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BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT: A FLAWED STANDARD YIELDS A PREDICTABLE RESULT

In *Board of Trustees of the University of Alabama v. Garrett*,[1] the United States Supreme Court held that private parties could not sue states in federal court for monetary damages under Title I of the Americans with Disabilities Act of 1990 (the ADA) because Congress did not validly abrogate the states' Eleventh Amendment immunity when it passed that statute.[2] Congress can only so abrogate when it properly invokes its power to enforce the Fourteenth Amendment pursuant to Section 5 of that provision.[3] The five-Justice *Garrett* majority concluded that Title I was not valid Section 5 legislation because: (1) Congress did not respond to an identified pattern of unconstitutional employment discrimination by states against the disabled; and (2) the statute prohibited too much constitutional state action.[4]

Title I is the latest in a series of federal statutes that have failed the Court's Section 5 test.[5] In all but one of these decisions, the Justices have split 5-4 along ideological lines, with Justices Stevens, Sou-

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

2. *Id.* at 960, 967-68. Title 1 of the ADA is codified at 42 U.S.C. §§ 12111-12117 (1994). 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." U.S. CONST. amend. XI.

3. *Garrett*, 121 S. Ct. at 967-68; *see infra* notes 27-36 and accompanying text (discussing Congress's abrogation power). Section 1 of the Fourteenth Amendment prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law" or "deny[ing] . . . any person within [their] jurisdiction[s] the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Section 5 of the same Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." *Id.* § 5.

4. *Garrett*, 121 S. Ct. at 967-68.

5. *See* United States v. Morrison, 529 U.S. 598, 626-27 (2000) (holding that 42 U.S.C. § 13981 (1994), part of the Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40302, 108 Stat. 1941-1942, was not valid Section 5 legislation); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91-92 (2000) (finding the same for the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994 & Supp. 1998)); Coll. Sav. Bank v. Fla. Prepaid Postsec. Educ. Expense Bd., 527 U.S. 666, 691 (1999) (finding the same for the Trademark Remedy Clarification Act, Pub. L. No. 102-542, 106 Stat. 3567, amending 15 U.S.C. § 1125(a) (1994)); Fla. Prepaid Postsec. Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647-48 (1999) (finding the same for the Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. §§ 271(d) & 296(a) (1994 & Supp. 1998)); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (finding the same for the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb to 2000bb-4 (1994)).

ter, Ginsburg, and Breyer in dissent.[6] Those Justices continue to maintain that Congress can abrogate states' Eleventh Amendment immunity with legislation that it passes pursuant to its powers under Article I of the Constitution—a notion which the other five Justices rejected in *Seminole Tribe v. Florida.*[7] In his *Garrett* dissent, however, Justice Breyer assumed the validity of *Seminole Tribe* and focused his attacks on the Court's Section 5 test.[8] In doing so, he was more successful in attacking the structure of that test, rather than the *Garrett* Court's application of it. This discrepancy is attributable to the fact that, although the Section 5 test is fundamentally flawed, the Court in *Garrett* applied that test—flaws and all—in the same way that it had in earlier cases. Whether one accepts that test as valid or not, it is difficult to deny that the ADA had obvious shortcomings under the test as it was formulated prior to *Garrett.* Thus, while the result in *Garrett* was ultimately wrong because of the Court's ill-conceived Section 5 formulation, it was nonetheless a predictable outcome.

I. THE CASE

In 1994, Patricia Garrett, a registered nurse and Director of Nursing, OB/Gyn/Neonatal Services at the University of Alabama in Birmingham Hospital, was diagnosed with breast cancer.[9] She subsequently underwent a lumpectomy, radiation treatment, and chemotherapy, which forced her to take extended leave from her job.[10] When she returned to work in July 1995, Garrett's supervisor told her that she was going to have to give up her director position.[11] Thereafter, she was transferred to a lower paying position as a nurse manager.[12]

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6. The one exception was *City of Boerne,* in which the Court developed the test it has used in subsequent Section 5 cases. In that case, none of the Justices dissented from the Court's Section 5 formulation. *See City of Boerne,* 521 U.S. at 544 (O'Connor, J., dissenting); *id.* at 565 (Souter, J., dissenting); *id.* at 566 (Breyer, J., dissenting).

7. 517 U.S. 44 (1996). Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, restated his objections to *Seminole Tribe* last year. *See Kimel,* 528 U.S. at 93 (Stevens, J., dissenting). Justice Stevens stated: "In my opinion, Congress' power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations on the States in the first place. Neither the Eleventh Amendment nor the doctrine of sovereign immunity places any limit on that power." *Id.*

8. *Garrett,* 121 S. Ct. at 969-76 (Breyer, J., dissenting).

9. *Garrett,* 121 S. Ct. at 961.

10. *Id.*

11. *Id.*

12. *Id.*

Milton Ash was a security officer for the Alabama Department of Youth Services (the Department).[13] During the course of his employment, the Department ignored two requests that Ash had made for special accommodations on account of medical conditions.[14] After he filed a discrimination claim with the Equal Employment Opportunity Commission, Ash noticed that his scores on performance evaluations were lower than they had been before he filed the claim.[15]

Garrett and Ash filed separate suits in the United States District Court for the Northern District of Alabama, both seeking monetary damages for violations of Titles I and II of the ADA.[16] The defendants in both cases filed for summary judgment, claiming that, as state entities, they were entitled to immunity from the suits under the Eleventh Amendment.[17] In a joint opinion, the district court granted both motions and dismissed both cases.[18] On appeal, the United States Court of Appeals for the Eleventh Circuit reversed.[19] In a case decided earlier that year by the Eleventh Circuit, the court had held that the ADA was valid Section 5 legislation and that Congress, therefore, had abrogated states' Eleventh Amendment immunity when it had passed the statute.[20] Bound by this precedent, the court rejected the state of Alabama's immunity defense.[21] The Supreme Court granted certiorari to consider whether individuals may sue states for money damages in federal court under Titles I and II of the ADA.[22]

II. LEGAL BACKGROUND

A. *The Supreme Court's Eleventh Amendment Framework*

The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign

13. *Id.*

14. *Id.* Ash suffered from chronic asthma and sleep apnea and requested special accommodations to minimize adverse reactions to both conditions. *Id.*

15. *Id.*

16. *Id.*

17. Garrett v. Bd. of Trs. of the Univ. of Ala. in Birmingham, 989 F. Supp. 1409, 1410 (N.D. Ala. 1998).

18. *Id.* at 1412.

19. Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 193 F.3d 1214, 1218 (11th Cir. 1999).

20. *See* Kimel v. Fla. Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998), *rev'd in part,* 528 U.S. 62, *cert. granted sub nom.* Fla. Dep't of Corrs. v. Dickson, 525 U.S. 1121, *cert. dismissed,* 528 U.S. 1184 (2000).

21. *Garrett,* 193 F.3d at 1218.

22. 529 U.S. 1065 (2000).

State."[23] Despite this language, the Supreme Court, in *Hans v. Louisiana*,[24] held that the Amendment also prohibited citizens from suing their own states in federal court.[25] Since then, the Court has recognized exceptions to the immunity doctrine, one of which allows Congress to abrogate states' Eleventh Amendment immunity in legislation.[26]

1. *Congress's Abrogation Power.*—The Court first recognized Congress's abrogation power in *Fitzpatrick v. Bitzer*.[27] In that case, the Court held that state employees could sustain a federal action against the state of Connecticut under Title VII of the Civil Rights Act of 1964 (Title VII) because Congress had validly abrogated the state's Eleventh Amendment immunity using its power under Section 5 of the Fourteenth Amendment.[28] Thirteen years later, in *Pennsylvania v. Union Gas Co.*,[29] a plurality of the Court held that Congress had successfully abrogated the commonwealth of Pennsylvania's immunity when it had passed legislation pursuant to the Commerce Clause.[30] As a result of *Union Gas*, Congress's abrogation power was almost limitless, because most federal legislation is supported by the Commerce Clause.

Section 5 and Article I remained valid means of Eleventh Amendment abrogation until 1996, when the Court, split 5-4, reversed *Union Gas* in *Seminole Tribe v. Florida*.[31] The majority in that case adopted the *Hans* Court's reasoning that, despite its silence on the matter, the Constitution protects a state's immunity from suits brought by both its citizens and non-citizens and that, when an early Supreme Court decision contravened this concept of immunity by permitting a suit against the state of Georgia by a citizen of South Carolina, Congress crafted the Eleventh Amendment to reverse that decision and restore the

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23. U.S. CONST. amend. XI.

24. 134 U.S. 1 (1890).

25. *Id.* at 21.

26. *See infra* notes 27-36 and accompanying text.

27. 427 U.S. 445 (1976).

28. *Id.* at 456. Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17 (1994 & Supp. 1997). For the relevant portions of the Fourteenth Amendment, *see supra* note 3.

29. 491 U.S. 1 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44, 73 (1996).

30. *Id.* at 23. The Commerce Clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

31. 517 U.S. 44 (1996). Justices Stevens and Souter filed separate dissenting opinions in *Seminole Tribe*, with Justices Ginsburg and Breyer joining Justice Souter's opinion. *See id.* at 76 (Stevens, J., dissenting); *id.* at 100 (Souter, J., dissenting).

original broad version of state sovereign immunity.[32] Thus, even though the claimant tribe was suing the state of Florida, of which the tribe's members were citizens, its claim—that the state violated the Indian Gaming Regulatory Act (the Act) when it failed to negotiate a gaming compact in good faith—could only proceed if Congress had abrogated the state's immunity when it passed the Act. [33] To make this determination, the Court observed that it must "ask two questions: first, whether Congress . . . 'unequivocally expresse[d] its intent to abrogate the immunity,' and second, whether Congress . . . acted 'pursuant to a valid exercise of power.'"[34] The Court held that the Act failed the second prong because Congress had passed it pursuant to its powers under Article I, which the Court deemed an invalid means of Eleventh Amendment abrogation.[35] As a result, Section 5 is now the primary means by which Congress can wield its abrogation power.[36]

2. *Limiting the Scope of Section 5.*—In *City of Boerne v. Flores,*[37] the Court narrowly interpreted Section 5's scope and held that Congress had not validly enforced the Fourteenth Amendment when it passed the Religious Freedom Restoration Act of 1993 (RFRA).[38] With RFRA, Congress sought to reverse *Employment Division v. Smith,*[39] in which the Court held that a facially neutral, generally applicable Oregon law that outlawed use of the drug peyote was constitutional despite the incidental burden that the law placed on the claimant Native Americans' free exercise of religion.[40] Writing for the *City of Boerne*

32. *See Seminole Tribe*, 517 U.S. at 69-72 (arguing that *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793) was "contrary to the well-understood meaning of the Constitution").

33. *Id.* at 47. For the Court's abrogation discussion, see *id.* at 55-73. The Act is codified at 25 U.S.C. §§ 2701-2721 (1994 & Supp. 1998).

34. *Seminole Tribe*, 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

35. *Id.* at 59-73 (discussing flaws in *Union Gas* and overruling that decision).

36. While it is still an open question, many commentators have argued that Congress can also abrogate states' Eleventh Amendment immunity when it legislates pursuant to its powers under the enforcement provisions of the Thirteenth and Fifteenth Amendments. *See, e.g.*, Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137, 1227 n.424 (1997) ("Presumably, the reasoning of *Fitzpatrick* applies to authority granted to Congress under other post-Civil War amendments, such as Section 2 of the Thirteenth and Fifteenth Amendments."); William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843, 849 n.49 (2000) ("It appears that Congress may also abrogate the 11th Amendment when legislating under Section 2 of the 15th Amendment.").

37. 521 U.S. 507 (1997).

38. *Id.* at 536. RFRA is codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

39. 495 U.S. 872 (1990).

40. *Id.* at 890. The *Smith* Court had declined to apply the traditional standard for claims alleging unconstitutional burdens on free exercise rights. *Id.* at 884-85. In re-

majority, Justice Kennedy noted that Section 5 "is 'a positive grant of legislative power' to Congress" and that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[41] Justice Kennedy qualified these observations, however, by explaining that the enforcement power was not limitless, as it "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment," not to "decree[ing] the substance of [its] restrictions on the States."[42] While the *City of Boerne* majority conceded that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies," it nonetheless concluded that "the distinction exists and must be observed."[43] The Court explained that for legislation to be properly remedial, there had to be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[44]

Applying this Section 5 test to RFRA, the *City of Boerne* Court concluded that the statute lacked the requisite nexus "between the means used and the ends to be achieved," because, in the first place, Congress had failed to compile a legislative record that evinced any "modern instances of generally applicable laws passed because of religious bigotry."[45] In light of this lack of deliberately anti-religious state laws, the Court next observed that RFRA's broad prohibitions on state action made it "so out of proportion to a supposed remedial or preventative object that it [could not] be understood as responsive to, or

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sponse, Congress declared that one of the purposes of RFRA was "to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1).

41. *City of Boerne*, 512 U.S. at 517, 518 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966); Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

42. *Id.* at 519 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)). By dispelling the notion that Congress could enhance the Fourteenth Amendment's protections, the Court invalidated that popular interpretation of its decision in *Morgan*, in which it had held that Section 4(e) of the Voting Rights Act of 1965 was a valid exercise of Congress's Section 5 power. *Morgan*, 384 U.S. at 658; *see also City of Boerne*, 521 U.S. at 527-29 (concluding that such an interpretation of *Morgan* was not a "necessary" one "or even the best one").

43. *City of Boerne*, 521 U.S. at 519-20.

44. *Id.*

45. *Id.* at 530.

designed to prevent, unconstitutional behavior."[46] Justice Kennedy noted that RFRA's "[s]weeping coverage ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[47] Justice Kennedy further observed that RFRA lacked the kind of provisions that might have limited its scope enough to make it valid Section 5 legislation.[48] To the *City of Boerne* majority, the fact that most of the displaced state actions would have been valid under *Smith* "illustrate[d] the substantive alteration of [*Smith*'s] holding attempted by RFRA."[49]

B. Subsequent Applications of City of Boerne*'s Section 5 Test*

1. Florida Prepaid.—The Court next applied its Section 5 test in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank.*[50] In that case, the Court, split 5-4, held that the Eleventh Amendment barred private-party federal actions against states under the Patent and Plant Variety Protection Remedy Clarification Act (the Patent Remedy Act)[51] because that law was not valid Section 5 legislation.[52] Following *City of Boerne,* the Court first sought to "identify the Fourteenth Amendment 'evil' or 'wrong' that Congress intended to remedy."[53] Finding sparse evidence that states were consistently denying individuals their property rights without due process of law, the *Florida Prepaid* majority concluded that the Patent Remedy Act "[did] not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress faced in enacting proper prophylactic § 5 legislation."[54] Because the problem to which Congress purported to respond with the Patent Remedy Act was virtually non-existent and because that law "made all States immediately amenable to suit in federal court for all kinds of possible patent infringe-

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46. *Id.* at 532.

47. *Id.*

48. *Id.* at 532-33 (noting that "limitations of this kind tend to ensure Congress' means are proportionate to ends legitimate under § 5").

49. *Id.* at 534.

50. 527 U.S. 627 (1999).

51. 35 U.S.C. §§ 271(d), 296(a) (1994 & Supp. 1998).

52. 527 U.S. at 647 (concluding that "[t]he historical record and the scope of coverage . . . make it clear that the Patent Remedy Act cannot be sustained under § 5 of the Fourteenth Amendment"). Justices Souter, Ginsburg, and Breyer joined Justice Stevens's dissenting opinion in *Florida Prepaid. Id.* at 648 (Stevens, J., dissenting). Thus, the division of Justices in *Florida Prepaid* mirrored that of *Seminole Tribe. See supra* note 31 (identifying the *Seminole Tribe* dissenters).

53. *Florida Prepaid,* 527 U.S. at 639-40.

54. *Id.* at 645 (quoting *City of Boerne,* 521 U.S. at 526).

ment and for an indefinite duration," the Court also concluded that the statute prohibited too much constitutional state action to make it properly congruent and proportional under *City of Boerne*.[55]

2. *Section 5 and Civil Rights Legislation.*—Less than a year after *College Savings Bank*, the Court once again decided an Eleventh Amendment abrogation case. In *Kimel v. Florida Board of Regents*,[56] the issue was whether the Age Discrimination in Employment Act of 1967 (the ADEA) was valid Section 5 legislation.[57] Since the ADEA was a major piece of civil rights legislation, *Kimel* marked the first time that the Court applied *City of Boerne*'s Section 5 test to a statute that Congress had passed to enforce the Fourteenth Amendment's Equal Protection Clause.

a. *The Court's Equal Protection Jurisprudence.*—In the sixty years since the Court first suggested that it might subject laws that discriminated against "discrete and insular minorities" to a "more searching judicial scrutiny,"[58] the Court has developed a three-tiered system for analyzing state laws that draw classifications on the basis of individual characteristics. Courts presume that most social and economic legislation is constitutional unless it establishes such classifications in a manner not "rationally related to a legitimate state interest."[59] This rational basis standard is the lowest level of Equal Protection scrutiny, and legislation almost always survives under its lenient requirements.[60] Conversely, strict scrutiny, which courts apply to legislation that treats individuals differently on the basis of suspect classifications, such as race, alienage, and national origin, is the most stringent of the three standards.[61] Courts presume that such laws are unconstitutional unless states prove that they are "suitably tailored to serve a compelling state interest."[62] The third standard is an interme-

55. *Id.* at 647.

56. 528 U.S. 62 (2000).

57. *See id.* at 66-67. The ADEA is codified at 29 U.S.C. §§ 621-634 (1994 & Supp. 1998).

58. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

59. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985); *see also id.* (describing this standard as "the general rule" and explaining that "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes").

60. *Cf.* FCC v. Beach Communications, Inc., 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring) (concluding that rational basis review is "tantamount to no review at all").

61. *See Cleburne*, 473 U.S. at 440 ("These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.").

62. *Id.*

diate level of heightened Equal Protection scrutiny applicable to laws that draw classifications on the basis of quasi-suspect characteristics, such as gender and illegitimacy.[63] To satisfy this test, legislation must be, in the case of gender, "substantially related to a sufficiently important governmental interest"[64] or, in the case of illegitimacy, "'substantially related to a legitimate state interest.'"[65]

b. Kimel v. Florida Board of Regents.—Prior to *Kimel*, the Supreme Court had consistently concluded that it would subject state laws that discriminated on the basis of age to rational basis review.[66] The *Kimel* Court reaffirmed its commitment to this standard and with this lenient test as a backdrop ultimately concluded that the ADEA, "through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[67] In so concluding, the *Kimel* Court rejected the claimants' argument that the exceptions to the ADEA's general prohibition on age discrimination in employment ensured that the statute was not unconstitutionally broad.[68] Although the exceptions made the ADEA's ban on discrimination "less than absolute," the majority nonetheless observed that the statute's "substantive requirements . . . remain at a level akin to [the Court's] heightened scrutiny cases under the Equal Protection Clause."[69]

The *Kimel* Court next noted that the ADEA's sweeping prohibition of state age discrimination did "not alone provide the answer to [its] § 5 inquiry," as "[d]ifficult and intractable problems often require powerful remedies."[70] The Court concluded, however, that the sparse evidence of discrimination in the statute's legislative history, which consisted mainly of "isolated sentences clipped from floor debates and legislative reports," did not justify Congress's sweeping response.[71] Thus, because Congress had "never identified any pattern

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63. *Id.* at 440-41.

64. *Id.* at 441 (citing Miss. Univ. for Women v. Hogan, 485 U.S. 718 (1982); Craig v. Boren, 429 U.S. 190 (1976)).

65. *Id.* (quoting Mills v. Habluetzel, 456 U.S. 91, 99 (1982)).

66. *See* Gregory v. Ashcroft, 501 U.S. 452, 470 (1991) (concluding that rational basis review is the appropriate Equal Protection standard for scrutinizing state laws that discriminate on the basis of age); Vance v. Bradley, 440 U.S. 93, 97 (1979) (same); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313-14 (1976) (per curiam) (same).

67. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86 (2000).

68. *Id.* at 86-88.

69. *Id.* at 87-88.

70. *Id.* at 88.

71. *Id.* at 89.

of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation," the ADEA was "an unwarranted response to a perhaps inconsequential problem."[72]

C. *Legislative and Judicial Treatment of the Disabled*

1. The ADA.—When Congress enacted the ADA in 1990, it "invoke[d] the sweep of [its] authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."[73] In so doing, Congress sought "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[74] To ensure that the Eleventh Amendment would not stand in the way of this mandate, Congress expressly provided that "State[s] shall not be immune under [that provision] from an action in Federal or State court . . . for a violation of [the ADA]."[75]

Title I of the ADA applies to discrimination by employers.[76] Under this Title, "[n]o covered entity [may] discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[77] Title I defines a "qualified individual with a disability" as a person who "can perform the essential functions of the employment"[78] and an "employer"—one of the "covered entit[ies]"—as any "person engaged in an industry affecting commerce who has 15 or more employees."[79] Significantly, the ADA's definition of "person" also expressly includes states.[80]

While Title I prohibits employers from failing to provide the disabled with equal treatment, it also requires states to take affirmative steps to avoid violating the statute's ban on discrimination; that is, states must make "reasonable accommodation[s]" for their disabled employees.[81] The statute limits this requirement, however, to in-

72. *Id.*
73. 42 U.S.C. § 12101(b)(4) (1994).
74. *Id.* § 12101(b)(1).
75. *Id.* § 12202.
76. *Id.* §§ 12111-12117.
77. *Id.* § 12112(a).
78. *Id.* § 12111(8).
79. *Id.* § 12111(2), (5)(A).
80. *Id.* § 12111(7) (adopting the definition provided in 42 U.S.C. § 2000e(a) (1994)).
81. *Id.* §§ 12111(9), 12112(b)(5)(A).

stances in which the accommodations and modifications do not "impose an undue hardship" on employers.[82]

The ADA's legislative history is voluminous and reflects years of congressional research into the extent of the problem of disability discrimination in America.[83] That record evinces a long history of discrimination against the disabled, which Congress summarized in the list of findings in the ADA's statutory text.[84] Among other things, Congress observed that "individuals with disabilities are a discrete and insular minority" that, "historically, society has tended to isolate and segregate."[85] Furthermore, the disabled "continually encounter various forms of discrimination" and have been "relegated to a position of political powerlessness in our society."[86] That Congress described the disabled as a "discrete and insular minority" has symbolic constitutional significance, as courts subject laws that classify such minorities to a heightened level of Equal Protection scrutiny.[87] The Court, however, has never applied heightened scrutiny in this context; instead, it has consistently held that rational basis review is the appropriate standard for analyzing state laws that classify individuals based on their disabilities.[88]

2. *Judicial Classification of the Disabled.*—

a. City of Cleburne v. Cleburne Living Center, Inc.—In *City of Cleburne v. Cleburne Living Center, Inc.*,[89] the Supreme Court concluded, by a 6-3 majority, that the mentally retarded were not a quasi-suspect class and therefore courts could not apply a heightened level of Equal Protection scrutiny to laws singling them out for special treatment.[90] Writing for the majority, Justice White reasoned that, because the mentally retarded were "different . . . in relevant respects" from the rest of the population, "the States' interest in dealing with and

82. *Id.* §§ 12111(10), 12112(b)(5)(A); *see also* 28 C.F.R § 35.150 (1999) (allowing public entities to avoid making modifications that would "result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens").

83. *See* Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 393 nn.1-3 (1991) (listing the hearings that Congress held when it was considering the ADA).

84. *See* 42 U.S.C. § 12101(a).

85. *Id.* § 12101(a)(7), (2).

86. *Id.* § 12101(a)(5), (7).

87. *See supra* notes 58-65 and accompanying text.

88. *See infra* notes 89-101 and accompanying text (discussing the Supreme Court's classification of the disabled for Equal Protection purposes).

89. 473 U.S. 432 (1985).

90. *Id.* at 442.

providing for them is plainly a legitimate one."[91] Reluctant to make the kind of "substantive judgments" about legislation that a heightened level of Equal Protection scrutiny would require, the *Cleburne* majority chose rational basis scrutiny to ensure that legislators would have a level of flexibility in confronting the "difficult and often . . . technical matter" of how to treat the mentally retarded under the law.[92]

The Court's decision to provide this leeway was influenced by its determination that both federal and state legislators were dealing with the unique problems of the mentally retarded "in a manner that belie[d] a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary."[93] For the *Cleburne* majority, the fact that society "expect[ed] and approve[d]" of legislation that singled out the mentally retarded for special treatment demonstrated "that governmental consideration of those differences in the vast majority of situations is not only legitimate but also desirable."[94] While the Court conceded that it was possible that most of the beneficial legislation would have withstood heightened judicial scrutiny, it reasoned that imposing that standard was not prudent, because "merely requiring the legislature to justify its efforts [under heightened scrutiny] may lead it to refrain from acting at all."[95]

After establishing that the mentally retarded were not a quasi-suspect class, the *Cleburne* Court held that the municipal policy at issue in the case, whereby the city had required special use permits for multiple-dwelling facilities housing the mentally retarded but not for other such facilities, was unconstitutional even under the lenient rational basis standard.[96] The Court rejected the city's justifications for this disparate treatment, concluding that all of the city's asserted interests, which included allaying the concerns of local residents, protecting the retarded individuals from harassment by neighborhood students, and preventing overcrowding and potential fire hazards, were illegiti-

91. *Id.* (footnote omitted).

92. *Id.* at 442-43.

93. *Id.* at 443.

94. *Id.* at 444.

95. *Id.* The Court next provided two further justifications for its holding. First, it concluded that the very fact that there was such widespread legislative response to the problems of the mentally retarded "negate[d] any claim that [they] are politically powerless in the sense that they have no ability to attract the attention of lawmakers." *Id.* at 445. Finally, Justice White noted that the Court was reluctant to classify the mentally retarded as quasi-suspect because if it did so, it would almost certainly have to do the same for other classes of individuals with immutable characteristics, such as the aged, the disabled, the mentally ill, and the infirm. *Id.* at 445-46.

96. *Id.* at 450.

mate.[97] In the Court's final estimation, the permit program "rest[ed] on an irrational prejudice."[98]

Justice Marshall, joined by Justices Brennan and Blackmun, supported the Court's rejection of the city's permit policy, but would have reached that conclusion using heightened scrutiny.[99] Justice Marshall argued that the majority's purported application of traditional rational basis scrutiny was disingenuous because, if the Court had actually applied that exceedingly lenient test, "Cleburne's ordinance surely would have been valid."[100] He suggested that the Court's Equal Protection formulation in *Cleburne* "hereafter be called 'second order' rational-basis review," because the Court had applied "precisely the sort of probing inquiry associated with heightened scrutiny" while simultaneously rejecting that designation.[101]

III. THE COURT'S REASONING

A. *The Majority's Opinion*

In *Board of Trustees of the University of Alabama v. Garrett*, the Supreme Court, split 5-4, held that Title I of the ADA did not validly abrogate states' Eleventh Amendment immunity and therefore state employees could not bring federal claims for monetary damages against their employers under that provision.[102] Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, first noted that, in *Cleburne*, the Court had held that the rational basis test was the appropriate Equal Protection standard for scrutinizing laws that discriminated on the basis of disability.[103] Nothing in the ensuing discussion suggested that the *Garrett* Court gave any credence to Justice Marshall's argument that *Cleburne*'s formulation of the rational basis test was abnormally strict. "[W]here a group possesses 'distinguishing characteristics relevant to interests the State has the authority to implement,'" the Court observed, "a State's decision to act on the basis of those differences does not give rise to a constitutional

97. *Id.* at 448-50.

98. *Id.* at 450.

99. *Id.* at 455-56 (Marshall, J., concurring in part in the judgment and dissenting in part).

100. *Id.* at 456.

101. *Id.* at 458.

102. *Garrett*, 121 S. Ct. at 967-68. Although the parties had alleged violations of both Titles I and II of the ADA in district court, the Supreme Court refused to rule on the constitutionality of Title II because the parties did not brief the question of whether Title II covered employment discrimination. *Id.* at 960 n.1.

103. *Id.* at 963 (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441 (1985)).

violation."[104] Thus, the Court concluded that as long as state action was rationally related to an asserted interest, states could "quite hard-headedly—and perhaps hardheartedly—hold to job qualifications which do not make allowance for the disabled."[105]

With this Equal Protection formulation as a backdrop, the Court next concluded that Title I of the ADA was not valid Section 5 legislation because: (1) Congress did not identify a pattern of constitutional violations by states against their disabled employees; and (2) even if such a pattern had existed, the provisions of Title I prohibited too much constitutional state action to make them congruent and proportional to the problem Congress sought to address with the ADA.[106] On the question of whether Congress had uncovered a pattern of state discrimination, the Court noted that the respondents' brief cited only six examples of such discrimination from the ADA's legislative history.[107] Although these examples demonstrated that some states had failed to make the special accommodations for the disabled that the ADA required, it was not clear to the Court that the states had acted unconstitutionally under *Cleburne*.[108] Even if all the cited examples represented unconstitutional discrimination, the Court concluded that six instances did not amount to a pattern.[109] Furthermore, the Court was unwilling to consider the information contained in Appendix C to the *Garrett* opinion, which consisted of first-hand accounts of employment discrimination in all fifty states.[110] Chief Justice Rehnquist dismissed these accounts as "unexamined [and] anecdotal" and noted that they were not even reported to Congress, but rather to a special task force investigating disability discrimination.[111] The Court reasoned that if Congress had believed that the task force information represented a pattern of unconstitutional discrimination, it would have said so in the ADA's legislative history.[112] That it did not was enough justification for the Court to conclude

104. *Id.*

105. *Id.* at 964.

106. *Id.* at 964-68.

107. *Id.* at 965.

108. *See id.* (noting that, while many of the instances that Congress cited in the ADA's legislative history "evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled" that the statute requires, the question "[w]hether they were irrational under . . . *Cleburne* is more debatable").

109. *Id.*

110. *Id.* at 966. For Appendix C, *see id.* at 977-93.

111. *Id.* at 966.

112. *Id.*

that, even if the task force information was worthy of consideration, there was in fact no such pattern.[113]

The Court next found in the alternative that even if a pattern of unconstitutional discrimination by states existed, Title I was still not valid Section 5 legislation because its prohibitions on constitutional state action were too sweeping.[114] As support, the Court noted:

> [W]hereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities, the ADA requires employers to "mak[e] existing facilities used by employees readily accessible to and usable by individuals with disabilities."[115]

Although the Court conceded that there were exceptions to this accommodation requirement, it nonetheless observed that the ADA prohibited "a range of alternative responses" that were entirely constitutional.[116]

The majority was also troubled by the fact that "[t]he ADA . . . forbids 'utilizing standards, criteria, or methods of administration' that disparately impact the disabled, without regard to whether such action has a rational basis."[117] The Court noted that disparate impact alone was not enough to make a law unconstitutional under its Fourteenth Amendment jurisprudence.[118] Thus, even though the Court recognized that Congress did not have to legislate with absolute precision when it sought to remedy Equal Protection violations, it concluded that the gap between the amount of state action that Title I of the ADA prohibited and the requirements that the Constitution imposed on the states was too large to make the provision congruent and proportional to the problem of unconstitutional state discrimination against disabled employees.[119]

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113. *Id.*

114. *Id.* The Court explained: "Even were it possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne.*" *Id.*

115. *Id.* at 966-67 (quoting 42 U.S.C. §§ 12112(5)(B), 12111(9) (1994)).

116. *Id.* at 967.

117. *Id.* (quoting 42 U.S.C. § 12112(b)(3)(A)).

118. *Id.*

119. *Id.* at 967-68. Justice Kennedy filed a concurring opinion, in which Justice O'Connor joined. *Id.* at 968-69 (Kennedy, J., concurring). Both Justices joined the majority's opinion in full, but wrote separately to extol the virtues of the ADA despite its constitutional flaws. *Id.* Justice Kennedy had no "doubt that the [ADA] will be a milestone on the path to a more decent, tolerant, progressive society," creating a legal duty for citizens "to

B. *Justice Breyer's Dissent*

Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg, issued a dissenting opinion in which he attacked the majority's conclusion that Title I lacked both legislative evidence to demonstrate the existence of a pattern of unconstitutional discrimination and the requisite congruence and proportionality for purposes of the Court's Section 5 test.[120] In the evidentiary context, Justice Breyer observed that the ADA's legislative history contained "powerful evidence of discriminatory treatment throughout society in general."[121] Since "state agencies form part of . . . larger society," Justice Breyer observed, "[t]here is no particular reason to believe that they are immune from the 'stereotypic assumptions' and pattern of 'purposeful unequal treatment' that Congress found prevalent."[122] Furthermore, Justice Breyer asserted that such an inference was unnecessary, considering that the task force report from Appendix C contained "roughly 300 examples of discrimination by state governments themselves."[123] He criticized the majority for dismissing that report because of a lack of independent corroboratory evidence.[124] "[A] legislature is not a court of law," Justice Breyer observed, so its evidentiary burden should not be as strict and Congress should be free to draw general conclusions from anecdotal accounts of discrimination.[125] He noted that prior to its recent Section 5 cases, the Court had never required Congress to investigate evidence so extensively, nor had it "traditionally required Congress to make findings as to state discrimination, or to break down the record evidence, category by category."[126]

Justice Breyer was also critical of the Court's imposition of a judicially created restraint—the rational basis test—on Congress.[127] The Court had disapproved of such a blurring of the separation-of-powers doctrine in *Cleburne*, he noted, out of respect for Congress's institutional role in enforcing the Fourteenth Amendment.[128] "There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its § 5 authority, to adopt rules or presumptions that

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develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society." *Id.* at 968.

120. *Id.* at 969-76 (Breyer, J., dissenting).

121. *Id.* at 970.

122. *Id.*

123. *Id.*

124. *Id.* at 970-71.

125. *Id.* at 971.

126. *Id.*

127. *Id.* at 972-73.

128. *Id.* at 973.

reflect a court's institutional limitations," Justice Breyer argued, because "[u]nlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy."[129]

Finally, Justice Breyer attacked the Court's determination that Title I's "reasonable accommodation" and discriminatory intent provisions rendered it inappropriate Section 5 legislation because its prohibitions on state action exceeded the minimum constitutional requirements.[130] The fact that the ADA's statutory demands were stricter than what the Constitution required should not have doomed the statute, the dissent argued, because, as the Court had long ago observed, Section 5 "'brought within the domain of congressional power' whatever 'tends to enforce submission' to its 'prohibitions' and 'to secure to all persons . . . the equal protection of the laws.'"[131] Justice Breyer stressed that Congress was entitled to substantial deference in this context.[132] So long as the Court could "perceive a basis upon which the Congress might resolve the conflict as it did," he argued, it was not for the Court to second-guess Congress's decision about where to draw the line between substantive and remedial legislation.[133] Justice Breyer noted that the *Garrett* majority paid lip service to this notion of judicial deference, but that, as in prior Section 5 cases where the Court had made similar statements, its "analysis and ultimate conclusion deprive[d] its declarations of practical significance."[134]

IV. ANALYSIS

In *Garrett*, the Court once again stripped a federal statute of its Section 5 underpinning and in so doing strengthened states' Eleventh Amendment protection. The merits of the majority opinion are best examined by asking two questions: First, did the Court properly apply the Section 5 test that it had developed in the *City of Boerne* line of cases? And second, is that test a sound one? Justice Breyer's dissent answered both questions in the negative, but his criticisms pertaining to the second question were more successful than those related to the first. His struggles with respect to the first question are attributable to

129. *Id.*
130. *Id.* at 974-75.
131. *Id.* at 974 (quoting *Ex parte* Virginia, 100 U.S. 339, 346 (1880)).
132. *Id.*
133. *Id.* (internal quotation marks omitted) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)).
134. *Id.* at 975.

the fact that once one accepts the Section 5 test's validity, even if only for the sake of argument, it is practically impossible to say that the majority's holding in *Garrett* was wrong—the *Garrett* Court's application of the Section 5 formulation comported with the model it had established in earlier cases, and under that model, the ADA had obvious Section 5 shortcomings, so to accept that test as valid is to accept the result. Nevertheless, the test's fundamental flaws make it unworthy of such acceptance in the first place.

A. *The Majority's Section 5 Analysis*

Because it was obvious, based on the Court's recent Section 5 jurisprudence, that the conservative block of Justices would strictly apply the Section 5 test in *Garrett*, the result in the case hinged, for all practical purposes, on the Court's interpretation of *Cleburne*.[135] Significantly, many commentators who have analyzed that case have agreed with Justice Marshall, who, in his separate opinion in *Cleburne*, concluded that the Court, despite its assertions, must have applied something stricter than rational basis scrutiny because it would not have struck down the contested municipal policy if it had applied the traditional, lenient version of that standard.[136] Nevertheless, the *Garrett* Court perceived no such contradiction when it reviewed *Cleburne*, concluding instead that traditional rational basis scrutiny was exactly the standard that the *Cleburne* Court had endorsed.[137] In so doing, it assured the failure of Title I as Section 5 legislation, for that interpretation paved the way for the Court's conclusions that: (1) most of the government discrimination that Congress cited in the ADA's legislative history was constitutional;[138] and (2) it was rational for states to refuse to accommodate their employees' disabilities if they deter-

135. *See supra* notes 89-101 and accompanying text (discussing *Cleburne* in further detail).

136. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 456-58 (Marshall, J., concurring in part in the judgment and dissenting in part); *see also supra* notes 99-101 and accompanying text (discussing Justice Marshall's separate opinion in *Cleburne*). For academic reaction to Justice Marshall's interpretation, see Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 615 (2000) (citing commentaries that support Justice Marshall's view of *Cleburne* and observing that "there seems to be a consensus [among academics] that *Cleburne*-style rationality review does entail some meaningful degree of judicial scrutiny").

137. *See Garrett*, 121 S. Ct. at 963-64; *see also supra* notes 103-105 and accompanying text (discussing the *Garrett* Court's reading of *Cleburne*).

138. *See Garrett*, 121 S. Ct. at 965-66 ("It is telling . . . that . . . Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.").

mined that doing so would present an unwanted burden.[139] These conclusions made it practically impossible to prove the existence of a pattern of unconstitutional state discrimination[140] and meant that all of the state action that Title I's "reasonable accommodation" provision had outlawed was constitutional and therefore, most, if not all, of the requirements that that provision had imposed on the states crossed the line between substantive and remedial legislation.[141]

1. *The ADA's Legislative History.*—On the question of whether Congress had demonstrated a pattern of unconstitutional discrimination against the disabled, Justice Breyer's argument that the Court should have inferred the existence of state discrimination from a wider societal problem was without merit, at least in light of the Court's precedent.[142] Granted, the Court conceded that Congress had supported its claim that "historically, society has tended to isolate and segregate individuals with disabilities,"[143] but it went on to note that Congress had not cited enough examples of discrimination by states to justify Title I as Section 5 legislation.[144] Although the question of whether the Court should hold to such a standard is debatable, the *Garrett* majority's reasoning comported with what the *City of Boerne* line of cases requires. In none of those cases did the Court look beyond the contested statutes' legislative histories when considering the extent of the problems Congress had sought to address. Thus, even though the *Garrett* majority focused almost exclusively on how states had been treating the disabled in the years immediately prior to Congress's passage of the ADA in 1990—and thereby seemingly ignored its own prior admonition that "the propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it re-

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139. *See id.* at 964 ("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 hardheadedly—and perhaps hardheartedly—hold to job qualification requirements which do not make special allowance for the disabled.").

140. *Cf. id.* at 965 (noting that, while many of the instances that Congress cited in the ADA's legislative history "evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled" that the statute requires, the question "[w]hether they were irrational under . . . *Cleburne* is more debatable").

141. *Cf. id.* at 967 ("[T]he accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer.").

142. *See id.* at 970 (Breyer, J., dissenting); *see also supra* notes 120-134 and accompanying text.

143. 42 U.S.C. § 12101(a)(2) (1994); *see Garrett*, 121 S. Ct. at 965.

144. *See Garrett*, 121 S. Ct. at 965 ("The record assembled by Congress includes many instances to support [the finding in Section 12101(a)(2)]. But the great majority of these incidents do not deal with the activities of States.").

flects'"[145]—it could properly blame Congress for not providing enough evidence.

Of course, the Court could have attached more weight to the task force report, which contained hundreds of examples of state disability discrimination.[146] The majority's argument that, "had Congress truly understood this information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings" was spurious.[147] The Court's prior Section 5 cases cannot be read to require an express congressional pronouncement that a pattern of constitutional violations exists. If Congress makes such a statement, all the better; and in the wake of *Garrett* and its predecessors, it would be prudent to do so in the future. But so long as Congress identifies enough examples of constitutional violations to demonstrate a pattern, it does not have to take the superfluous step of announcing that pattern's existence. Nevertheless, even if the Court had never made this ill-conceived argument, its conclusion that "[a]t most, somewhere around 50 of the[ ] allegations [in the report] describe conduct that could conceivably amount to constitutional violations by the States"[148] was on point and suggests that it would not have attached much significance to the report in any event.

2. *Pattern of Unconstitutional Discrimination.*—Justice Breyer countered the Court's congruence and proportionality analysis by arguing that it was for Congress to decide where that line was, and that the Court had no business second-guessing that determination if the line had a conceivable basis.[149] But Justice Breyer overlooked important language from *City of Boerne.* In that case, although Justice Kennedy conceded that "the line between measures that remedy or

145. Fla. Prepaid Postsec. Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 640 (1999) (internal quotation marks omitted) (quoting City of Boerne v. Flores, 521 U.S. 507, 525 (1997)). The Court's only historical reference was in a footnote, where it acknowledged that "[t]he record does show that some States, adopting the tenets of the eugenics movement of the early part of this century, required extreme measures such as sterilization of persons suffering from hereditary mental disease." *Garrett,* 121 S. Ct. at 965 n.6. The Court was quick to shift the focus back to recent years, however, noting that "there is no indication that any State had persisted in requiring such harsh measures as of 1990 when the ADA was adopted." *Id.*

146. *See Garrett,* 121 S. Ct. at 977-93 (providing a copy of the task force report); *see supra* notes 110-113 and accompanying text (discussing the task force report and the Court's dismissal of the evidence that it contained).

147. *See Garrett,* 121 S. Ct. at 966.

148. *Id.* at 966 n.7.

149. *See id.* at 974-75; *see also supra* notes 120-122 and accompanying text (discussing Justice Breyer's objections to the majority's congruence and proportionality analysis).

prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies," he went on to say that "the distinction exists and must be observed."[150] This last bit of language was critical because it suggested that the line has an independent, judicially determinable existence that was not affected by Congress's decision on the matter. The point is best illustrated by asking: how could the Court judge how well Congress had "observed" the line if it had not first drawn the line itself? Justice Breyer's argument cannot provide an answer because he would take more power out of the hands of the judiciary than *City of Boerne* permits. In reality, the "wide latitude" that Congress is due really amounts to a permissible level of imprecision in its line drawing, for which courts must allow because, as Justice Kennedy noted in *City of Boerne*, "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[151]

Under this proper reading of *City of Boerne*, Title I would have congruence and proportionality problems even if it did not include the "reasonable accommodation" provision. More specifically, considering the *Garrett* majority's interpretation of *Cleburne*, it is safe to conclude that, in a number of instances, a state employer could justify as rational a policy "limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of [that person] . . . because of [a] disability."[152] The fact that all, or almost all, of the state action prohibited by the "reasonable accommodation" provision was constitutional under the Court's reading of *Cleburne* only compounded Title I's Section 5 shortcomings and made the result in *Garrett* that much more predictable.

B. *Flaws in the Court's Section 5 Formulation*

To admit that the *Garrett* Court may have properly applied its Section 5 test based on precedent is not to concede that such precedent is worthy of being followed. Without *Seminole Tribe*, for instance, which commentators have criticized extensively,[153] it would have been

150. *City of Boerne*, 521 U.S. at 519-20.

151. *Id.* at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

152. 42 U.S.C. § 12112(b)(1) (1994).

153. *See, e.g.*, Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953, 968 (2000) ("*Seminole Tribe* was clearly wrongly decided."); Henry Paul Monaghan, Comment, *The Sov-*

sufficient for purposes of Eleventh Amendment abrogation that Congress passed Title I pursuant to its Commerce Clause power.[154] Significantly, all of the dissenting Justices in *Garrett* continue to reject the part of *Seminole Tribe* that foreclosed that means of abrogation.[155] Nevertheless, in his *Garrett* dissent, Justice Breyer chose not to restate his objections to *Seminole Tribe.* Instead, he assumed the validity of the decision in that case and attacked only the Section 5 part of the Court's Eleventh Amendment equation.[156] In this context, Justice Breyer properly focused on the awkward role that the Court's Equal Protection jurisprudence had played in *Kimel* and *Garrett.*

In typical Equal Protection cases, the Court applies one of its three standards to assess the constitutionality of a state action that a plaintiff is directly challenging.[157] If rational basis is the appropriate standard, then the Court identifies the discriminatory state action and considers whether the asserted justifications for the provision are rationally related to a legitimate governmental interest.[158] This formulation is unremarkable, of course, but it highlights how differently the Court uses the Equal Protection standards in its Section 5 cases. In that context, the Court, at least in theory, takes something of an inventory of all the instances of state discrimination that Congress cites in a contested statute's legislative history and considers those instances under the appropriate Equal Protection standard.[159]

There are separation-of-powers considerations that caution against this approach, which Justice Breyer discussed in his dissent; he argued powerfully that it was not for the Court to, in effect, impose rules of judicial restraint on Congress.[160] As two commentators recently explained, "the considerations of 'judicial restraint' that shape

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ereign Immunity "Exception," 110 HARV. L. REV. 102, 133 (1996) ("The majority's devotion to this doctrine of state sovereign immunity is . . . mystifying. In the end, *Seminole Tribe* simply perpetuates a questionable line of reasoning . . . ." (footnote omitted)).

154. *Cf. supra* notes 31-36 (discussing *Seminole Tribe* and its effect on Congress's abrogation power).

155. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 93 (2000) (Stevens, J., dissenting in part and concurring in part) ("In my opinion, Congress' power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations on the States in the first place. Neither the Eleventh Amendment nor the doctrine of sovereign immunity places any limit on that power."). Justice Stevens's *Kimel* dissent was joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 92.

156. *See supra* notes 120-134 (reviewing Justice Breyer's dissenting opinion in *Garrett*).

157. *See supra* notes 58-65 and accompanying text.

158. *See supra* notes 59-60 and accompanying text.

159. *See supra* notes 114-119 and accompanying text (discussing the *Garrett* Court's examination of the ADA's legislative history).

160. *See Garrett*, 121 S. Ct. at 974-75 (Breyer, J., dissenting).

and guide rational basis review are specifically designed to prevent courts from intruding on legislative discretion, they ought not to prevent Congress from applying the prohibition against invidious discrimination in a procedurally different and more comprehensive way than a court."[161]

But these institutional concerns are not the only problem with the manner in which the Court has interjected rational basis review into its Section 5 cases; its method also makes it practically impossible for courts to scrutinize each state action as closely as they would in a typical Equal Protection case, where courts usually consider the merits of only one law. By the same token, the parties in a Section 5 case are in a much worse position in attacking or defending the discriminatory state actions cited in a statute's legislative history than are the parties in a standard case. That is, in a typical Equal Protection case involving the rational basis test, a plaintiff claims injury resulting from a discriminatory government action.[162] Because the law's constitutionality is one of the direct issues in the case, the parties submit evidence regarding what interests the state sought to further when it passed the challenged law and whether the law was rationally related to those interests.[163] But a plaintiff in a Section 5 case does not have a similar opportunity, at least not as a practical matter. If Congress cites 200 examples of potentially unconstitutional state action in a statute's legislative history, for instance, a plaintiff seeking to defend that statute as Section 5 legislation cannot possibly offer evidence to attack the constitutionality of all of those cited examples. Instead, courts end up predicting whether they would find those state laws unconstitutional.

This process is inherently arbitrary, and any conclusions that courts draw are necessarily general. The discriminatory city ordinance at issue in *Cleburne* illustrates the point. If that law had been one of hundreds of discriminatory provisions cited by Congress in a Section 5 statute's legislative history, would a reviewing court have looked at it on its face and decided that it was irrational? Without the specific evidence regarding the city's asserted interests that the *Cleburne* Court was able to consider, the answer is probably "no."[164] It is not surprising, then, that the *Kimel* and *Garrett* Courts both con-

161. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441, 467 (2000).

162. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 435-39 (1985) (discussing the municipal zoning ordinance at issue in the case).

163. *See, e.g.*, *id.* at 447-50 (discussing the asserted justifications for the zoning ordinance and considering the merits of that ordinance under the rational basis test).

164. For discussion of the evidence presented, see *Cleburne*, 473 U.S. at 447-50.

cluded that most of the examples of state discrimination that Congress cited in the ADEA and the ADA, respectively, were constitutional and that neither statute responded to the requisite pattern of discrimination.[165] Additionally, because it would be equally predictable if the Court draws the same conclusion in future Section 5 cases involving federal civil rights statutes that—like the ADEA and ADA—protect groups that are not suspect or quasi-suspect for Equal Protection purposes, it is an open question whether Congress can now ever abrogate states' Eleventh Amendment immunity with such statutes.[166]

V. CONCLUSION

One of the ADA's congressional sponsors has referred to it as an "emancipation proclamation" for the disabled.[167] There is no doubt that that the statute has provided disabled individuals unprecedented legal protections. But the *Garrett* Court eroded those protections by scrutinizing the ADA under its controversial Eleventh Amendment formula, which only five of the Court's current Justices accept as valid and which includes the ill-conceived Section 5 test. The requirements of that test are clear, as the Court has now applied it in numerous cases. In *Garrett,* the Court did not deviate from that familiar model. Thus, the result in *Garrett* is difficult to criticize if one considers the opinion on these narrow terms. But to do so is insufficient because the Court's Section 5 test is inherently flawed and is unworthy of continued application. The Court should retool its Section 5 test so that it is more deferential to Congress's unique institutional role in enforcing the Fourteenth Amendment's guarantees.

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165. *See supra* notes 67-72 (reviewing the *Kimel* Court's discussion of ADEA's legislative history); *supra* notes 114-119 and accompanying text (discussing the *Garrett* Court's examination of the ADA's legislative history).

166. *See* Post & Siegel, *supra* note 161, at 461 ("If the exercise of congressional Section 5 power must be congruent and proportional to behavior that a court would hold unconstitutional under rational basis review, virtually all antidiscrimination legislation, except that protecting racial minorities and women, will be rendered beyond Congress's Section 5 power.").

167. Tom Harkin, *Our Newest Civil Rights Law—The Americans With Disabilities Act,* 26 TRIAL 56 (1990).