sup>285</sup> The Supreme Court will need to fashion workable standards to determine at what point "pressure turns into compulsion."<sup>286</sup> The federalism revival will condition that determination because if Congress can achieve through its

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279. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) (noting that a conditional spending statute is unconstitutional if the condition is not sufficiently related to the purposes of the spending statute); *id.* at 208 (holding that the condition in federal highway funding statute that states raise drinking age to 21 is directly related to safe interstate travel, which is one of the primary purposes of federal government's expenditure of highway construction funds).

280. 235 F.3d 1079 (8th Cir. 2001).

281. See *Jim C v. United States*, 235 F.3d at 1085 (Bowman, J., dissenting).

282. One can imagine, for example, the difficulty in establishing relatedness in the context of a disability discrimination claim brought in a section 504 suit against a state agency receiving federal funds to support, for example, the operation of a state wildlife sanctuary.

283. *Dole*, 483 U.S. at 211.

284. See *id.*

285. See *Jim C.*, 235 F.3d at 1083 (Bowman J., dissenting).

286. For a defense of Congress' exercise of the spending power when enacting section 504 see James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-discrimination Mandate of the Americans With Disabilities Act*, 52 ALA. L. REV. 91, 176-85 (2000).

spending power all it has been denied in the recent Section 5 cases, many of the States' rights "gains" achieved over the past several Terms of the Court will have been for naught.

The outcome of spending power challenges to existing federal spending statutes such as section 504 of the Rehabilitation Act will significantly affect congressional responses to *Garrett* and other congressional losses suffered in the federalism revival cases. For example, the "Older Workers' Rights Restoration Act" was introduced in the Congress after the Court's decision in *Kimel*. It requires states and state agencies receiving federal funds to waive their judicial immunity in suits alleging violations of the ADEA.<sup>287</sup> If that legislation is a constitutional exercise of Congress' spending power then so also is a "Disabled Persons' Rights Restoration Act" that uses the spending power to override the Supreme Court's decision in *Garrett*. One suspects, however, that the five Justices who have persevered over the past six Terms to thwart Congress' abrogation authority will resist congressional efforts to achieve indirectly through the Spending Power what this slim majority has held may not be achieved directly through Congress' regulatory powers.<sup>288</sup> The upcoming spending power chapter in the federalism revival will indeed be the next great battleground.

A different congressional response to *Garrett* might be an amendment to the ADA that clarifies Congress' intent that the ADA creates a private right of action for damages against the States to remedy disability-based discrimination that itself constitutes a violation of the Fourteenth Amendment. I have argued above that nothing in *Garrett* renders such a cause of action unconstitutional and that it remains in Title I of the ADA after *Garrett*.<sup>289</sup> But language in the *Garrett* decision suggests that the Court may be of the view that Congress did not intend that a private ADA Title I cause of action for damages against the States based on allegations of invidious discrimination should survive the holding in *Garrett* that Congress lacks Section 5 power to enact the overbreadth in Title I.<sup>290</sup> One therefore can expect courts will resist the argument that Title I still contains a private right of action for damages to remedy invidious discrimination by the States.<sup>291</sup> Accordingly, Congress could amend the ADA to clarify its intent to preserve a

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287. See ADEA Enforced Against States? 37 Fair Empl. Prac. Cas. (BNA) 75 (June 21, 2001).

288. The academic literature provides a wealth of suggestions for modifications of the *Dole* approach to the problem. See Lynn A. Baker, *Conditional Federal Spending and States' Rights*, in THE SUPREME COURT'S FEDERALISM: REAL OR IMAGINED, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 104 (Frank Goodman ed., March 2001); Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911 (1995). For a useful collection of contrasting views see *Spending Clause Symposium*, 4 CHAPMAN L. REV. 1 (2001).

289. See *supra* notes 120-26 and accompanying text.

290. See *supra* notes 120-21 and accompanying text.

291. See *supra* note 128 (discussing *Estate of Langan v. Nebraska*, 63 F. Supp. 2d 1025 (D. Neb. 1999)).

Title I cause of action for money damages to remedy unconstitutional disability-based employment discrimination, notwithstanding *Garrett*.<sup>292</sup>

Congress could amend the ADA in two additional ways to secure rights for persons with disabilities. First, Congress could provide in the ADA a private right of action for damages against state officers sued in their individual capacity. Such a right of action is constitutionally sound but the ADA currently is interpreted as not providing it.<sup>293</sup> As part of this ADA amendment, Congress also could amend the standards for establishing qualified immunity in individual capacity suits, a change that is needed since the current standards render individual capacity suits such a problematic option.<sup>294</sup> Second, Congress could amend the ADA to make unambiguous its intent to provide the remedy of prospective relief in suits against state officers sued in their official capacity pursuant to the doctrine of *Ex parte Young*.<sup>295</sup> This would eliminate the risk of courts finding no such intent as a result of the ADA's existing comprehensive remedial scheme.<sup>296</sup>

### C. *Effects of Garrett Beyond the Beltway*

It seems inevitable that state law prohibiting disability-based discrimination will be consulted increasingly by those seeking a damage remedy against a state to remedy disability-based discrimination.<sup>297</sup> Whether such state legislation currently is available to state employees to combat disability-based employment discrimination, and on what terms, particularly whether such statutes provide for the recovery of adequate money damages against the state, is a question that deserves a more thorough academic inquiry.<sup>298</sup> How

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292. A less surgical approach would be to amend § 1983 to include the States as "persons" covered by the portion of § 1983 that creates a private right of action for damages for violation of rights guaranteed by Fourteenth Amendment. This would reverse the current interpretation of § 1983. See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 70 (1989). It also would create remedies against the States for constitutional violations other than just disability-based discrimination.

293. See discussion *supra* note 185 and accompanying text. Moreover, currently the ADA is interpreted as precluding § 1983 suits for damages against state officers for violation of rights guaranteed by the ADA because of the ADA's comprehensive remedial scheme. See discussion *supra* note 195 and accompanying text. The Congress could amend the ADA to make clear its intent that § 1983 is available to enforce the statutory rights the ADA provides through suits against state officers sued in their individual capacities.

294. See discussion *supra* notes 197-99 and accompanying text.

295. See discussion *supra* notes 200-06 and accompanying text.

296. See discussion *supra* notes 213-14 and accompanying text.

297. See Section 504 Is "Next Battleground," *supra* note 269, at 1 (quoting Jonathan Mook, a nationally recognized ADA lawyer, as emphasizing the "importance of 'dusting off the state statutes' in light of the *Garrett* ruling.").

298. Final conclusions with respect to the adequacy of state law protecting state employees from disability-based discrimination by state employers must await thorough academic inquiry. The amicus brief filed in *Garrett* by the National Association of Protection and Advocacy Systems and United Cerebral Palsy Associations, Inc. does a very good job of summarizing state disability law as of 1990 when the ADA was enacted. See Brief for the National Ass'n of Protection and Advocacy Systems & United Cerebral Palsy Ass'ns, Inc. as Amici Curiae in Support of Respondents, Bd. of Trustees of the Univ. of Ala. v. *Garrett*, 2000 WL 1154037 (Aug. 11, 2000) (No. 99-1240). That brief demonstrates that

states will respond to *Garrett* in terms of their own disability discrimination law is one of *Garrett's* important unanswered questions.<sup>299</sup>

Ironically, *Garrett* and the other Section 5 cases that are eroding the post-World War II system of protective labor and civil rights legislation applicable to the States could have the unintended consequence of energizing unionization among public employees. During the 1970s, national labor policy shifted from protecting group rights to protecting the rights of categories of individuals.<sup>300</sup> The ADA is a good example. While on its face none of the category-based legislation was inconsistent with a commitment to protecting group action, it nevertheless undermined it. Professor James Brudney has demonstrated how the movement away from protecting group rights in favor of individual rights evidences a loss of confidence in collective bargaining as an institution, which in turn causes a "loss of legitimacy for unions as the enablers of group action. This loss of legitimacy encourages the business community and the general public to erode and belittle the role of unions."<sup>301</sup>

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many states' disability discrimination laws provided considerably less protection than does the ADA in terms of the availability of a private right of action to enforce statutory rights, the definition of disability, the requirement of providing a reasonable accommodation, the availability of compensatory damages, damage caps, coverage of mental disability, and coverage of persons with a record of an impairment or those regarded as disabled. *See id.* at 15-26; *id.* at Appendix (describing for each state the limitations as of 1990 and today of each state's disability discrimination law); *see also* J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 ARK. L. REV. 185, 261 (1986) (summarizing limits of state law protection prior to the enactment of the ADA).

299. A plaintiff desiring to sue a state on a federal civil rights claim by alleging, for example, a *Young* ADA claim for prospective relief and also on a state law claim for damages cannot bring both actions in a single court against an unconsenting state. *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89 (1984) held that the Eleventh Amendment bars a federal court from hearing state law claims against an unconsenting state pursuant to pendent jurisdiction. ("[N]either pendent jurisdiction or any other basis of jurisdiction may overrule the Eleventh Amendment."). *Id.* at 121. *Alden* precludes suing an unconsenting state on a federal claim in the state's own courts. Nor does there appear to be any way a plaintiff can toll the running of the state law statute of limitations while plaintiff files, for example, a *Young* ADA action in federal court. *See Regents of the Univ. of Minn. v. Raynor*, 620 N.W.2d 680 (Minn. 2001), *cert granted*, 121 S. Ct. 2214 (2001) (No. 00-1514) (holding that the federal supplemental jurisdiction statute, which tolls the statute of limitations on state law claims while they are pending in federal court, 28 U.S.C. § 1367(d), violates the Eleventh Amendment as applied to claims brought against unconsenting states). Accordingly, to benefit from both state and federal law, plaintiff will have no choice but to file state claims in state court and simultaneously file a federal court action to assert federal claims.

300. Since the 1960s, the national commitment for "group-based" legislation, such as the Wagner Act and the Taft-Hartley Act, seeking to advance worker interests through the protection of group action, has given way to "category-based" legislation that "relied on individual rights and freedoms while virtually ignoring group action." James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1568 (1996); *see also* Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 177- 80 (1996) (discussing "group-based" rules such as the Wagner Act and other labor relations laws and "category-based" legislation such as discrimination laws).

301. *See* Brudney, *supra* note 300, at 1564.

Moreover, category-based legislation signals that the collective bargaining process is unable to address pervasive workplace problems.<sup>302</sup> In addition, the new employment legislation reduces the need for unions because it creates individual rights enforced by individuals,<sup>303</sup> and in most of these statutes, unions play bit parts or are cast as part of the problem.<sup>304</sup> In short, at some point in the mid-1970s, the equilibrium shifted from legislation protecting the group to legislation protecting the individual and concomitantly this shift impaired the ability of workers to unionize effectively.

*Garrett* raises the tantalizing possibility of reversing the trend away from unionization that has been caused in part by the plethora of category-based legislation enacted over the past thirty years. Now public employees no longer can obtain a damage remedy for a state's violation of the minimum wage or overtime provisions of the Fair Labor Standards Act,<sup>305</sup> for a violation of the ADEA,<sup>306</sup> or for violations of Title I of the ADA. Many other civil rights and labor protection laws are in great danger of significant erosion due to the principles established in the Court's Section 5 cases.<sup>307</sup> It has been argued that a federal labor policy built around individual rights-based legislation risks giving American workers a false sense of security.<sup>308</sup> Will *Garrett* clarify that false sense of security among public employees and reignite their

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302. See *id.* at 1569 (stating that “[t]he need for a legislative solution revealed shortcomings in the collective bargaining approach”); see also Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 591-93 (1992) (summarizing state judicial and legislative changes creating a “renaissance of rights for individual employees” and concluding that “the emerging regime of individual employee rights represents not a complement to or an embellishment of the regime of collective rights, but rather its replacement”).

303. See Brudney, *supra* note 300, at 1570 (noting that “[e]mployees were now able to pursue their own rights at little or no financial cost, just as they had relied on unions to pursue their contractual and statutory rights in the past.”).

304. Professor Brudney observes that under group-based legislation, unions play the lead role in negotiating improved working conditions for employees, but under category-based legislation, “the individual rights regime assigns unions cameo appearances or even casts them as villains impeding employees’ economic progress.” *Id.* at 1571.

305. See Alden 527 U.S. at 712.

306. See Kimel, 528 U.S. at 91.

307. See discussion *supra* notes 1 – 12 and accompanying text.

308. See Susan L. Cater, *The Case Against Proposals to Eliminate the Employment at Will Rule*, 5 INDUS. REL. L.J. 471, 471-72 (1983). The infamous 1989 Term of the United States Supreme Court began eroding individual rights, which has continued under the recent federalism revival. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (limiting the coverage of the Civil Rights Act of 1870); *Loraine v. AT&T Tech., Inc.*, 490 U.S. 900 (1989) (interpreting Title VII limitations period to make recovery more difficult); *Martin v. Wills*, 490 U.S. 755 (1989) (holding that white employees who were not parties to consent decrees have had their interests harmed); *Wards Cove Packing Co., Inc. v. Atone*, 490 U.S. 642 (1989) (limiting the “disparate-impact” theory of recovery under Title VII of the 1964 Civil Rights Act); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (changing burden of proof, making recovery under civil rights statutes more difficult). Congress was required to remedy the harm done that Term, which it did, but only in part, in the Civil Rights Act of 1991. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in 42 U.S.C. § 1981) (1991).



interest in examining the possibilities of collective empowerment as an alternative to statutorily protected individual rights? You can bet that the men and women who comprise the new generation of young, sophisticated trade union leaders are asking that very question.