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Meaningful Judicial Review: a Protection of Civil Rights Board of Trustees of the University of Alabama v. Garrett

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MEANINGFUL JUDICIAL REVIEW: A PROTECTION OF CIVIL RIGHTS BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT

*by Kevin A. Rogers**

I. INTRODUCTION

On February 21, 2001, the United States Supreme Court ruled on *Board of Trustees of the University of Alabama v. Garrett* and found that the Eleventh Amendment prohibited a state from being subjected to suit in federal court by a private citizen under Title I of the Americans with Disabilities Act.[1] The decision itself is not surprising given the Court's recent decisions curtailing the power of Congress to promulgate similar prophylactic legislation subjecting states to private tort suits. Certainly under a Court of the same composition, the future of similar prophylactic civil rights legislation bestowing such authority is in doubt.

In its recent decisions culminating in *Garrett,* the Court has provided an uncomplicated, yet monumental instruction to Congress: provide specific evidence of unlawful discrimination before enacting legislation designed to prevent such discrimination. Needless to say that such an evidentiary threshold undoubtedly raises the bar over which Congress must perform the Fosbury Flop before the Court will approve the constitutionality of congressional legislation passed under the Fourteenth Amendment. Critics have stamped numerous labels on the Court's ruling, but the chief criticism accuses the Court of engaging in activist judicial review under the auspices of federalism. Such criticism undoubtedly cloaks an ideological objection to the concept of sovereign immunity in its entirety, not to mention a desire for extending the limited powers of Congress. However persuasive such positions might be, the Court has a constitutional right to give meaningful judicial review to legislation, and should not be required to abdicate that right by merely placing its rubber stamp on broad prophylactic civil rights legislation or by simply winking at Congress, either under claims that the Constitution is malleable, or under the assertion that Congress should be afforded due deference. Simply because it may be more expedient to limit the power of the Court and increase congressional power does not provide significant justification for the Court to ignore its duty of judicial review. This note will examine this overlooked element in the Court's ruling in *Garrett*: the assertion, protection, and exercise of the Court's right to judicial review.

II. FACTS

Since the Court's ruling in *Garrett* was limited to the issue of sovereign immunity, and did not turn on the specific facts of the case, such facts merit only a cursory development. In *Garrett,* the District Court of Northern Alabama had consolidated two cases and issued a single opinion disposing of both.[2] In the first case, Patricia Garrett had served as director of nursing for the University of

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1. 531 U.S. 356, 374 (2001). The American with Disabilities Act is hereinafter referred to as the ADA. 42 U.S.C. §§ 12111-12117 (2001).

2. *Id.* at 362-63.

Alabama at Birmingham hospital.[3] After being diagnosed with breast cancer, she took a significant leave of absence from work in order to undergo treatment.[4] Upon her return, she was required to give up her position, and thereafter took a transfer to a lower paying position.[5]

In the second case, Milton Ash was employed by the Alabama Department of Youth Services as a security officer.[6] Upon beginning his employment, he asked that his duties be tailored so that he would have a minimum amount of exposure to carbon monoxide and cigarette smoke, due to chronic asthma.[7] He was later diagnosed with sleep apnea, and subsequently requested a transfer to the day shift to minimize his problem.[8] His requests were not granted, and he filed a charge with the Equal Employment Opportunity Commission.[9]

Both Garrett and Ash filed separate suits under the ADA in federal court seeking monetary damages from the state of Alabama for unlawful employment discrimination due to each oneís disabilities.[10] The state defendants moved for summary judgment claiming sovereign immunity under the Eleventh Amendment from suit under the ADA.[11] The district court granted the motions of the defendants, and the Eleventh Circuit Court of Appeals reversed, relying on its decision in *Kimel v. Florida Board of Regents.*[12] The Supreme Court granted certiorari in order to resolve a split among the Circuit Courts of Appeals as to whether a State may be sued for monetary damages by a private individual under the ADA.[13]

III. BACKGROUND OF THE LAW

The law on which the Court chiefly relies in *Garrett* developed extensively over the last quarter of the Twentieth Century, yet its roots grow deep within the soil of constitutional interpretation. The background of the law relied on by the Court in *Garrett* was composed of several branches of legal thought and constitutional interpretation protruding from the Court's prior decisions. In order to better facilitate an understanding of the background of this law, it is helpful to categorize these different branches into four main areas: sovereign immunity, congressional authority, disability discrimination, and federalism. Such analysis will expedite a more complete grasp of the Court's ruling.

A. The Development of Sovereign Immunity and the Eleventh Amendment

In the early case of *Chisholm v. Georgia,* the Supreme Court ruled that a federal court did have jurisdiction over a suit between a citizen of South Carolina

3. *Id.* at 362.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id. See Garrett,* 989 F. Supp. 1409 (N. D. Ala. 1998).
12. *Id.* at 362-63. *See Garrett,* 193 F.3d 1214 (11th Cir. 1999). *See also* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998) (where the Eleventh Circuit determined that Congress validly abrogated state sovereign immunity under the ADA, because there was clear intent to do so in the statute).
13. *Id.* at 363; *cert. granted,* 529 U.S. 1065 (2000).

and the State of Georgia.[14] In response to this decision, the Eleventh Amendment was ratified in 1798.[15] The Eleventh Amendment stated: "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."[16] Thus, states were extended sovereign immunity from diversity suits by private citizens in federal court under the Eleventh Amendment.

In the 1890 case of *Hans v. Louisiana,* the Supreme Court made a crucially significant interpretation of the language and structure of the Eleventh Amendment, finding that it provided a state sovereign immunity not merely from suits based on diversity, but suits based on federal question jurisdiction as well.[17] In *Hans,* a Louisiana citizen argued that since the Eleventh Amendment's language only prevented suits against a state brought by a citizen of a different state, jurisdiction was proper over federal questions.[18] The Court acknowledged that while such a reading might be accurate according to the precise language of the Eleventh Amendment, the history and context behind the adoption of the Eleventh Amendment merited a broader interpretation.[19] The Court reexamined its decision in *Chisholm,* noting that the decision had "created such a shock of surprise throughout the country" that Congress thereafter quickly proposed and adopted the Eleventh Amendment, which acted to reverse the *Chisholm* decision.[20] Therefore, according to the Court, it was absurd to think that the Eleventh Amendment would have intended to protect States from suits by non-citizens in federal court, but not bar suits by its own citizens.[21] Furthermore, the Court found that the Framers implicitly understood that state sovereignty was inherent in the nature of the Constitution.[22] The concept of sovereign immunity had "been so often laid down and acknowledged by courts and jurists that it [was] hardly necessary to be formally asserted."[23] Accordingly, sovereign immunity of the states was present before the adoption of the Eleventh Amendment, and the fact that the Eleventh Amendment left out any limitation on private suits against a State by a citizen of that State served as evidence as to the original understanding of the Constitution.[24] Thus, despite the specific language of the Eleventh Amendment, the Court ruled that the Eleventh Amendment created sov-

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14. 2 U.S. (2 Dall.) 419 (1793).

15. The Eleventh Amendment was first proposed to state legislatures on March 4, 1794, and ratified on February 7, 1795. U.S.C.S. CONST. amend. XI (2001) (citing history of amendment).

16. U.S. CONST. amend. XI.

17. 134 U.S. 1 (1890). Here, a citizen of Louisiana brought a bond payment suit in federal court against Louisiana. *Hans,* 24 F. 55 (C.C.E.D. La. 1885).

18. *Hans,* 134 U.S. at 10.

19. *Id.* at 10-11.

20. *Id.*

21. *Id.* at 15.

22. *Id.* at 14-15.

23. *Id.* at 16.

24. *Id.* at 15-16. It is a curious point often raised by critics that if sovereign immunity was embodied in the Constitution, then why was the Eleventh Amendment necessary? It may be that such an amendment was necessary because it was the only way that the Supreme Court could be overruled, and that Congress felt at the time that the Court had incorrectly interpreted the Constitution. In other words, what else was Congress to do?

ereign immunity for states from suits by private citizens regardless of whether the suit was based on diversity or upon a federal question.[25]

B. Section Five of the Fourteenth Amendment and Katzenbach

The Fourteenth Amendment was ratified in 1868.[26] Section one of the Fourteenth Amendment stated in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[27] Section five of the Fourteenth Amendment stated: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[28] The debate over the meaning of "appropriate legislation" has a long and arduous history that will likely continue into perpetuity. In sum, the central disagreement has concerned the extent Congress possesses unfettered authority to pass legislation that fits under the umbrella of the "appropriate legislation" required by the Fourteenth Amendment. Does the identity of the ultimate arbiter of the meaning of "appropriate legislation" change depending upon the context of the legislation? How much deference should be afforded to Congress under § 5 of the Fourteenth Amendment?

In *Katzenbach v. Morgan,* the Court examined the scope of congressional authority under § 5 of the Fourteenth Amendment.[29] In *Katzenbach,* § 4(e) of the Voting Rights Act was challenged as unconstitutional because it interfered with a New York constitutional election requirement that required voters to be able to read and write in English.[30] The Court found Congress was authorized by § 5 of

25. *Id.* Curiously absent from the Court's reasoning was the fact that original federal question jurisdiction was not established until 1875 by the enactment of 28 U.S.C. § 1331. *See* 28 U.S.C.A. § 1331 (2001). Such jurisdiction did not exist at the time of the passage of the Eleventh Amendment; thus, it may be that the language of the Eleventh Amendment does not specifically apply to federal question suits because Congress did not view such an inclusion as necessary.

26. The Fourteenth Amendment was proposed by Congress to state legislatures on June 13, 1866. Ratification was completed on July 9, 1868. U.S.C.S. CONST. amend. XIV (2001) (citing history of amendment).

27. U.S. CONST. amend. XIV, § 1.

28. U.S. CONST. amend. XIV, § 5.

29. 384 U.S. 641 (1966). In the previous decision of *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), the Court examined the constitutionality of the Voting Rights Act in light of Congressional authority under § 2 of the Fifteenth Amendment. Section 2 of the Fifteenth Amendment, like § 5 of the Fourteenth Amendment, gives Congress the power to enact appropriate legislation to enforce the amendment. U.S. CONST. amend. XV. The Court found that Congress had proper authority because of the detailed legislative inquiry into the voting rights discrimination exemplified by debates in the House for three days and the Senate for 26 days, as well as a nine-day hearing where 67 witnesses testified. South Carolina v. Katzenbach, 383 U.S. at 308-09. The Court in *Garrett* later compares the legislative inquiry examined in *Katzenbach* to the legislative inquiry regarding the ADA. *Garrett,* 531 U.S. at 373 n.8.

30. *Id.* at 643. Section 4(e) states in part: "(1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language. (2) No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language." 42 U.S.C. § 1973(b)(e). Article II, §1 of the New York Constitution states in part: "No person shall become entitled to vote...unless such a person is also able...to read and write English."

the Fourteenth Amendment to enforce its protections by the use of "appropriate legislation," and the Supreme Court's role was to evaluate the appropriateness of the legislation.[31]

The Court relied on Chief Justice Marshall's definition of the scope of legislative powers: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."[32] Under such a standard, Congress was entitled to "exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[33] Thus, "appropriate legislation" was that which was adapted to the end of enforcing the Equal Protection clause and that was not contrary to the "letter and spirit of the constitution."[34] Congress had authority to "weigh . . . conflicting considerations" in adapting § 4(e) to advancing the rights under the Equal Protection Clause.[35] All that was left for the Court to determine was whether a rational basis existed for congressional adoption of the act, and in this case, the Court found that such a rational basis existed.[36]

However, the Court also required that the remedies provided by Congress must not have interfered "with the letter and spirit of the Constitution."[37] In this case, the section did "not restrict or deny the franchise but in effect extend[ed] the franchise to persons who would be denied it by state law."[38] The Court concluded that such a remedy did not violate the Constitution's letter and spirit.[39]

C. Narrowing the Scope of Congressional Authority to Abrogate Sovereign Immunity

In its recent decisions, the Supreme Court has acted to narrow the scope of congressional authority to allow federal law to supersede, or abrogate, state sovereign immunity. While Congress did have the authority to pass legislation, any such legislation was accordingly limited by the sovereign immunity found in the Eleventh Amendment. By the time of *Garrett,* the Court had recognized that the only viable congressional method of abrogating state sovereign immunity was through "appropriate legislation" enacted pursuant to § 5 of the Fourteenth Amendment. Thus, the Court had not allowed abrogation of sovereign immunity through any congressional powers under Article I. The following cases demonstrate the arguments surrounding congressional legislative authority.

31. Katzenbach v. Morgan, 384 U.S. at 649-650.
32. *Id.* at 650 (quoting McCulloch v. Maryland, 4 U.S. (4 Wheat.) 316, 421 (1819)).
33. Katzenbach, 384 U.S. at 651.
34. *Id.* at 651.
35. *Id.* at 652-53.
36. *Id.* at 653.
37. *Id.* at 656-658.
38. *Id.* at 657.
39. *Id.* at 657-58. Justice Harlan disagreed with the Court: "I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature." *Id.* at 666 (Harlan, J., dissenting). He further elaborated that the right to determine a substantive violation of the Fourteenth Amendment belonged to the Court, not Congress, because allowing Congress such discretion would allow Congress to "dilute . . . equal protection" and exceed "the governmental boundaries set by the Constitution." *Id.* at 668, 671.

1. Fitzpatrick and the Scope of Section 5 Authority

In *Fitzpatrick v. Bitzer,* the Supreme Court ruled that Congress could abrogate state sovereign immunity found in the Eleventh Amendment by § 5 of the Fourteenth Amendment.[40] In *Fitzpatrick,* the district court had refused to award monetary damages for a state retirement plan's discrimination against male employees because it found that Congress had exceeded its authority to abrogate state sovereign immunity under Title VII, and the court of appeals affirmed.[41] The Supreme Court reversed and ruled that the Fourteenth Amendment limited the principle of state sovereign immunity found in the Eleventh Amendment.[42] Thus, under § 5, Congress had exercised "authority that [was] plenary within the terms of the constitutional grant, [and] it [was] exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embod[ied] limitations on State authority."[43] Congress may have limited sovereign immunity under § 5 of the Fourteenth Amendment by enforcing "appropriate legislation."[44] Thus, the Court found that Congress could have allowed for private suits against states by enacting "appropriate legislation" under the Fourteenth Amendment.[45]

2. Union Gas and Commerce Clause Power

In *Pennsylvania v. Union Gas Co.,* the Supreme Court considered the congressional abrogation of the Eleventh Amendment by legislation enacted under the Commerce Clause.[46] In *Union Gas,* a suit arose between the federal government, Pennsylvania, and a coal gasification plant over the costs associated with cleaning up environmental damage.[47] Pennsylvania claimed that it was immune under the Eleventh Amendment from a damage claim by Union Gas.[48] The Third Circuit held that the language of the federal statute, CERCLA, specifically rendered Pennsylvania liable for monetary damages, and Congress had authority to abrogate Pennsylvania's sovereign immunity under the Commerce Clause.[49] The Supreme Court agreed that Congress clearly intended to hold states liable under CERCLA.[50] The Court reconsidered *Fitzpatrick* and found that the same rationale

40. 427 U.S. 445, 448 (1976).

41. *Id.* at 448, 450-51. *See* Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D. Conn. 1974) and Fitzpatrick v. Bitzer, 519 F.2d 559 (2d Cir. 1975).

42. *Id.* at 456.

43. *Id.*

44. *Id.*

45. *Id.* Justice Brennan concurred in the judgment, but noted that he believed that the States had surrendered any claim to sovereign immunity from suits by its own citizens in adopting the Constitution. *Id.* at 457-58. (Brennan, J., concurring). Justice Stevens concurred in judgment, but argued that the Eleventh Amendment defense should be rejected, because it was incorrect of Congress to rely on § 5 of the Fourteenth Amendment because no violation of the Fourteenth Amendment was proven. *Id.* at 458-59 (Stevens, J., concurring).

46. 491 U.S. 1 (1989). The Commerce Clause stated that Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. 1, § 8, cl. 3.

47. *Union Gas,* 491 U.S. at 5-6.

48. *Id.*

49. *See Union Gas,* 832 F.2d 1343 (3d Cir. 1987).

50. *Union Gas,* 491 U.S. at 13.

for allowing Congress to authorize suit against States for money damages under § 5 of the Fourteenth Amendment also seemed applicable to an analysis under the Commerce Clause.[51] Pennsylvania argued, however, that since the Commerce Clause existed antecedent to the enactment of the Eleventh Amendment, the principles in *Fitzpatrick* were not equally applicable to legislative abrogation pursuant to Article I congressional authority.[52] The Supreme Court rejected such an argument preferring to continue to give Congress broad legislative abrogation authority under the Commerce Clause.[53]

Justice Stevens, in his concurring opinion, objected to the Supreme Court's interpretation of the Eleventh Amendment in *Hans,* arguing that the Eleventh Amendment did not provide for state sovereign immunity from suits based on federal questions.[54] Furthermore, he wrote that such a construction of the Eleventh Amendment, in effect, hindered the ability of federal courts to protect individual constitutional rights.[55]

Justice Scalia, in his partial dissent, in contrast to Justice Stevens, argued that state sovereign immunity should be afforded more protection by the Court from congressional abrogation.[56] *Hans* had provided that state sovereign immunity as a whole was embodied in the federalist structure of the Constitution.[57] However, allowing Congress to abrogate such immunity under the Commerce Clause allowed Congress to effectively overrule *Hans.*[58] Justice Scalia concluded that the "holding today can be applauded only by those who think state sovereign immunity so constitutionally insignificant that Hans itself might as well be abandoned."[59]

3. *Seminole Tribe* and the overruling of *Union Gas*

In *Seminole Tribe v. Florida,* the Court ruled that Congress did not have authority to abrogate state sovereign immunity under the Indian Commerce Clause.[60] In *Seminole Tribe,* the Seminole Tribe of Florida sued the State and its governor under 25 U.S.C. § 2710(d)(7)(A) claiming that the state and the governor violated the good faith requirement by not entering into negotiations with the

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51. *Id.* at 15-16.

52. *Id.* at 17. Such an argument is important because it later became the basis for the decision overruling *Union Gas.*

53. *Id.*

54. *Id.* at 24 (Stevens, J., dissenting).

55. *Id.* at 27. For example, in *Atascadero State Hosp. v. Scanlon,* 473 U.S. 234, 247 (1985), the Court determined that a state had not waived its immunity from suit under the Rehabilitation Act of 1973, 29 U.S.C. § 794, by accepting funds because there was not clear abrogation language in the federal statute. Brennan wrote in his dissent, "the Court's Eleventh Amendment doctrine diverges from text and history virtually without regard to underlying purposes or genuinely fundamental interests." *Atascadero,* 473 U.S. at 247-48 (Brennan, J., dissenting). He further concluded, "In consequence, the Court has put the federal judiciary in the unseemly position of exempting the States from compliance with laws that bind every other legal actor in our Nation." *Atascadero,* 473 U.S. at 248.

56. *Union Gas,* 491 U.S. at 29-30 (Scalia, J., dissenting).

57. *Id.* at 33-35. Scalia viewed the *Hans* decision as "enunciating a fundamental principle of federalism, evidenced by the Eleventh Amendment, that the States retained their sovereign prerogative of immunity." *Id.* at 37.

58. *Id.* at 36.

59. *Id.* at 44.

60. 517 U.S. 44, 47 (1996). The Indian Commerce Clause stated that Congress had the power "[t]o regulate Commerce . . . with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.

tribe concerning gaming on tribal land.[61] The district court denied the State's motion to dismiss on sovereign immunity grounds, but the Eleventh Circuit reversed and found that Florida was entitled to sovereign immunity.[62]

The Supreme Court reexamined its prior decision in *Union Gas,* which allowed Congress to abrogate state sovereign immunity under the Commerce Clause.[63] The Court found that in *Union Gas,* the plurality's opinion conflicted with "established federalism jurisprudence and essentially eviscerated our decision in *Hans.*"[64] Thus, *Union Gas* incorrectly expanded federal jurisdiction under Article III by use of the Commerce Clause, and should be overruled.[65] The Court reasoned that since the Eleventh Amendment limited the judicial power under Article III, Congress could not use Article I powers to circumvent such limitations.[66] Therefore, concerning the Indian Commerce Clause, the Court concluded:

> [W]e reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States.[67]

Consequently, the Eleventh Amendment prevented Congress from abrogating state sovereign immunity under the Indian Commerce Clause, and Florida was immune from suit.[68]

Two justices wrote dissenting opinions. In Justice Stevens' dissent, he criticized the Court for preventing "Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy," and he also echoed his dissent in *Union Gas,* arguing that the *Hans* decision was an incorrect construction of the Eleventh Amendment.[69]

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61. *Seminole Tribe,* 517 U.S. at 51-52. Title 25 U.S.C. § 2710(d)(7)(A) was part of the Indian Gaming Regulatory Act. The Act required that States negotiate in good faith with a tribe in the formation of a compact. 25 U.S.C. § 2710(d)(1)(C)(2001). Under Title 25 U.S.C. § 2710(d)(7)(A) provided: "The United States district courts shall have jurisdiction over . . . any cause of action initiated by an Indian tribe . . . for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith."

62. *Seminole Tribe,* 517 U.S. at 51-52. *See Seminole Tribe,* 801 F. Supp. 655 (S.D. Fla. 1992) and *Seminole Tribe,* 11 F.3d 1016 (11th Cir. 1994).

63. *Seminole Tribe,* 517 U.S. at 63.

64. *Id.* at 64.

65. *Id.* at 65-66. Only the Fourteenth Amendment could have altered the balance between the balance between the Eleventh Amendment and Article III. A provision that existed before the Eleventh Amendment was altered by the Eleventh Amendment. Thus, the Eleventh Amendment cannot be altered by an antecedent provision. *Id.*

66. *Id.* at 72.

67. *Id.* Since the Eleventh Amendment altered the balance of authority between Article I and Article III powers, only an amendment enacted after the Eleventh Amendment could change such a balance.

68. *Id.* at 76. The Court also decided the question whether under the doctrine of *Ex parte Young,* the Seminole Tribe could sue the governor. *Id.* at 53. In *Ex parte Young,* 209 U.S. 123 (1908), the Court allowed a suit against a state attorney general, and the Court held that a state actor can be sued in his or her personal capacity. Here, the Court found that courts should hesitate applying the doctrine of *Ex parte Young* when "Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe,* 517 U.S. at 74. Since the procedural scheme under § 2710(d)(3) was specific, the duty defined was limited, and, thus, enforcement should be limited. *Seminole Tribe,* 517 U.S. at 74-75.

69. *Seminole Tribe,* 517 U.S. at 77, 95 (Stevens, J., dissenting).

In Justice Souter's dissent,[70] he disputed the historical assertion that there was a general understanding of state sovereignty implicit in the Constitution.[71] Any interpretation extending the Eleventh Amendment to cover state sovereign immunity over federal question suits was in error.[72] Justice Souter further criticized the *Hans* decision, finding three critical errors: a misreading of the text of the Eleventh Amendment, a misunderstanding of the common-law doctrines that existed at the time of the Constitution, and a misunderstanding of the early conception of sovereign immunity.[73]

4. *Boerne* and the Emergence of the Congruence and Proportionality Test

In *City of Boerne v. Flores,* the Supreme Court for the first time found congressional legislation that abrogated state sovereign immunity under § 5 of the Fourteenth Amendment to be unconstitutional.[74] In *Boerne,* a church was prevented from enlarging its building because local zoning ordinances had classified the church as a historical landmark, and the church sued under the Religious Freedom Restoration Act.[75] The district court concluded that Congress had exceeded its authority in enacting the RFRA under § 5 of the Fourteenth Amendment, and as a result, the law was unconstitutional.[76] The Fifth Circuit Court of Appeals reversed the District Court, declaring the RFRA to be a valid exercise of congressional power under § 5 of the Fourteenth Amendment.[77]

The Supreme Court reversed the Fifth Circuit decision.[78] While the Court recognized the claim of the church that the RFRA was only protecting a guaranteed liberty under the Fourteenth Amendment, the Court determined that Congress

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70. The majority countered the dissenting arguments by admonishing the dissent for failing to cite any decision other than *Union Gas* to provide support for its view of sovereign immunity and by stating that sovereign immunity is a fundamental concept in every civilized nation, distinct from any common law concepts. *Seminole Tribe,* 517 U.S. at 68. The majority chastised the dissent writing that the dissent "disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events." *Id.*

71. *Seminole Tribe,* 517 U.S. at 102 (Breyer, J., dissenting).

72. *Id.* at 110, 114. Justice Souter noted that the earliest interpretation of the Eleventh Amendment recognized that its purpose was to only bar diversity suits. *See* Cohen v. Virginia., 19 U.S. (6 Wheat.) 264, 383 (1821). Originally, Congress rejected a proposed Eleventh Amendment that would have limited federal jurisdiction over federal question cases, and this amendment was known as the Sedgwick Amendment. *Seminole Tribe,* 517 U.S. at 111-12 (Breyer, J., dissenting).

73. *Seminole Tribe,* 517 U.S. at 130 (Souter, J., dissenting). There was no uniform common law in America at the time of the founding that could have been adopted under the Constitution because each state had experienced different development of common law. *Id.* This includes any common law concept of sovereignty. *Id.* Thus, the common law doctrine of sovereign immunity should not have been read into the Constitution, and there was no indication that state sovereign immunity was implicit in the Constitution at the time of its framing. *Id.* at 138-142. There was also significant evidence of a disagreement as to the role of state sovereign immunity in the new government. *Id.* at 142-44. Additionally, the structure of the government would have been significantly hampered by a continuing concept of state sovereignty. *Id.* at 149-50. The adoption of the federal system balanced a state's exercise of sovereignty with the need to a have a supreme federal government. *Id.* at 150. Thus, "sovereign immunity as it would have been known to the Framers before ratification thereafter became inapplicable as a matter of logic in a federal suit raising a federal question." *Id.* at 153.

74. 521 U.S. 507 (1997).

75. *Boerne,* 521 U.S. at 511-12. *See* City of Flores v. Boerne, 877 F. Supp. 355 (W.D. Tex. 1995). The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et seq.*, provided that a government could not pass a law that resulted in a substantial burden on a person's religious exercise unless there was a "compelling governmental interest" and the action was the "least restrictive means of furthering" such interest.

76. *Boerne,* 521 U.S. at 512.

77. *Id. See* City of Flores v. Boerne, 73 F.3d 1352 (5th Cir. 1996).

78. *Boerne,* 521 U.S. at 511-12. The Court found that the RFRA was enacted in direct opposition to its decision in *Employment Division of the Department of Human Resources of Oregon v. Smith,* where the Court had allowed a state to enforce a law banning the illegal drug peyote, which local Native Americans used as a part of religious rituals. 494 U.S. 872 (1990).

could have only passed legislation under § 5 when it did so to deter or remedy a violation of such constitutional liberties.[79] Since Congress' enforcement powers under § 5 were remedial, it may not have changed the substance of the Fourteenth Amendment's restrictions on States, and this included any redefinition of the Free Exercise Clause found in the First Amendment.[80] This limit on congressional power was confirmed by the history of the Fourteenth Amendment and its enforcement clause, as well as by case precedent.[81] The Court concluded that allowing Congress to determine the scope of its own powers by changing the Fourteenth Amendment would essentially put the Constitution on the same footing as ordinary legislation.[82]

Therefore, according to the Court, only it possessed the authority to define the scope of substantive rights.[83] In order for Congress to pass such legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[84] Applying such a congruence and proportionality test, the Court compared the RFRA with the Voting Rights Act evaluated in *South Carolina v. Katzenbach.*[85] The Court found a lack of evidence supporting remedial legislation, and consequently the action was not congruent to the injury to be prevented.[86] The Court also found that the RFRA's remedies were "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[87] Thus, since the RFRA was not a congruent response to any established pattern or practice by states, and its remedies were out of proportion to any claimed unconstitutional action, Congress lacked the constitutional authority to pass such legislation.[88]

5. Further Protection of Sovereign Immunity: *Florida Prepaid* and *Kimel*

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,* the Court found Congress could not abrogate state sovereign immunity under the Patent Clause, and Congress could not hold states amenable

79. *Boerne,* 521 U.S. at 517-18. Such an interpretation of the role of Fourteenth Amendment legislation was not a novel concept. In the *Civil Rights Cases,* 109 U.S. 3 (1883), the Court found that the Civil Rights Act of 1875 was not a valid act under the Fourteenth Amendment because appropriate legislation under § 5 of the Fourteenth Amendment must be corrective in nature.

80. *Boerne,* 521 U.S. at 519.

81. *Id.* at 520.

82. *Id.* at 529 (quoting Marbury v. Madison, 19 U.S. (1 Cranch) 137, 177 (1803)).

83. *Id.* at 524.

84. *Id.* at 520.

85. *Id.* at 532.

86. *Id.* at 530-32. There was no evidence of any pattern of state laws being enacted because of religious bigotry in the last 40 years. The only evidence was that some laws placed an incidental burden on religion, and these laws were not created in order to directly burden a religion or to discriminate. *Id.*

87. *Id.* at 532.

88. *Id.* at 532, 534. Justices Stevens, Scalia, O'Connor, Souter, and Breyer all filed separate opinions. However, these opinions focused on the interpretation of the Free Exercise Clause and the Court's decision in *Smith.*

to patent suit by private citizens under § 5 of the Fourteenth Amendment.[89] In this case, College Savings had sued Florida Prepaid under 35 U.S.C. § 271(a) alleging that Florida Prepaid had infringed on College Savings' patent for financing methodology designed to provide for funds to pay college tuition.[90] On the basis of the Seminole Tribe ruling, Florida Prepaid moved to dismiss on the basis of sovereign immunity, but was denied by the district court, and the Court of Appeals for the Federal Circuit affirmed.[91]

Relying on the Court's decision in *Seminole Tribe,* the Court concluded that for the Act to abrogate state sovereign immunity, it required a clear statement of intent by Congress and a valid grant of congressional authority.[92] Here, since congressional intent was clear, the question for the Court was whether Congress had the authority to abrogate state sovereign immunity in this case.[93] According to the Court, Congress could have only abrogated state sovereign immunity under § 5 of the Fourteenth Amendment, and not the Commerce Clause or Patent Clause.[94]

Under the Court's rationale, for Congress to abrogate state sovereign immunity under § 5, the legislation must have been appropriate, or in other words, must have been congruent and proportional under the test in *Boerne.*[95] Here, the wrong to be remedied was clearly patent infringement on the part of the states, but no pattern of such infringement by States had ever been identified.[96] According to congressional testimony, there was a lack of patent violations by the states.[97] Therefore, the Court found that Congress enacted this legislation due to only a few assertions of patent infringement by the States, and such legislation was not validly passed under § 5 of the Fourteenth Amendment.[98]

Justice Stevens argued in his dissent that Congress had acted validly under the Due Process Clause of the Fourteenth Amendment to protect patent holders from

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89. 527 U.S. 627 (1999). In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666 (1999), the Court ruled on the same set of facts, but concerning the constitutionality of a state waiving its sovereign immunity under the Trademark Act of 1946, or the Lanham Act, 15 U.S.C. §1125(a) (2001). *Id.* at 668-69. The Court found that Florida had not waived its sovereign immunity under the Lanham Act. In Justice Breyer's dissent, he argued for the abolition of sovereign immunity claiming that it limited Congress from enacting "economic legislation needed for the future" and denied it the "necessary legislative flexibility" it needed to protect private citizens. *College Savings,* 527 U.S. at 700-01 (Breyer, J., dissenting). *See also* Parden v. Terminal Ry. of Ala. State Docks Dept., 377 U.S. 184 (1964) (where Congress found that a state could implicitly waive its sovereign immunity because it became subject to regulation of Congress when it engaged in the operation of an interstate railroad). *Also see* California v. Taylor, 353 U.S. 553 (1957); *Atascadero,* 473 U.S. at 247; U.S. v. Cal., 297 U.S. 175 (1936).

90. *Fla. Prepaid,* 527 U.S. at 630-31. The Patent and Plant Variety Protection Remedy Clarification Act, 35 U.S.C. § 271(a) provides in part, "Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States . . . infringes the patent."

91. *Id.* at 633. *See College Savings Bank,* 148 F.3d 1343 (Fed. Cir. 1998).

92. *Fla. Prepaid,* 527 U.S. at 635-36.

93. *Id.* at 635.

94. *Id.* at 636. The Patent Clause states that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art I, § 8, cl. 8. Since the Court had previously ruled that Congress could not abrogate the Eleventh Amendment by expanding Article III powers under any Article I powers in *Seminole Tribe,* the same reasoning was applicable here. *Seminole Tribe,* 517 U.S. at 72.

95. *Fla. Prepaid,* 427 U.S. at 637-39.

96. *Id.* at 640.

97. *Id.* at 640-41.

98. *Id.* at 645-47.

patent infringement.[99] He chided the Court for focusing too narrowly on a lack of congressional evidence considered by Congress before enacting the Act.[100] According to Justice Stevens, the standard required by the Court was far more stringent than the standard that Congress had attempted to follow when it passed the Act.[101]

In *Kimel v. Florida Board of Regents,* the Supreme Court found that Congress did not validly abrogate state sovereign immunity under § 5 of the Fourteenth Amendment when it enacted the Age Discrimination in Employment Act.[102] The Eleventh Circuit had ruled that Congress had not validly abrogated sovereign immunity under the ADEA, and states possessed sovereign immunity from suit.[103]

Continuing its previous method of analysis, the Supreme Court expounded on the questions of whether or not the ADEA contained a clear statement of congressional intent to abrogate state sovereign immunity and whether the ADEA was a "proper exercise of Congress' constitutional authority."[104] The Court concluded that while the ADEA did contain a clear statement of intent to abrogate immunity, Congress did not have authority to abrogate under § 5 of the Fourteenth Amendment.[105]

The Court recognized that for Congress to abrogate state sovereign immunity, it could only have done so under § 5 of the Fourteenth Amendment.[106] Under the Fourteenth Amendment, the legislation passed by Congress must have been "appropriate," and appropriate language under § 5 of the Fourteenth Amendment must have served to remedy or deter conduct.[107] According to the test applied in *Boerne,* congressional action, accordingly, must also have been congruent and proportional to the harm to be remedied.[108]

Under the Court's subsequent analysis, the ADEA was not appropriate legislation under the Fourteenth Amendment.[109] First, the ADEA requirements were "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[110] Since age was not a suspect classification under the Equal Protection Clause of the Fourteenth Amendment, state action was only required

99. *Id.* at 652-54 (Stevens, J., dissenting). Justice Stevens also argued that Article I gave Congress plenary power over patents and copyrights, and that the Patent and Plant Variety Protection Remedy Clarification Act merely defined Congress' exclusive jurisdictional grant. *Id.* at 652.

100. *Id.* at 654.

101. *Id.*

102. Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000). The Age Discrimination in Employment Act of 1967, states: "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age in employment." 29 U.S.C. § 621(b). Hereinafter, the Age Discrimination in Employment Act will be referred to as the ADEA.

103. *Kimel,* 528 U.S. at 71-72. *See Kimel,* 139 F.3d at 1433 (1998). The Eleventh Circuit had consolidated three sets of facts. In the first set of facts, two employees sued the University of Montevello in Alabama claiming unfair discrimination because of Age. MacPherson v. Univ. of Montevallo, 938 F. Supp. 785, 786 (N. D. Ala. 1996). In the second set of facts, a group of faculty member of Florida State sued because of failure to adjust salaries of employees because of age. *Kimel,* 139 F.3d at 1429. In the third set of facts, an employee of the Florida Department of Corrections sued for failure to promote because of age. *Kimel,* 193 F.3d at 1429.

104. *Kimel,* 528 U.S. at 66-67. *See Kimel,* 139 F.3d at 1433 (11th Cir.1998).

105. *Id.* at 67, 73-75.

106. *Id.* at 78-80.

107. *Id.* at 80-81.

108. *Id.*

109. *Id.* at 82-83.

110. *Id.* at 83.

to be rationally related to furthering a state interest.[111] Since all that was required was a reason that was rationally related to a governmental purpose, the ADEA served to "substantively redefine the States' legal obligations with respect to age discrimination."[112] Thus, the remedies of the ADEA were not proportional to the asserted injury.[113]

Additionally, the Court considered that the evidence found in the legislative history did not support allowing a private individual to bring suit against the states for age discrimination.[114] No pattern of discrimination had ever been identified by Congress.[115] In fact, the evidence compiled by Congress was mostly "isolated sentences clipped from floor debates and legislative reports."[116] Furthermore, the general evidence collected by Congress of private discrimination was insufficient, because specific findings as to actions of the states were required.[117] Thus, the congressional response to age discrimination in creating the ADEA was not congruent to any age discrimination by the states.[118]

Justice Stevens dissented, arguing that since Congress had the power to impose statutory obligations on state agencies, it also had the power to create federal remedies for violations of these obligations.[119] In his mind, it was not the place of the Court to protect the sovereignty of the states, because the Framers had provided for such protection when they created equal representation in the Senate.[120] Additionally, Congress was better able to balance state and federal interests by having the flexibility to restrict or extend jurisdiction depending upon the issue at hand.[121] While federalism concerns are to some degree meaningful, where Congress had clearly indicated intent to regulate state action, it had made a valid policy decision, which was in accord with the Framers' delegation of legislative authority to Congress.[122] Here, according to Justice Stevens, the Court had applied a "novel judicial interpretation of the doctrine of sovereign immunity" in its application of the Eleventh Amendment to congressional legislation.[123]

6. *Morrison* and Congressional Evidentiary Requirements

In *United States v. Morrison,* the Court considered congressional authority to pass the Violence Against Women Act, under the Commerce Clause and § 5 of

111. *Id.* at 83-84.
112. *Id.* at 88.
113. *Id.*
114. *Id.* at 89.
115. *Id.*
116. *Id.*
117. *Id.* at 90. A 1966 report prepared by the State of California was also given great weight by Congress, but the report makes no findings as to any widespread pattern of age discrimination across the United States. *Id.*
118. *Id.*
119. *Id.* at 93 (Stevens, J., dissenting).
120. *Id.*
121. *Id.* at 94-95.
122. *Id.* at 96.
123. *Id.* at 97. Stevens additionally wrote that he still supports the decision of *Union Gas,* and is unwilling to accept the Court's decision in *Seminole Tribe* because the rationale behind it was fundamentally mistaken. *Id.* at 97-98.

the Fourteenth Amendment.[124] In *Morrison,* a Virginia Tech woman student was attacked and raped by two male students; the female student sued the two attackers and the university, and the district court found that while the complaint did state a claim, Congress did not have the power to enact such a provision under both the Commerce Clause and the Fourteenth Amendment.[125] The Fourth Circuit Court of Appeals reversed, but the case was later heard *en banc,* where the Fourth Circuit affirmed the district court's ruling and reasoning, declaring that Congress did not have the proper authority to pass such legislation under the Commerce Clause or the Fourteenth Amendment.[126]

On appeal to the Supreme Court, relying on the Court's prior decision in *United States v. Lopez,* the Court first examined congressional authority under the Commerce Clause.[127] The Court found that despite the great volume of congressional findings concerning "the serious impact that gender-motivated violence has on victims and their families," such violence could not have played a substantial role in interstate commerce, thus congressional authority could not be found under the Commerce Clause.[128] Even though the evidence gathered by Congress was quite abundant, no specific connection between such evidence and the actual affect on interstate commerce had been established.[129]

The Court also found that Congress did not have the authority to pass such legislation under §5 of the Fourteenth Amendment.[130] The Court noted that there was a significant amount of evidence in the congressional record to indicate that a "pervasive bias [existed] in various state justice systems against victims of gender-motivated violence."[131] The Court noted, however, that the Fourteenth Amendment did place restrictions on congressional legislation, which were crucial "to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government."[132] One of these limitations was that the Fourteenth Amendment limits only actions by states.[133] Here, the Violence Against Women Act was not

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124. 529 U.S. 598, 601-02 (2000). According to the Violence Against Women Act, its purpose was: "[p]ursuant to the affirmative power of Congress to enact this part under section 5 of the Fourteenth Amendment to the Constitution, as well as under section 8 of Article I of the Constitution, it is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender." 42 U.S.C. § 13981(a)(2001). The act provided a private cause of action: "[a] person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate." 42 U.S.C. § 13981(c) (2001).

125. *Morrison,* 529 U.S. at 602, 604.

126. *Id.* at 604-05.

127. *Id.* at 607-09. *See* United States v. Lopez, 514 U.S. 549, 558 (1995). In *Lopez,* the Court held that the Gun-Free School Zones Act of 1990 exceeded congressional authority under the Commerce Clause. *Lopez,* 514 U.S. at 558. The Court established that three categories of regulation are channels of interstate commerce, the instrumentalities of interstate commerce, and acts that substantially affect interstate commerce. *Lopez,* 514 U.S. at 558-559.

128. *Morrison,* 529 U.S. at 614.

129. *Id.*

130. *Id.* at 618-19.

131. *Id.* at 619-20.

132. *Id.*

133. *Id.* at 621.

aimed at limiting discrimination by states, but was directed at criminal acts of individuals.[134] Here, the remedy was simply not corrective in nature, nor congruent and proportional.[135]

D. Cleburne *and Title I of the ADA*

In *City of Cleburne, Texas v. Cleburne Living Center,* the Supreme Court made a critical resolution as to level of scrutiny required under the Equal Protection Clause of the Fourteenth Amendment in regard to the mentally disabled.[136] In *Cleburne,* the city had refused to issue a special use permit in accordance with a zoning ordinance to Cleburne Living Center to operate a home for the mentally retarded.[137] The district court held that the ordinance did not violate the Fourteenth Amendment's Equal Protection Clause and found that no fundamental right was involved, and that mental disability was not a suspect or quasi-suspect classification.[138] The Fifth Circuit Court of Appeals reversed, classifying the mentally disabled as a "quasi-suspect" class under the Equal Protection Clause, thus allowing the city to refuse to issue such a permit only if zoning ordinance substantially furthered an important governmental purpose.[139]

The Supreme Court reversed the Fifth Circuit, agreeing with the district court's holding that "no fundamental right was implicated and that mental retardation was neither a suspect nor a quasi-suspect classification."[140] Therefore, as the district court had determined, the ordinance only had to bear a rational relationship to a governmental purpose to be constitutional.[141] The Court elaborated on this conclusion by noting several factors.[142] First, the Court found that since the "mentally retarded have a reduced ability to cope with and function in the everyday world" and because such a group is so numerous and diversified, the legislature was better equipped to respond to the group's needs.[143] Second, legislative response indicated that there was little prejudice currently evident in society, and thus, little need for an increased protection by the courts.[144] Third, the mentally retarded had been successful in initiating any needed legislative response and were sufficiently able to garner support among the legislature.[145]

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134. *Id.* at 626. *See* Ex Parte Virginia, 100 U.S. 339 (1879).

135. *Morrison,* 529 U.S. at 625-26. Justice Souter's dissent, addressing only the constitutionality under the Commerce Clause, argued that Congress had the power to pass such legislation particularly considering that the "mountain of data assembled" was significantly more than the amount of evidence compiled in enacting Title II of the Civil Rights Act, which had been upheld in *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964) and *Katzenbach v. McClung,* 379 U.S. 294 (1964). *Morrison,* 529 U.S. at 628-36 (Souter, J., dissenting).

136. 473 U.S. 432 (1985).

137. *Id.* at 435.

138. *Id.* at 437.

139. *Id.* at 437-39. *See* Cleburne Living Center v. City of Cleburne, Texas, 726 F.2d 191 (5th Cir. 1984).

140. *Cleburne,* 473 U.S. at 437.

141. *Id.* Justice Stevens' concurring opinion disagrees with the classification of groups under three different categories of review, finding that such classification do not "adequately explain the decisional process." *Id.* at 451 (Stevens, J., concurring). Justice Marshall's opinion argued that the Court's test as applied was more stringent than a rational basis test. *Id.* at 458 (Marshall, J., concurring in judgment in part, dissenting in part). Marshall also disputes the Court's reasoning for not applying a heightened standard of scrutiny. *Id.* at 467-73.

142. *Id.* at 442-447.

143. *Id.* at 442.

144. *Id.* at 442-43

145. *Id.* at 445.

Fourth, if the mentally retarded were found to be a quasi-suspect class then it would be difficult to distinguish other disabled groups "who can claim some degree of prejudice from at least part of the public at large."[146]

Title I of the American with Disabilities Act of 1990 provided for equal opportunity for individuals with disabilities in employment.[147] It stated: "No covered entity shall 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.[148] A "covered entity" is any "employer, employment agency, labor organization, or joint labor-management committee."[149]

Under the language of Title I, discrimination includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual . . . unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business," and "denying employment opportunities . . . if such denial is based on the need of such covered entity to make reasonable accommodation."[150] Reasonable accommodations include providing for accessible facilities or job restructuring, modifying, or reassignment.[151] Title I provides for several factors to be considered in determining the presence of an undue hardship, including "the nature and cost of the accommodation," the "financial resources of the facility . . . or the impact otherwise of such accommodation upon the operation of the facility," the "financial resources of the covered entity," and "the type of operation or operations of the covered entity."[152]

Primary enforcement authority of the ADA belongs to the Equal Employment Opportunity Commission and the Attorney General as provided for under the Civil Rights Act of 1964.[153] Such an enforcement mechanism allows for private suit by individuals after the EEOC has issued a right to sue letter.[154] It also allows

146. *Id.* According to the Court, examples of such groups include "the aging, the disabled, the mentally ill, and the infirm." *Id.* at 446. The Court's final determination was that the zoning ordinance was invalid even under this lesser standard of scrutiny, because it was the result of irrational prejudice. *Id.* at 447-50.

147. 42 U.S.C. §§ 12111-12117 (2001). While the scope of the rights under the ADA is beyond the focus of this note, the Court has issued several recent rulings that are worth noting. In *Toyota Motors v. Williams,* 122 S. Ct. 681 (2002), the Court limited ADA coverage of employees with carpal tunnel syndrome; in *U.S. Airways v. Barnett,* 122 S. Ct. 1516 (2002), the Court determined that seniority rights of employees in most cases should be considered above ADA rights of disabled workers; in *Chevron U.S.A. Inc., v. Echazabal,* 122 S. Ct. 2045 (2002), the Court upheld an EEOC regulation that permitted an employer to refuse to hire a worker with medical conditions that could be worsened by employment; and in *Barnes v. Gorman,* 122 S. Ct. 2097 (2002), the Court ruled that punitive damages could not be assessed against municipalities for violations under the ADA.

148. *Id.* § 12112(a).

149. *Id.* § 12111(2). Additionally, an "employer" is "a person engaged in an industry affecting commerce who has more than 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year," but "does not include . . the United States, [or] a corporation wholly owned by the United States, or an Indian Tribe." *Id.* § 12111(5).

150. *Id.* § 12112(5).

151. *Id.* § 12111(9).

152. *Id.* § 12111(10)(B). The Act also provides for a general defense that "an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." *Id.* § 12113(a).

153. *Id.* § 12117; *See also* 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, 2000e-9 (2001).

154. *Id.* § 2000e-5.

for remedies including reinstatement, promotion, backpay, injunctions, and attorneys fees, as well as compensatory and punitive damages made available under the Civil Rights Act of 1991.[155] Despite the decision in *Garrett,* the EEOC still maintains unrestricted enforcement authority under the ADA.[156]

E. Alden *and the Federalism Argument*

Federalism certainly plays an important role behind the Court's decisions contracting congressional authority in the effort to protect sovereign immunity. Through nearly all of the Court's recent decisions, the historical arguments persist as to validity of the decision in *Hans* extending protection of the Eleventh Amendment. One of the best illustrations as to the historical arguments for and against the extension of the Eleventh Amendment is found in *Alden v. Maine.*[157] In *Alden,* the Supreme Court was faced with state sovereignty, not in federal court, but in state court.[158] The Supreme Court found that Congress did not have the power under Article I of the Constitution to provide for private suits in state courts against a non-consenting state under the Fair Labor Standards Act.[159]

The Court recognized state sovereignty to be a fundamental right, clearly incorporated into the Constitution, as attested to by the "Constitution's structure, and its history, and the authoritative interpretations by this Court."[160] The federalist system, through its concurrent authority exercised by federal and state governments, and the writings of Alexander Hamilton, James Madison, and John Marshall strongly supported state sovereign immunity.[161] Additionally, the passage of the Eleventh Amendment was an effort to restore the original federalist constitutional design altered by *Chisholm.*[162] Finally, Supreme Court precedent "reflect[ed] a settled doctrinal understanding consistent with the views of the leading advocates of the Constitution's ratification, that sovereign immunity derive[d] not from the Eleventh Amendment but from the structure of the original Constitution itself."[163]

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155. *Id.* § 2000e-5 and § 1981(a) (2001). The Rehabilitation Act of 1973, 29 U.S.C. § 701, *et seq.,* served as a model for the ADA. Duval v. County of Kitsap, 260 F.3d 1124, 1135 (9th Cir. 2001). Section 504 of the Rehabilitation Act prohibits discrimination, including for disability, under programs that receive federal financial assistance. 29 U.S.C. § 794. Congressional authority for such law is found in the Spending Clause of the Constitution, Art. I, § 8, cl. 1. *See* South Dakota v. Dole., 483 U.S. 203 (1987) (where the Court held that the federal government could withhold federal highway funds from a state if the state refused to raise the minimum drinking age limit to 21 under Spending Clause authority).

156. Thus, states do not have a complete license to discriminate against disabled workers. Michael L. Russell, *The Americans with Disabilities Act and the Eleventh Amendment: Do States Have a License to Discriminate?,* 28 OHIO N. U. L. REV. 133 (2001). In addition to redress through government means, private citizens may also be able to recover under state disability discrimination laws, although such laws may be lacking. *See* Ruth Colker and Adam Milani, *Garrett, Disability Policy, and Federalism: A Symposium on* Board of Trustees of the University of Alabama v. Garrett: *The Post-Garrett World: Insufficient State Protection Against Disability Discrimination,* 53 ALA. L. REV. 1075 (2002). Thus, private citizens may need to petition their local state governments to provide adequate disability discrimination protection, instead of the national government.

157. 527 U.S. 706 (1999).

158. *Id.* at 711-12.

159. *Id.* In *Alden,* probation officers had sued Maine in federal court for violations of the overtime provisions of the Fair Labor Standards Act and sought compensatory and liquidated damages. *Id.*

160. *Id.* at 711-13.

161. *Id.* at 715-718.

162. *Id.* at 721-22.

163. *Id.* at 728.

The Court also acknowledged that since states were immune from private suit in federal court under the federalist structure found in the Constitution, to allow them to be sued in state court by private citizens "would be even more offensive to state sovereignty than a power to authorize the suits in a federal forum."[164] Additionally, the Court reasoned that such private suits would have endangered the treasuries of the States, hindered decision-making ability, and strained the "allocation of scarce resources."[165] The Court, while noting the implications of sovereign immunity, also affirmed that it was "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States."[166]

Justice Souter disagreed with the Court's historical argument defining federalism and its effect on state sovereign immunity. First, Souter disputed the findings by the Court that there was any fundamental notion of sovereignty enjoyed by the States prior to the Constitution.[168] At the time of the formation of the Constitution there was no settled definition and practice of sovereign immunity.[169] At the Constitutional Convention, there was no discussion as to the retention of a State's sovereign immunity.[170] Even Alexander Hamilton's writings focused only on state immunity from state law claims, and would not have included federal claims.[171] Additionally, there was evidence of disagreement in ratification debates as to sovereign immunity as found in statements by Edmund Randolph and James Wilson.[172] Thus, according to Justice Souter, there was no consensus as to the status of sovereign immunity at the time of ratification either.[173] Such uncertainty was evidenced by the Court's decision in *Chisholm,* where there was no evidence of any kind of "natural law conception of sovereign immunity" claimed by the Court to have been present at the time of the Constitution.[174]

Second, Souter objected to the Court's structural argument in favor of federalism, stating "that the federal constitutional structure itself necessitate[d] recognition of some degree of state autonomy broad enough to include sovereign immunity from suit in a State's own courts, regardless of the federal source of the claim asserted against the State."[175] However, state and federal governments maintained sovereignty only with respect to what was under their authorities.[176] Thus, Maine was not sovereign because the objective of the FLSA was a part of the national government.[177] Maine could not have claimed that since it had created its own courts, that it should have decided the kinds of claims that these

164. *Id.* at 749.
165. *Id.* at 750-51.
166. *Id.* at 755. There was no waiver by Maine of its sovereign immunity, because it had not expressly chosen to consent to suit in this case. *Id.* at 757-58.
167. *Id.* at 760 (Souter, J., dissenting). Souter also noted that if the Court is correct in its reasoning as to the inherent nature of sovereign immunity, then the Eleventh Amendment was merely superfluous. *Id.* at 761.
168. *Id.* at 762.
169. *Id.* at 772.
170. *Id.*
171. *Id.* at 773 n. 13. *See also Seminole Tribe,* 517 U.S at 145-49.
172. *Id.* at 775-778.
173. *Id.* at 778.
174. *Id.* at 781.
175. *Id.* at 799.
176. *Id.* at 800 (quoting *McCulloch,* 17 U.S. (4 Wheat.) at 410).
177. *Id.*

courts may hear, because once Maine created state courts of general jurisdiction, it submitted to the authority of the federal government under the Supremacy Clause.[178] This authority required state courts to hear a case based on a federal cause of action, because a state was not sovereign to a federal claim.[179]

IV. GARRETT

In *Garrett,* the Supreme Court found that the provisions of Title I of the ADA, passed pursuant to congressional authority under § 5 of the Fourteenth Amendment, did not validly abrogate state sovereign immunity under the Eleventh Amendment.[180] The *Garrett* decision did not render Title I of the ADA unconstitutional, but only ruled that it was not a constitutional abrogation of sovereign immunity found in the Eleventh Amendment.[181]

A. The Majority Opinion

The majority opinion, written by Justice Rehnquist, and joined by Justices O'Connor, Scalia, Kennedy, and Thomas, continued along the same § 5 analysis that the Court had engaged in, beginning with *Boerne.* First, the Court required that the ADA express a clear intent to abrogate state sovereign immunity, and since such intent was clear from the statutory language, the main issue before the Court was whether Congress had constitutional authority to enact such legislation.[182] Since Congress did not have constitutional authority to abrogate Eleventh Amendment sovereign immunity under any of its Article I powers, including the Commerce Clause, it could only have validly abrogated such immunity through the Fourteenth Amendment.[183]

Relying on *Fitzpatrick,* the Court noted that § 5 of the Fourteenth Amendment gave Congress the power to enforce the guarantees of the first section of the Fourteenth Amendment by "appropriate legislation."[184] However, the power to enforce these guarantees was not remedial in nature; thus, the power to determine the substance of these guarantees belonged not to Congress, but to the Court.[185]

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178. *Id.* at 801.

179. *Id.* Justice Souter also recognized that the effect of the Court's decision in *Alden,* coupled with its decision in *Seminole Tribe,* provided a total barrier to individual enforcement of federal claims. *Id.* at 809.

180. *Garrett,* 531 U.S. at 360. The court specifically did not address the issue of whether suits under Title II of the ADA would be barred by the Eleventh Amendment. *Id.* at n.1. Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. Neither did the Court find the ADA completely unconstitutional, it was only unconstitutional under the Fourteenth Amendment. The ADA may very well be constitutional under the Commerce Clause, as is the ADEA; however, since the Eleventh Amendment cannot be abrogated by the Commerce Clause, the states would still retain sovereign immunity if the ADA was constitutional under the Commerce Clause.

181. *Garrett,* 531 U.S. at 360

182. *Id.* at 364. Title I states in part: "No covered entity shall 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." 42 U.S.C. § 12112(a).

183. *Garrett,* 531 U.S. at 364.

184. *Id.* at 365.

185. *Id.*

Therefore, under the two-part congruence and proportionality test in Boerne, legislation passed pursuant to § 5 of the Fourteenth Amendment must have demonstrated "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[186]

The Court's first step in the congruence and proportionality test required the identification of the "scope of the constitutional right at issue."[187] The Court looked to its prior decision concerning the Equal Protection Clause in *Cleburne,* which determined that disability discrimination was only subject to rational basis review.[188]

Under the congruence portion of the test, the Court turned to the question of "whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled."[189] The Court found that the evidence of a pattern of disability discrimination in employment by state governments was severely lacking.[190] First, the Court discounted evidence of employment discrimination by local governments and municipalities, because they are not afforded Eleventh Amendment protection.[191] Second, while Congress did make a general finding as to the existence of discrimination in society, nearly all of the specifics gathered by Congress did not cover actions by the States.[192] Even the six examples regarding states seemed to be questionable findings of discrimination in light of the decision in *Cleburne,* because they contained no evidence to indicate whether or not the state employers might have had a rational basis for the alleged discrimination.[193] Thus, Congress did not present sufficient evidence to indicate that state governments were engaged in unlawful disability discrimination.[194]

The Court also contrasted the amount of evidence considered by Congress before enacting the ADA to the amount of evidence considered before enacting the Voting Rights Act, as examined by the Court in *South Carolina v. Katzenbach.*[195] In *South Carolina v. Katzenbach,* Congress had carefully outlined a pattern of discrimination.[196] However, the Court in *Garrett* noted, "The contrast between this kind of evidence, and the evidence that Congress considered in the present case, is stark."[197] Thus, the Court determined that the ADA was not congruent to the asserted harm because there was no evidence of any pattern of unlawful employment disability discrimination.[198]

Applying the proportionality portion of *Boerne*'s test, the Court determined that the rights and remedies granted by the ADA were clearly out of proportion

186. *Id.*
187. *Id.*
188. *Id.* at 365-68.
189. *Id.* at 368.
190. *Id.* at 368-70.
191. *Id.* at 369. *See* Lincoln County v. Luning, 133 U.S. 529, 530 (1890).
192. *Garrett,* 531 U.S. at 370.
193. *Id.* at 369-70.
194. *Id.* at 370.
195. *Id.* at 373. The Court noted that the enforcement provisions of the Fifteenth Amendment, considered in *South Carolina v. Katzenbach,* and the Fourteenth Amendment are "virtually identical." *Id.* at n. 8.
196. *Id.* at 373.
197. *Id.* at 374.
198. *Id.* at 370-72.

to the harm to be prevented.[199] Under the ADA, employers were only allowed to refuse to make reasonable accommodations for employees where it would impose an undue hardship.[200] However, under the Constitution, a state would only have to provide a rational basis for a discriminatory action against disabled individuals.[201] The accommodation duty for employees required by the ADA surpassed what was required by the Constitution, by charging the state employer with a burden to prove undue hardship, instead of charging the individual with a burden to prove lack of rational basis.[202]

Thus, while, it is Congress' prerogative to construct and adopt a "desirable public policy," a pattern of unlawful employment discrimination by the States violating the Fourteenth Amendment was required for Congress to abrogate state sovereign immunity, as well as a proportional remedy that specifically targeted the violation.[203] Such requirements were not met here, and to allow Congress to abrogate state sovereign immunity would allow them to reformulate that Fourteenth Amendment requirement decided in *Cleburne*.[204]

B. Justice Kennedy's Concurring Opinion

Justice Kennedy objected in his concurring opinion to the dissent's assumption that a State must be guilty of unlawful disability discrimination simply because of a general finding that such discrimination was pervasive in the private sector.[205] He stated, "It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws. . . ."[206] He also wrote that merely because a state had failed to revise its policies that may have appeared incorrect in light of the policy of the ADA did not necessarily indicate that there was a violation of the Equal Protection Clause.[207] Here, according to the Court, no equal protection violation had been shown concerning the states.[208] According to Justice Kennedy, if there were such violations, they would be evident in judicial proceedings of the courts of the United States, and such evidence was nonexistent.[209] States cannot be held liable for money damages to private citizens in federal court when there has been no pattern or practice of discrimination, and such pattern or practice was not established by Congress in the legislative history of the ADA.[210]

C. Justice Breyer's Dissenting Opinion

Justice Breyer in his dissent wrote, "Congress reasonably could have concluded that the remedy before us constitutes an 'appropriate' way to enforce this

199. *Id.* at 372.
200. *Id. See* 42 U.S.C. § 12112(b)(5)(A).
201. *Garrett*, 531 U.S. at 372.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.* at 375 (Kennedy, J., concurring).
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 375-76.
210. *Id.* at 376.

basic equal protection requirement."[211] Justice Breyer believed that the main problem with the Court's decision was the evidentiary requirements the Court placed on Congress.[212] Here, Congress had assembled a "vast legislative record" that documented widespread discrimination against disabled persons.[213] This evidence as to general treatment of disabled individuals necessarily implied that state governments must also have engaged in such action.[214] Justice Breyer also attached an appendix in which he documented nearly 300 discrimination examples by state governments that Congress had considered.[215] He argued that Congress should not have been required to evaluate evidence as a court of law might, but instead should be allowed to "draw general conclusions" in interpreting evidence.[216] Here, "Congress expressly found substantial unjustified discrimination against persons with disabilities," and in light of the evidence, Congress was entitled to reasonably find unconstitutional discrimination.[217]

Furthermore, Justice Breyer advocated that while a strict judicial standard of evidentiary review might well be applicable in a court of law, such an approach should not have applied to Congress.[218] The Court should have instead reviewed acts of the legislature according to a rational basis standard, which would have served as a judicial restraint.[219] Congress should not be subjected to the limitations of evidence evaluation that courts are limited to, 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."[220]

In regard to the proportionality portion of the test, according to Justice Breyer, while the Court might have argued that the remedy of the ADA was not "proportional" to the violation to be remedied, there was nothing wrong with allowing a remedy that required reasonable accommodation.[221] Even if there was a difference between what was reasonable statutorily and what was reasonable constitutionally, the power granted by § 5 was to allow Congress to require more than the absolute minimum.[222] Thus, the Court should have been willing to defer to Congress as long as there was a rational basis for Congressional action. Justice Breyer concluded, "The Court, through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invade[d] a power that the Constitution assign[ed] to Congress."[223]

V. ANALYSIS

The *Garrett* decision will undoubtedly have a significant impact on three areas of law: the future of civil rights legislation; sovereign immunity; and judi-

211. *Id.* at 377 (Breyer, J. dissenting).
212. *Id.*
213. *Id.*
214. *Id.* at 378.
215. *Id.* at 379. These examples comprise Appendix C of the opinion. *Id.* at 391-424.
216. *Id.* at 380.
217. *Id.*
218. *Id.* at 384.
219. *Id.*
220. *Id.*
221. *Id.* at 385-86.
222. *Id.* at 386.
223. *Id.* at 388.

cial review.[224] Only future litigation will fully reveal *Garrett*'s impact on the constitutionality of civil rights legislation. *Garrett* opened the door for future cases challenging the constitutionality of other sections of the American with Disabilities Act, most notably Title II, not to mention other civil rights legislation, such as the Family and Medical Leave Act.[225] Opening such a door means that those desiring to uphold such legislation will undoubtedly search for new constitutional authority to pass legislation abrogating state sovereign immunity, such as under the Spending Clause, or by waiver under the Rehabilitation Act.[226]

Garrett also reaffirmed the concept of state sovereign immunity found in the Eleventh Amendment, which is in the precarious position of being both simultaneously ingrained into American jurisprudence and perched on the edge of judicial abolition.[227] With majority and minority opinions containing such differing structural, statutory, and historical interpretations, sovereign immunity under the Eleventh Amendment will continue to be disputed law, and may well be curtailed or eliminated entirely by a Supreme Court of a different composition.[228]

The Court's conception of the scope and depth of judicial review, as applied in *Garrett,* is a significant aspect of the Court's decision that has been overlooked in much of the recent scholarship. Judicial review, as applied by the Court, encompasses such touchstone arguments as federalism and congressional deference, particularly concerning § 5 authority.[229] Judicial review, federalism, and the

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224. Undoubtedly, it will impact other areas, most notably disability law, but this not the focus of this note. For such an analysis see Jaclyn A. Okin, *Has the Supreme Court Gone Too Far?: An Analysis of* University of Alabama v. Garrett *and Its Impact on People with Disabilities,* 9 AM. U. J. GENDER, SOC. POL'Y & LAW 663 (2001) and Christina M. Royer, *Paradise Lost? State Employee's Rights in the Wake of "New Federalism,"* 34 AKRON L. REV. 637 (2001).

225. Several circuits have subsequently held after *Garrett* that Title II of the ADA was an unconstitutional exercise of § 5 authority in subjecting states to suit. *See* Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn, 280 F.3d 98 (2d Cir. 2001); Reickenbacker v. Foster, 274 F.3d 974 (5th Cir. 2001); Thompson v. Colorado, 278 F.3d 1020 (10th Cir. 2001). However, other circuits have disagreed. Hason v. Medical Bd. of California, 279 F.3d 1167 (9th Cir. 2002); Kiman v. New Hampshire Dept. of Corrections, 301 F.3d 13 (1st Cir. 2002).
Circuits have also considered the constitutionality of the Family and Medical Leave Act, with a majority of the courts finding it to invalidly abrogate sovereign immunity. *Compare* Hibbs v. Dept. of Human Res., 273 F.3d 844 (9th Cir. 2001) (finding the FMLA to be valid) *with* Laro v. New Hampshire, 259 F.3d 1 (1st Cir. 2001), Townsel v. Montana., 233 F.3d 1094 (8th Cir. 2000); Chittister v. Dept. of Cmty. and Econ. Dev., 226 F.3d 223 (3d Cir. 2000); Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000); Sims v. Univ. of Cincinnati, 219 F.3d 559 (6th Cir. 2000) and Hale v. Mann, 219 F.3d 61 (2d Cir. 2000). *See also* Kurtis A. Kemper, Annotation, *Immunity of States in Private Actions for Damages under Family and Medical Leave Act* (29 U.S.C.A. §§ 2601 et seq.), 180 A.L.R. FED 579 (2002).

226. Under the Rehabilitation Act, 29 U.S.C. § 794, circuits have held that a state has waived its sovereign immunity by accepting federal funds and could be sued under the same discrimination provisions as are found in the ADA. Carten v. Kent State Univ., 282 F.3d 391 (6th Cir. 2002); Grey v. Wilburn, 270 F.3d 607 (8th Cir. 2001); Douglas v. California Dept. of Youth Auth., 271 F.3d 812 (9th Cir. 2001). In fact, the Eleventh Circuit recently granted a motion for rehearing *Garrett* on the issue of waiver under the Rehabilitation Act. *Garrett,* 276 F.3d 1227 (2001). However, in *Reickenbacker,* 274 F.3d at 983, the Fifth Circuit held that the Rehabilitation Act was unconstitutional. *See also* Shepard v. Irving, 204 F. Supp. 2d 902 (E.D. Va. 2002).

227. *See* Joseph M. Pellicciotti, *Redefining the Relationship Between the States and the Federal Government: A Focus on the Supreme Courtís Expansion of the Principle of Sovereign Immunity,* 11 B. U. PUB. INT. L. J. 1 (2001).

228. *See* Erwin Chemerinsky, Symposium: *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity,* 53 STAN. L. REV. 1201 (2001) and Louise Weinberg, *Of Sovereignty and Union: The Legends of Alden,* 76 NOTRE DAME L. REV. 1113 (2001) for opposition to sovereign immunity; *see* Alfred Hill, *In Defense of Our Law of Sovereign Immunity,* 42 B.C.L. REV. 485 (2001) for support of sovereign immunity. For historical background, *see* John E. Nowak, *The Scope of Congressional Power to Create Causes of Action against State Governments and the History of the Eleventh and Fourteenth Amendments,* 75 COLUM. L. REV. 1413 (1975).

229. *See* Ronald Rotunda, Symposium: Garrett, *Disability Policy, and Federalism: The Eleventh Amendment,* Garrett, *and Protection for Civil Rights,* 53 ALA. L. REV. 1183 (2002).

scope of § 5 authority, are interrelated issues that are crucially important to the future of not only disability discrimination legislation, but also to other possible future legislation, including civil rights. Opposing conceptions of federalism catalyze the argument between the majority and the minority of the Court, and it is an understatement that the corresponding struggle between judicial review and congressional deference constitutes the chief ideological difference between the majority and the minority of the Supreme Court. The Court's stance on these issues under the umbrella of judicial review may well prove to be the most significant aspect of the *Garrett* decision.

A. Right to Judicial Review

The Court has laid down a number of basic guidelines for judicial review of the constitutionality of legislation. Legislation passed by Congress "must be based on one or more of its powers enumerated in the Constitution."[230] Justice Marshall said long ago in *Marbury*: "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written."[231] He also first formulated the concept of judicial review in *Marbury* stating: "It is emphatically the province and duty of the judicial department to say what the law is."[232] Finally, in *McCulloch*, Marshall stated the requirements for constitutionality: "Let the end be legitimate, let it be within the scope of the constitution and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional."[233]

Thus, the concept of judicial review has been incorporated into American jurisprudence for nearly 200 years. Generally, it had become accepted that the Supreme Court had not only the right, but the duty to review legislation as to its constitutionality. Yet, the right to judicial review has come under attack by those that seek to increase the scope and power of the federal government, and view judicial review as a roadblock on the road to civil rights reform.[234] Some of these critics have falsely labeled judicial review as judicial activism, and chastised the Court for preventing Congress from passing needed legislation. However, the Court, in its role as a court of judicial review, has acted to hold Congress accountable for broad sweeping legislation passed under the guise of constitutional authority, not as protection of state governments, but as a protection of the federal government.

1. Right to Judicial Review as Opposed to Assertion of "New Federalism"

Much of the discussion and criticism that has emerged concerning the recent decisions of the Supreme Court has claimed that the only possible reasoning

230. *Morrison*, 529 U.S. at 607
231. *Marbury*, 5 U.S. (1 Cranch) at 176.
232. *Id.* at 177.
233. *McCulloch*, 17 U.S. (4 Wheat.) at 421.
234. *See* Ruth Colker and James J. Bradney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Neal Devins, Symposium: *The Constitution in Exhile: Congress as Culprit: How Lawmakers Spurred on the Courtís Anti-Congress Crusade*, 51 DUKE. L. J. 435 (2001); and Lynn A. Baker and Ernest A. Young, Symposium: *The Constitution in Exhile: Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75 (2001).

behind the majority's stance was an unrelenting ideological devotion to federalism, and, indeed, critics have termed such a devotion "New Federalism."[235] "New Federalism," in their minds, is a new-found effort by the Court to protect the powers traditionally given to States and limit federal government legislation that infringes upon such traditional powers. While federalism inherent in the concepts of separation of powers and limited government forms much of the basis for the Court's stance, an overlooked element in the majority's ideology is the assertion of the right of judicial review.[236]

In *Katzenbach v. Morgan*, Justice Harlan wrote in his dissent, "I believe the Court has confused the issue of how much enforcement power Congress possesses under § 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature."[237] In Justice Harlan's opinion, the right to determine a substantive violation of the Fourteenth Amendment belonged to the Court, not Congress, because allowing Congress such discretion would allow Congress to "dilute equal protection."[238] Thus, Congress should be "subject to the governmental boundaries set by the Constitution."[239]

In *Boerne*, Justice Kennedy wrote that the history of the Fourteenth Amendment "confirms the remedial, rather than substantive, nature of the Enforcement Clause."[240] According to Justice Kennedy, the Fourteenth Amendment was expressly designed to prevent Congress from obtaining "primary power to interpret and elaborate on the meaning of the new Amendment through legislation."[241] Thus, "[t]he design of the Fourteenth Amendment has proved significant also in maintaining the traditional separation of powers between Congress and the Judiciary."[242] Justice Kennedy finally noted:

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' It would be 'on a level with ordinary legislative acts, and, like other acts . . . alterable when the legislature shall please to alter it.'

The same principle was also affirmed by Justice Rehnquist's majority opinion in *Garrett* that stated that the Court, not Congress, has the "responsibility . . . to define the substance of constitutional guarantees."[244]

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235. *See* Note, *The Irrational Application of Rational Basis: Kimel, Garrett, and Congressional Power to Abrogate State Sovereign Immunity,* 114 Harv. L. Rev. 2146 (2001), for criticism of the Court's analysis.

236. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 580-89 (O'Connor, J. dissenting) and Ronald D. Rotunda, *Resurrecting Federalism Under the New Tenth And Fourteenth Amendments,* 29 TEXAS TECH L. REV. 953 (1988).

237. Katzenbach v. Morgan, 384 U.S. at 666 (Harlan, J., dissenting).

238. *Id.* at 668.

239. *Id.* at 671.

240. *Boerne,* 521 U.S. at 520.

241. *Id.* at 524.

242. *Id.* at 523-24

243. *Id.* at 529 (quoting *Marbury,* 5 U.S. (1 Cranch) at 177).

244. *Garrett,* 531 U.S. at 365.

The primary concern of the Court was that if Congress was not only allowed to prescribe remedial legislation to correct an injustice, but also to determine if an injustice actually exists, Congress effectively would possess unlimited prophylactic authority. Logically, when two entities share power, particularly in the same manner as the federal and state governments, when one entity's power is limited, the other is necessarily increased. So, where congressional power is curtailed, the result is an increase, or at least a reinforcement, of state power. Justice Kennedy in another opinion noted, "The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design."[245] Thus, the interplay between the constitutional limitation of congressional power enforced by the Supreme Court, and the power subsequently left to the states, created an illusion that such a limitation by the Court was solely a protection of States' rights, or Federalism, where in fact, the Court was also asserting its right of judicial review in curtailing congressional legislative authority. Therefore, while federalism has played a role in the Court's recent decisions, those decisions, including *Garrett,* are also assertions of the right to judicial review.[246]

2. Judicial Review: A More Consistent Approach

Critics of the recent Supreme Court decisions have vigorously asserted that the Court should be willing to defer to Congress on legislation under § 5 of the Fourteenth Amendment. Justice Stevens advocated, "The importance of respecting the Framers' decision to assign the business of lawmaking to the Congress dictates firm resistance to the present majority's repeated substitution of its own views of federalism for those expressed in statutes enacted by the Congress and signed by the President."[247] Also, in *Garrett,* Justice Breyer wrote, "The Court, through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress."[248]

However, as expedient as deference to Congress might be, in the instance where congressional power has the ability to go unmonitored, the Supreme Court's right to judicial review would serve as the only check on congressional power. Justice Breyer has criticized the Court's restriction of congressional power as limiting Congress' ability "to enact economic legislation needed for the future" and denying "necessary legislative flexibility."[249] Yet, such a stance necessarily characterizes the Supreme Court as a practical hindrance to congressional legislation, and negates judicial review. In fact, a broad policy of deference to Congress essentially eviscerates judicial review. However, such a policy of broad deference to Congress results in a practical anomaly, as was evidenced in *Boerne.*

245. *Alden,* 527 U.S. at 713.

246. For a defense of the enforcement of federalism, *see* Marci A. Hamilton, Symposium: *New Voice on the New Federalism: Why Federalism Must Be Enforced: A Response to Professor Kramer,* 46 VILL. L. REV. 1069 (2001).

247. *Kimel,* 528 U.S. at 96 (Stevens, J., dissenting).

248. *Garrett,* 531 U.S. at 388 (Breyer, J., dissenting) (citing Katzenbach v. Morgan, 384 U.S. at 648 n. 7).

249. *College Savings,* 527 U.S. at 701 (Breyer, J., dissenting).

In *Boerne,* the Supreme Court found that the Religious Freedom Restoration Act was unconstitutional under the congruence and proportionality test.[250] Even the *Garrett* minority did not object to the test applied in *Boerne.* Yet, under a broad principle of deference to Congress, the Court could not have overturned the RFRA. Under congressional deference, the Court would have yielded to Congress' policy decisions. Yet, the *Garrett* minority, all of whom were firmly implanted against the RFRA, also argued that the ADEA and the ADA should be upheld as constitutional under the Fourteenth Amendment by according appropriate deference to congressional decision-making. Why defer in one case, and apply a congruence and proportionality standard in the next?

One possible explanation might be that the RFRA was clearly unconstitutional because of its effect on the Free Exercise Clause under the First Amendment, and the ADEA and ADA are quite different pieces of legislation. Thus, the Court should review legislation when it is clearly unconstitutional and defer when it is not.

Another possible explanation might conclude that the RFRA was examined in *Boerne* because the RFRA was enacted to overturn a previous decision of the Court. Thus, the Court should review legislation when it is enacted to improperly overrule prior decisions.

Yet, both explanations fail to set any definite parameters for evaluating whether legislation should be reviewed at all. There is little doubt that the RFRA would have been just as unconstitutional *with* or *without* a prior decision by the Supreme Court. Such an untenable approach reveals the strength of the consistent congruent and proportional judicial review of congressional legislation, and highlights the inconsistency of broad deference to Congress. In other words, broad deference leaves little room for the Court to review legislation that is suspect, particularly because there is little principle that would allow judicial review in such circumstances. Thus, the most logical and consistent approach is to *always* review the constitutionality of legislation, as opposed to review only in *selected* cases, where the criteria for selection is undefined and unprincipled.[251]

B. The Boerne *Test: An Applicable Standard*

Even if critics were to agree that meaningful judicial review of all legislation was a more consistent approach, some might argue that the congruent and proportional standard of review applied to legislation passed under § 5 of the Fourteenth Amendment was difficult to apply, and should be discarded because of such difficulty.[252] Others might argue for a diminished standard of review, such as the rational basis standard of review, which in practical effect would serve as a rubber stamp on legislation.[253] While such arguments as to the ease of

250. *Boerne,* 521 U.S. at 511.

251. This is not to say that the Court should *never* defer to Congress, but where Congress has broad legislative authority with few boundaries, deference should be severely limited, and the Court should not serve simply as a rubber stamp on legislation exceeding such boundaries.

252. *See* Ronald D. Rotunda, Symposium: *The Powers of Congress Under Section 5 of the Fourteenth Amendment after* City of Boerne v. Flores, 32 IND. L. REV. 163 (1988).

253. For discussion of why rational basis review should be applied *see* Evan H. Caminker, Symposium: *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: "Appropriate" Means-Ends Constraints on Section 5 Powers,* 53 STAN. L. REV. 1127 (2001).

applicability of the congruence and proportionality standard may well have had some merit before *Garrett*, the Court in *Garrett* simplified the matter by applying its standard and giving clear guidance on how the standard should be applied in the future.

First, the Court's traditional analysis under the congruence part of the test centered on the actual harm committed, requiring the type of evidence indicating a pattern of discriminatory conduct as was considered in *South Carolina v. Katzenbach.*[254] However, in recent times, the level of evidence required by the Court has been difficult to ascertain. In *Boerne,* for example, the Court found the evidence considered in congressional hearings only pertained to incidental religious discrimination.[255] In *College Savings* and *Florida Prepaid*, no evidence was ever found to indicate that state governments had engaged in a pattern of patent infringement.[256] In *Kimel,* no specific finding was ever made as to age discrimination by state governments, though there was evidence of a general finding of discrimination.[257]

Likewise, in *Garrett,* no evidence had been produced that indicated that states were unlawfully discriminating against disabled individuals in employment.[258] Thus, the Court in *Garrett* narrowly defined the evidence it required. The Court only considered the narrow evidence of *unlawful employment discrimination by state governments,* and dismissed other unrelated evidence as irrelevant.[259] Therefore, in order to apply the congruence portion of the test, evidence must be considered from a narrow perspective producing specific conclusions as to the presence of harm in the context of the facts at issue, rather than mere general conclusions as to the presence of any harm.[260] Such evidence should also consider that States may well have a legitimate reason for disability discrimination, since ordinarily such discrimination is only subject to rational basis review.[261]

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254. *Garrett,* 531 U.S. at 373.

255. 521 U.S. at 530-31. Such acts included autopsies performed contrary to an individuals religious beliefs and zoning ordinances that created inconveniences.

256. 527 U.S. at 640.

257. 528 U.S. at 89.

258. 531 U.S. at 368.

259. *Id.* at 369.

260. The context of the facts at issue should be limited as narrowly as possible. In other words, for disability employment discrimination by states, there needs to be evidence that states actually unlawfully discriminated. Certainly, this creates a high hurdle for Congress, particularly when alleged discrimination is subject to rational basis review, which means, of course, that a state must not have had a rational basis for discrimination.

261. Is this a judicially created standard? Perhaps, to the extent that evidence should be gathered from *both* sides, as opposed to hearing only one side of the facts. Also consider, that Justice Kennedy has stated: "It is a most serious charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws, particularly where the accusation is based not on hostility but instead on the failure to act or the omission to remedy." *Garrett,* 531 U.S. at 375. Justice Kennedy's remark seems to indicate that with disability discrimination, discrimination may not be based on hostility as much as it is based on mere oversight and failure to change procedures. In this case, it seems perfectly reasonable to require the Congress consider evidence from both parties. For a criticism of the Court's consideration of scrutiny standards in *Garrett, see* Melissa Hart, Symposium: *New Voices on the New Federalism: Conflating Scope of Right With Standard of Review: The Supreme Court's "Strict Scrutiny" of Congressional Efforts to Enforce the Fourteenth Amendment,* 46 VILL. L. REV. 1091 (2001).

The Court's analysis of the proportional part of the test has centered on the proportion of the remedy prescribed in relation to the possible harm.[262] In *Boerne,* the Court found that the RFRA was out of proportion with any religious discrimination because the method of enforcement allowed any individual to claim that his or her exercise of religion had been infringed on, and would put the burden of proof on the government, severely hampering the traditional regulatory role of the government.[263] In *Kimel,* the Court held that the ADEA required more of state employers than would be required constitutionally, which is a rational basis, yet the ADEA specifically made all age discrimination, even that that was rationally based, unlawful.[264] In *Morrison*, the Court held that since the remedy allowed was against an official, it was not covered under the Fourteenth Amendment because the Amendment only covered actions by states.[265] In *Garrett,* the remedy created by Congress was disproportionate because it required an employer to prove an undue hardship in discrimination against disabled individuals, instead of the constitutionally required rational basis.[266] Thus, under the proportional part of the test, the Court must determine if the remedy exceeds what is constitutionally required by the purported harm, and if the remedy is not proportional to such harm, then the second part of the test must fail.

So, while many critics may have argued that the congruence and proportionality test applied by the Court in prior decision was difficult to practically apply, the Court in *Garrett,* simplified the two part test, by narrowly defining the evidence it required of Congress to pass such prophylactic legislation under the Fourteenth Amendment, and by requiring a proportional remedy.

C. Restraint on Legislation: Added Benefits of Judicial Review

Judicial review of § 5 legislation also offers added benefits not supplied by congressional deference. The Court applies a high evidentiary standard to prevent the passage of measures that are not needed and that are motivated by current politics. Thus, judicial review prevents Congress from passing laws based on popular politics, and removes the burden from individual members of Congress of having to evaluate for themselves the constitutionality of legislation.[267] Judicial review also leaves constitutional evaluation to those that are experienced and competent in such analysis, and those that are less vulnerable to changing

262. For discussion on proportionality analysis, *see* Marci A. Hamilton and David Schoenbrod, Symposium: *The Reaffirmation of Proportionality Analysis under Section 5 of the Fourteenth Amendment,* 21 CARDOZO L. REV. 469 (Dec. 1999). Professor Hamilton was the lead counsel for the City of Boerne in *City of Boerne v. Flores. See also* Tracy A. Thomas, *Congress' Section 5 Power and Remedial Rights,* 34 U.C. DAVIS. L. REV. 673 (2001).

263. *Boerne,* 521 at 533-34. For a discussion of the RFRA *see* William W. Van Alstyne, *The Failure of The Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment,* 46 DUKE L. J. 291 (1996).

264. *Kimel,* 528 U.S. at 86.

265. *Morrison,* 529 U.S. at 626.

266. *Garrett,* 531 U.S. at 372.

267. The Constitution was drafted to minimize the effect of popular politics, which are movements that tend to cycle throughout history. For instance, it might be popular politics to ignore the rights of captive terrorists, but such action is certainly not lawful. The Constitution, by setting up a framework for government, is designed to prevent the law from drastically changing merely because of popular opinion, except, of course, through the Amendment process. While members of Congress take an oath to uphold the Constitution, the pressure of popular politics is self-evident, and denial of such realistic pressures is idealistically absurd.

political pressures. Thus, it also serves to allow members of Congress to tend to the needs of constituents, political parties, and special interests, when proposed legislation is on the border of constitutionality. Therefore, judicial review can properly be classified as a benefit, rather than a detriment, to Congress.

1. Setting a High Evidentiary Bar

In *Garrett,* Justice Breyer challenged the level of evidence that the Court required of Congress: "The Court's failure to find sufficient evidentiary support may well rest upon its decision to hold Congress to a strict, judicially created evidentiary standard, particularly in respect to lack of justification."[268] He also wrote:

> Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy. Unlike courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification. Unlike judges, Members of Congress can directly obtain information from constituents who have firsthand experience with discrimination and related issues.

It is beyond dispute that in recent decisions, such as *Lopez, Morrison, College Savings, Florida Prepaid,* and *Kimel,* the Court placed a burden on Congress to provide evidence for passage of legislation.[270]

In *Garrett,* the Court did not discontinue the trend. Yet, the *Garrett* decision did serve to narrowly define the kind of specific evidence required by the Court. The guidance of the Court is clear in *Garrett* that there must be evidence of unlawful employment discrimination by a state, not merely general evidence of discriminatory conduct. Justice Breyer dissented:

> The powerful evidence of discriminatory treatment throughout society in general, including discrimination by private persons and local governments, implicates state governments as well, for state agencies form part of that same larger society. There is no particular reason to believe that they are immune from the 'stereotypic assumptions' and pattern of 'purposeful unequal treatment.'

However, Justice Kennedy wrote in his concurrence, "It is a question of quite a different order, however, to say that the States in their official capacities . . . must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of some of their citizens."[272] Justice Kennedy further stated that simply because a state has failed "to revise policies now seen as incorrect under a new understanding of proper policy" does not indi-

268. *Garrett,* 531 U.S. at 382 (Breyer, J., dissenting).
269. *Id.* at 384.
270. For analysis and criticism of the congressional evidence required *see* William W. Buzbee and Robert A. Schapiro, *Legislative Record Review,* 54 STAN. L. REV. 87 (2001).
271. *Garrett,* 531 U.S. at 378.
272. *Id.* at 375 (Kennedy, J., concurring).

cate that these states have violated the Fourteenth Amendment.[273] Justice Breyer's guilt by association assumption may well be true, yet the Court in requiring actual proof as to a pattern of discriminatory actions by the entities to be burdened actually benefits future legislation.[274]

The benefits to future legislation can be seen through the Court's decisions on legislation based on other constitutional authority, such as Article I's Commerce and Patent Clauses. In those cases, the Court required the same quality of evidence as it required for § 5 legislation. Such a requirement of evidentiary proof serves as a protection to the federal government. Justice Kennedy wrote in *Alden*, "We need not attach a label to our dissenting colleagues' insistence that the constitutional structure adopted by the Founders must yield to the politics of the moment."[275] Indeed, some of the criticism of the original draft of the Fourteenth Amendment asserted "that giving Congress primary responsibility for enforcing legal equality would place power in the hands of changing congressional majorities."[276] The benefit of setting a high evidentiary bar on Congress is that it prevents future legislation from passing with ease merely because of a change in political control. While Justices Breyer and Stevens have argued for increased legislative flexibility, such flexibility does not come without a price. Allowing Congress broad authority to legislate merely because it is *assumed* that from general evidence there must be *some* discriminatory act by a State has dangerous consequences indeed. Justice Kennedy has noted that if States had really been guilty of discriminatory conduct, then there should be evidence to that end. Merely because there is a new recognition of a need for more adequate treatment of disabled individuals does not indicate that States should be found in violation of the Equal Protection Clause.[277] Allowing Congress to pass legislation based on mere general assumptions effectively creates a slippery slope at the bottom of which lies carte blanche prophylactic legislative authority. If the Supreme Court will not be allowed to monitor Congress to prevent such an usurpation of authority then who will?[278]

2. Constitutional Review by Congress or the Court?

Critics of the Supreme Court's recent assertion of judicial review have argued that individual members of Congress are perfectly able to evaluate the constitu-

273. *Id.*

274. While certainly requiring actual evidence of unlawful discrimination burdens Congress more than requiring only one-sided evidence of unlawful discrimination, such a requirement only serves to prevent unneeded legislation from being enacted. If unlawful discrimination exists, there should be evidence of it. *See Garrett*, 531 U.S. at 375-76 (Kennedy, J., concurring).

275. *Alden*, 527 U.S. at 758-59.

276. *Boerne*, 521 U.S. at 521.

277. *Garrett*, 531 U.S. at 375-76 (Kennedy, J., concurring). "If the States had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations. This confirming judicial documentation does not exist. That there is a new awareness, a new consciousness, a new commitment to better treatment of those disadvantaged by mental or physical impairments does not establish that an absence of state statutory correctives was a constitutional violation."

278. Such an approach to review by the Court, of course, burdens Congress more than broad deference by the Court, which is certainly void of any serious standard of review. Yet, again, if there is unlawful discrimination, there should be evidence of such, and it should not be unreasonable to require Congress to produce such evidence.

tionality of legislation. Justice Stevens has argued, "It is the Framers' compromise giving each State equal representation in the Senate that provides the principle structural protection [of the Constitution] for the sovereignty of the several States."[279] Such a statement reveals much of the philosophy of many critics: the Court should keep its powers of constitutional interpretation separate from the legislative powers of Congress. Yet, such a solution is awash with practical application problems. Members of Congress are not as free to evaluate the constitutionality of legislation as one might argue.[280] Each is burdened with the needs of constituents, political parties, and special interest groups. Nor is each member experienced or qualified to analyze the constitutionality of legislation. Most importantly, as a practical matter, re-election remains the top priority for most members of Congress, which guarantees popular laws, regardless of their constitutionality, will get passed or debated.[281] Such deficiencies alone argue for a third party to evaluate constitutionality of legislation, and are too carelessly overlooked by those advocating congressional deference by the Court.

The problem can be illustrated by a situation where a member is faced with legislation that may or may not be constitutional; a so-called "borderline" act. What if a member of Congress is uncertain as to the constitutionality of a certain piece of legislation? Is a member of Congress expected to go against his or her constituency's needs, or political party's interests, and vote against an act that might well be constitutional, because he or she believes it *might* be unconstitutional? Wouldn't it be beneficial to them to know that another entity will be responsible for reviewing the constitutionality of legislation?

Of course, the Supreme Court provides a forum of experienced, legal minds, who can evaluate the constitutionality of legislation without the practical political problems of re-election, gaining an important committee seat, or campaign contributions.[282] Allowing the Supreme Court to review the constitutionality of legislation works out best for members of Congress and should be viewed not as a hindrance to legislation, but as a tool allowing members of Congress to remove some added pressure in favor of a becoming better politicians.

V. CONCLUSION

Just beyond the horizon of *Garrett* lie future decisions to be rendered on other pieces of civil rights legislation. Under the current Court's composition, other civil rights laws that provide a federal forum for private citizens for suits against state government will be evaluated under a difficult test. Certainly, few would argue that sovereign immunity is "fair" to the private citizen, and many will continue to argue for its complete abolition in American jurisprudence. The reality

279. *Kimel*, 528 U.S. at 93 (Stevens, J., dissenting).

280. This is not to say that members of Congress are not bound by an oath to uphold the Constitution. Members of Congress should be expected to uphold the Constitution. Yet, an argument that they should be the sole check on the constitutionality of legislation fails to see the reality of the political process, and might well be a means-end argument for getting around the Courtís right to judicial review.

281. For instance, many may agree that the ADA's definition of disability is vague. However, no member of Congress would ever dare to try to modify the ADA, as such would be political suicide.

282. *See* Thomas I. Vanaskie, *The Independence and Responsibility of the Federal Judiciary*, 46 VILL. L. REV. 745 (2001).

of the situation, is, of course, that every state would be reluctant to unequivocally waive its sovereign immunity and open up its coffers to monetary judgments in discrimination suits, no matter how "fair" that might be to a private individual. Therefore, as long as state governments have anything to say about the matter, it is likely that sovereign immunity will remain firmly entrenched in American law.

The likely stance of states leaves the Supreme Court as perhaps the most powerful *potential* foe of the states in the war against sovereign immunity, or, at least sovereign immunity from federal question jurisdiction. The opinion voiced by the minority of the Court in *Garrett* and previous cases leaves little doubt as to the precarious precipice upon which sovereign immunity is situated. Thus, critics of sovereign immunity will make every attempt to modify either the composition or the position of the Supreme Court.

As long as sovereign immunity survives, its opponents will continue to seek out new ways to circumvent its protection of states, whether that is in increasing the scope of congressional authority by resorting to a broad deference approach, or by encouraging the use of waiver, or any other as yet undiscovered means. Such an approach, it seems, may be dangerous because it fails to take into account any potential future repurcussions that might result from an all-powerful Congress. In a country that is composed of so many geographic and cultural differences, diminishing the ability of the states to protect its citizens through its general legislative authority by granting more such authority to Congress can only have disastrous consequences for under-represented state citizens. Such is the benefit of federalism: that is to keep powers separate among governments to ultimately protect the people. While few would argue that legislation protecting disabled individuals is itself destructive, at the bottom of the slippery slope lies a dangerous chasm. Allowing the legislature to not only enact legislation, but to define whether or not such legislation is lawful itself, inherently creates an atmosphere where the potential for the abuse of power is considerable; not to mention, steps over the bounds of separation of powers.

Thus, judicial review serves as a protection from any one side of government gaining too much of a foothold on absolute authority, whether such protection is between the executive, legislative, and judicial branches, or between the federal and state governments. Yet, judicial review is overlooked as a potential tool in providing for a balanced government, and seen instead as an overreaching protection of "New Federalism" and a hindrance to progressive civil rights legislation. Opponents of judicial review argue that the Court should be more deferential to congressional decision-making; however, since deference would ultimately result in the demise of judicial review, what opponents are actually advocating is a system of laws that Congress could modify at its every whim. If the Supreme Court can no longer judicially review legislation, why would Congress need to follow the law? Of course, only the future will hold the ultimate fate of judicial review, and whether broad deference to Congress will ultimately destroy the concept. However, for now, judicial review ultimately serves as a protection for the people of the United States and the Constitution under which we are governed.

Thus, Garrett exemplified a protection of the Court's right of judicial review

in accordance with principles that have been ingrained in the American court system for nearly 200 years. Those who oppose such review fail to see the danger of allowing Congress to define its own substantive law, and are willing to support whatever congressional means are required to set its own boundaries because the legislative ends are noble. Yet, is it wise to completely entrust one branch of government with such unchecked power and authority? James Madison wrote words of caution:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[283]

Therefore, the Supreme Court in *Garrett,* through its judicial review of legislation infringing on sovereign immunity of states under the Eleventh Amendment, provided a protective control mechanism, not an obstacle to congressional legislation under the Fourteenth Amendment, by assuring that the authority and powers of members of Congress will continue to be bound by the Constitution and the laws of the United States.

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283. THE FEDERALIST PAPERS, Federalist No. 51.