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Has the Supreme Court Gone Too Far?: An Analysis of University of Alabama v. Garrett and its Impact on People with Disabilities

Jaclyn L. Okin

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HAS THE SUPREME COURT GONE TOO FAR?: AN ANALYSIS OF *UNIVERSITY OF ALABAMA V. GARRETT* AND ITS IMPACT ON PEOPLE WITH DISABILITIES

JACLYN A. OKIN*

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INTRODUCTION

Since the Americans with Disabilities Act of 1990 (“ADA”)¹ was enacted, it has been contested in the Supreme Court only a minimal number of times. The Supreme Court has examined issues such as clarifying the definition of a disability,² identifying the entities covered by the ADA,³ determining the appropriate placement for individuals with mental disabilities,⁴ and remedying the contradictions existing between the requirements of the ADA and the requirements of the Social Security Disability Act.⁵ The question of the constitutionality of the ADA has never been raised in front of the Court, until recently.⁶

At a time when there is increasing debate regarding the balance of power between the federal government and the states,⁷ the ADA has

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1. 42 U.S.C. §§ 12101-12213 (1994) (outlawing discrimination against people with disabilities in employment, public services, public transportation, telecommunications, and public accommodations or services operated by private entities).

2. *See Sutton v. United Airlines*, 527 U.S. 471, 482-83 (1999) (holding that in order to determine if an individual is disabled within the meaning of the ADA, it is important to take into account any corrective measures the individual with the impairment employs). Therefore, individuals who are able to correct their vision to 20/20 or better with eyeglasses are not to be considered disabled. *Id.* at 481; *see also* *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 566 (1999) (concluding that cases questioning the existence of a disability must be examined on a case-by-case basis regarding whether an individual is impaired in any major life activities); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 520 (1999) (relying on *Sutton* to conclude that petitioner’s high blood pressure could not be considered a disability when petitioner was taking medication to control it); *Bragdon v. Abbott*, 524 U.S. 624, 637 (1998) (asserting that an individual with HIV is considered a person with a disability even in the beginning stages of the disease).

3. *See Pa. Dep’t of Corrections v. Yeskey*, 524 U.S. 206, 210 (1998) (declaring state prisons to be a state entity subject to the requirements of Title II of the ADA).

4. *See Olmstead v. L.C.*, 527 U.S. 581, 607 (1999) (finding that under Title II of the ADA, the appropriate placement for people with mental disabilities are community-based settings when such placement is deemed appropriate by the state’s treatment professionals).

5. *See Cleveland v. Policy Mgmt. Sys. Corp.*, 528 U.S. 795, 807 (1999) (declaring that it is not a contradiction of terms when an individual claims to be “totally disabled” in order to collect Social Security Disability Insurance, and at the same time is able to perform the essential functions of a job under the ADA).

6. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 960 (2001) (raising the question of the constitutionality of Title I of the ADA to the extent that it regulates state governments); *see also* 42 U.S.C. § 12101 (1994) (prohibiting discrimination in employment settings in Title I).

7. *See generally* *United States v. Morrison*, 529 U.S. 598, 617-18 (2000) (finding Congress to have incorrectly taken over state policing power when enacting the Violence Against Women Act); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 67 (2000) (determining that the federal government invaded the rights of the states when it enacted the Age Discrimination in

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fallen in the middle of the controversy.⁸ Under the context of the Eleventh Amendment,⁹ in February of 2001, the Supreme Court decided a case questioning whether Title I of the ADA, as it is applied to state governments, is constitutional when it abrogates states' Eleventh Amendment rights.¹⁰ This case not only raised the issue of the constitutionality of Title I of the ADA,¹¹ but also the future of Federalism and the relationship between the states and the federal government.¹²

*Board of Trustees of University of Alabama in Birmingham v. Garrett*¹³ arose from two state employees separately filing claims against Alabama in the district court, after they were forced to leave their jobs due to their disabilities.¹⁴ Both Garrett and Ash filed claims under Titles I and II of the ADA,¹⁵ and section 504 of the Rehabilitation Act.¹⁶ Garrett also included a violation of the Family and Medical Leave Act ("FMLA")¹⁷ in her claim.¹⁸ Consolidating the

Employment Act).

8. See Brief for Petitioners, 2000 WL 821035, *2; *Garrett*, 121 S. Ct. 955 (2001) (arguing that the ADA's expansion of congressional authority is at the expense of a diminution of state sovereignty) (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

9. U.S. CONST. amend. XI ("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.").

10. See *Garrett*, 121 S. Ct. at 960 (questioning whether an individual can sue a state and recover monetary damages).

11. See Judge David L. Bazelon Center for Mental Health Law, *The Garrett Case: New Challenge to the ADA* (Feb. 21, 2000), at <http://www.bazelon.org/garrettcase.html> (citing how *Garrett* calls into question the constitutionality of the ADA).

12. See Peter Schmidt, *Supreme Court to Decide Whether Public Colleges May be Sued Under Disability Law*, CHRON. HIGHER EDUC., Apr. 28, 2000, at A37 (reporting that the Supreme Court's decision in *Garrett* will result in an examination of Federalism).

13. *Garrett v. Bd. of Trs. of Univ. of Ala.*, 193 F.3d 1214 (11th Cir. 1999) *rev'd*, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 121 S. Ct. 955, 961 (2001) (consolidating two disability discrimination claims against state employers).

14. See United States Amicus Curiae for Respondent, *Garrett*, 121 S. Ct. 955 (2001) available at <http://www.usdoj.gov:80/osg/briefs/1999/0responses/99-1240.resp.html> (explaining the background of the case). Specifically, Respondent Patricia Garrett was demoted with a significant pay cut from her position with the University of Alabama after she took four months leave to recover from breast cancer. *Id.* In addition, Respondent Milton Ash had adverse employment action taken against him when he reported his employer, Alabama Department of Youth Services, to the Equal Employment Opportunity Commission as a result of the Department failing to enforce its no-smoking policy and exacerbating Respondent's asthma. *Id.*

15. See 42 U.S.C. §§ 12111-12131 (1994) (prohibiting discrimination against individuals with disabilities by employers of fifteen or more people, including state and local governments).

16. See 29 U.S.C. § 794 (1994) (outlawing discrimination against people with disabilities in any federally funded program).

17. See 29 U.S.C. §§ 2601-2654 (1994) (barring discrimination against employees on medical leave).

18. See *Garrett v. Bd. of Trs. of Univ. of Ala.*, 989 F. Supp. 1409, 1410 (N.D. Ala. 1998) (establishing the similarities and differences between Patricia Garrett's and Milton Ash's cases).

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two cases, the district court dismissed the case on grounds that Alabama's sovereign immunity was not properly abrogated in any of the statutes.¹⁹ Upon review by the circuit court, the lower court's decision regarding the ADA and section 504 of the Rehabilitation Act was overruled.²⁰ However, the court upheld the decision that the FMLA did not properly abrogate Alabama's Eleventh Amendment right.²¹ In April of 2000, the Supreme Court granted certiorari to review the question of the constitutionality of the ADA.²² Yet, when analyzing the issues in question, the Court limited its review to Title I of the ADA as it affects state employers.²³

Part I of this Note explains the various factors and tests the Court took into account when determining if the ADA constitutionally abrogates states' Eleventh Amendment Right.²⁴ Parts II and III of this Note examine the ramifications of the Court's decisions. Part II discusses the potential future for people with disabilities following the Court's decision to strike down one section of the ADA.²⁵ Finally, Part III of this Note discusses the future of Federalism and states' rights in this country had the Court upheld the constitutionality of the ADA.²⁶

19. See *id.* at 1412 (holding that Congress did not properly enact the legislation in question, thus Alabama's immunity could not be abrogated); see also text, *infra* Part I.

20. See *Garrett*, 193 F.3d at 1217-18 (finding the ADA and section 504 of the Rehabilitation Act to specifically state Congress' intent to abrogate the states' Eleventh Amendment immunity right and to be enacted pursuant to valid exercises of Congressional power); see also text, *infra* Part I.

21. See *id.* at 1219-20 (believing Congress' intent to abrogate states' immunity under the FMLA was not as clear as the ADA or the Rehabilitation Act and that Congress' enforcement of this law was not completely remedial in nature); see also text, *infra* Part I.

22. See *Bd. of Trs. v. Garrett*, 529 U.S. 1065 (2000) (granting certiorari to review Congress' authority to abrogate states' Eleventh Amendment immunity right under Titles I and II of the ADA).

23. See *Bd. of Trs. of Univ. of Ala.*, 121 S. Ct. at 960 n.1 (finding the issue of the constitutionality of Title II of the ADA was insufficiently briefed and therefore could not be decided at the time).

24. See *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996) (establishing the test to determine whether Congress properly abrogated states' Eleventh Amendment right in particular legislation); see also *City of Boerne v. Flores*, 521 U.S. 507, 519-20 (1997) (refining the *Seminole Tribe of Florida* test).

25. See *Garrett*, 121 S. Ct. at 960 (invalidating Title I of the ADA as it applies to state governments); see also Eve Hill, *Advances, But Still Problems*, SUN SENTINEL, Aug. 1, 2000, at 17A (reporting that if current attacks on the ADA are successful, the accomplishments of the ADA thus far, are likely to be lost).

26. See Marcia Coyle, *Justices Tinker with Federalism Trend, But Watch Out Next Term*, NAT'L L.J., June 5, 2000, at A1 (showing how the Supreme Court is slowly changing the current structure of this country's federalist government).

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I. DETERMINING THE CONSTITUTIONALITY OF THE AMERICANS WITH DISABILITIES ACT OF 1990

A. *Explanation of Established Standards*

When the Supreme Court considered the constitutionality of the ADA, and its abrogation of the Eleventh Amendment, the Court had to determine if the Act satisfied the two-prong test established in *Seminole Tribe of Florida v. Florida*.²⁷ First, the Court considered whether Congress unequivocally stated within the statute its intent to abrogate the states' Eleventh Amendment immunity.²⁸ Congress must clearly state its intent to abrogate states' immunity; it cannot generally authorize a party to sue a state in federal court.²⁹ Second, the Court had to determine if Congress passed the statute "pursuant to a valid exercise of power."³⁰

To determine whether Congress specifically sought to abrogate states' Eleventh Amendment right, the Court must simply examine the text of a statute.³¹ However, to determine whether a statute is a valid exercise of Congressional power under section five of the Fourteenth Amendment,³² the purpose of the Amendment first must be explained.³³ While the Court has previously recognized that section five is "a positive grant of legislative power" to be used by Congress to remedy constitutional violations, section five is also viewed as a limited source of power.³⁴

27. 517 U.S. at 55 (stating the ways in which Congress could legitimately abrogate states' Eleventh Amendment immunity); *see, e.g.*, *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627, 635-36 (1999) (applying the two-prong test to determine if Congress' enactment of the Patent Remedy Act validly abrogated states' sovereign immunity); *Kimel*, 528 U.S. at 72-73 (using the test stated within *Seminole Tribe* to examine if the Age Discrimination in Employment Act (ADEA) properly abrogated states' Eleventh Amendment immunity right).

28. *See Seminole Tribe of Fla.*, 517 U.S. at 55 (concluding Congress must clearly state its intent when abrogating state immunity) (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

29. *See id.* (holding that Congress' intent must be obvious) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238-39 (1985)).

30. *Id.* (examining the constitutionality of the Indian Gaming Regulatory Act to see if it was a valid act of Congress' Enforcement power of the Fourteenth Amendment).

31. *See id.* at 56 (examining the text of the Indian Gaming Regulatory Act to find Congress' clear intent for abrogation).

32. U.S. CONST. amend. XIV, § 5 (stating that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.").

33. *See Flores*, 521 U.S. at 516-29 (explaining the purposes of the Fourteenth Amendment before determining whether the Religious Freedom Restoration Act ("RFRA") was a valid exercise of Congressional power under section five of the Fourteenth Amendment).

34. *See Flores*, 521 U.S. at 517-19 (declaring that section five is to be used solely to enforce the provisions of the Fourteenth Amendment, thus giving Congress remedial power only) (citing *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966)).

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In previous Fourteenth Amendment jurisprudence, the Court determined that Congress did not have the authority to declare what constitutional rights and violations are comprised of in order to enforce them.³⁵ Thus, recognizing the intent of the authors of the Fourteenth Amendment, the Court was careful not to grant Congress too much power out of fear that the federal government will begin to overpower the states, causing the current structure of government to be seriously altered.³⁶ Under section five of the Fourteenth Amendment, Congress is only to enact legislation that carries out the objectives of the Amendment, enforces prohibitions, and secures the equality of civil rights for all citizens.³⁷ These goals have subsequently been interpreted to allow Congress to use the Fourteenth Amendment solely as a remedial and preventative measure.³⁸

Once the Court determined the purposes of the Fourteenth Amendment, it also recognized that it is extremely difficult to determine exactly when Congress is enacting legislation to cure constitutional violations and when it is making substantive changes to constitutional rights.³⁹ Therefore, the Court declared it would give Congress a significant amount of latitude when determining if legislation was enacted appropriately pursuant to the Fourteenth Amendment.⁴⁰ The only requirement the Court imposed upon such legislation was that there had to be a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁴¹

Legislation is considered legitimate under this test and is considered proportional if the statute’s requirements upon states do

35. See *id.* at 519 (explaining that “[t]he design of the Amendment and the text of section five are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States”).

36. See *id.* at 521-22 (reviewing the history and debates surrounding the enactment of the Fourteenth Amendment).

37. See *id.* at 517 (explaining the domain of congressional power under section five of the Fourteenth Amendment) (citing *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879)).

38. See *id.* at 526 (remarking how the Court has acknowledged Congress’ need to use strong remedial measures to respond to persisting deprivation of constitutional rights since *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)).

39. See *Flores*, 521 U.S. at 519 (reconciling the differences by explaining that while Congress has the power to protect individuals’ rights by legislating against constitutional violations, Congress does not have the authority to define constitutional rights).

40. See *id.* at 519-20 (explaining the difficulty in distinguishing between remedies of unconstitutional actions and substantive changes in governing law and the need to grant Congress wide latitude in determining where the distinction lies).

41. *Id.*; see generally *Kimel*, 528 U.S. at 82 (applying the congruence and proportionality test by reviewing the legislative record of the ADEA); Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. at 637-38 (reviewing the decision in *Flores* in order to apply the congruence and proportionality test to Patent Remedy Act); .

not reach beyond the requirements that the Constitution imposes upon states.⁴² For instance, a statute may not restrict states' practices any more than what is considered unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.⁴³ Moreover, for a law to be considered congruent, the Court needs to find clear evidence substantiating the need for the law within the statute's legislative record.⁴⁴ For example, when the Court reviewed the Religious Freedom Restoration Act in *City of Boerne v. Flores*, the Justices examined whether Congress identified a significant pattern of particular violations by the states that were clearly unconstitutional.⁴⁵ It is insufficient for Congress to recognize and enact legislation as a result of incidental burdens upon individuals' rights; evidence of widespread discrimination is required.⁴⁶

42. See *Kimel*, 528 U.S. at 85-86 (declaring the Age Discrimination in Employment Act ("ADEA") to be unconstitutional since it requires states to justify their actions with more than a rational reason, which is all that is required under constitutional standards).

43. See *id.* at 81-82 (explaining that since age classifications do not violate the Equal Protection Clause, states may discriminate against such classes of people as long as the states possess a rational reason for doing so); see generally *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (declaring that restrictions that curtail the civil rights of certain groups are immediately suspect); *City of Cleburne v. Cleburne Living Ctrs.*, 473 U.S. 432, 440 (1985) (explaining that although the general rule is that state legislation will be sustained if the classifications drawn by the statute are rationally related to a legitimate state interest, this rule is abandoned when the Court considers legislation that creates classifications that are suspect). For example, when the Court is considering a statute that classifies individuals by race, alienage or national origin, it will subject the statute to strict scrutiny and sustain the legislation only if it is narrowly tailored to meet a compelling state interest. *Id.* The reason the Court will subject this type of legislation to such scrutiny is because the Justices do not believe that any legislation that creates classifications based on race, alienage, or national origin is relevant to any legitimate state interest; rather, these laws usually only reflect individuals' prejudice and antipathy. *Id.* Another instance in which the Court will depart from its general stated rule is if it is examining legislation that classifies individuals based upon gender. *Id.* at 441. In these instances, the Court will subject the statute in question to heightened scrutiny. *Id.* The state will need to explain how the statute is substantially related to an important governmental interest in order to have the legislation sustained. *Id.* The reason for this scrutiny is because often legislation that creates gender classification has no sensible reason for the differential treatment. *Id.* at 440.

44. See *Kimel*, 528 U.S. at 81-82 (explaining how Congress failed to recognize a pattern of widespread violations committed by the states affecting individuals due to their age). Therefore, the Court concluded that the ADEA failed the congruence and proportionality test. *Id.*

45. See *Flores*, 521 U.S. at 530 (noting how RFRA's record lacks any evidence of a state law passed in the last forty years as a result of religious bigotry); *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 638 (remarking how Congress failed to recognize a pattern of patent infringements by the states or even a pattern of constitutional violations).

46. See *Flores*, 521 U.S. at 531 (recognizing that Congress' reliance on anecdotal evidence and concern for incidental burdens was not enough support the enactment of the RFRA).

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B. Application of Established Standards to the ADA

1. Abrogation is Specifically Addressed within the ADA

When reviewing *Garrett*, Justice Rehnquist, writing for the majority in a five-to-four opinion, easily recognized that the first prong of the *Seminole* test, whether abrogation is specifically stated within the ADA, was undisputed.⁴⁷ In Title V of the ADA, Congress specifically stated, “a state shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act.”⁴⁸ A statement such as this not only unequivocally states Congress’ intent, but also has been recognized by the Supreme Court to satisfy the intent requirement of the *Seminole* test when analyzed in other statutes.⁴⁹

2. Congress’ Authority to Enact the ADA

a. There was no need for Congress to remedy constitutional violations on behalf of the states with the enactment of the ADA

The first consideration Justice Rehnquist took into account when reviewing Congress’ authority to pass the ADA was whether Congress was remedying constitutional violations committed by the states when enacting the ADA.⁵⁰ To determine whether states were committing constitutional violations in the first place, it was necessary for the Court to re-evaluate its case law to determine the type of protection to afford to people with disabilities under the Equal Protection Clause.⁵¹

The last time the Supreme Court seriously considered this issue was

47. See *Garrett*, 121 S. Ct. at 962 (recognizing that the intent of the ADA was clear and undisputed).

48. 42 U.S.C. § 12202 (1994).

49. See generally *Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 635 (holding that Congress’ intent to abrogate could not have been clearer when enacting the Patent Remedy Act and stating, “any State . . . shall not be immune, under the Eleventh Amendment of the Constitution of the United States . . .”) (citing 35 U.S.C. § 296(a)); *Kimel*, 528 U.S. at 73-74 (2000) (concluding Congress clearly intended to abrogate states’ immunity stating that an individual can seek relief from various employers, including state agencies).

50. See *Garrett*, 121 S. Ct. at 962-63 (examining the limitations of section one of the Fourteenth Amendment in regards to the parameters its places on the states’ treatment of the population of people with disabilities).

51. See *id.* at 963 (reviewing its previous holding in *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), where the Court ruled that legislation affecting people with disabilities needed only to have a rational basis in order to be considered constitutional).

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in *City of Cleburne v. Cleburne Living Centers*.⁵² The Court determined that people with mental retardation are not part of a suspect classification⁵³ that would require the city to possess a compelling state interest when it denied a special permit for the construction of a group home.⁵⁴ Rather, the Court declared the mentally challenged to be a non-suspect class that would only require the city's actions to be rationally related to a valid state interest.⁵⁵

The Court cited four main reasons for denying individuals with mental retardation suspect classification status.⁵⁶ First, it was up to the legislature, not the judiciary, to decide how this large and diverse group was to be treated.⁵⁷ Second, the legislative response to people who are mentally challenged proves that these people face unique problems that have been addressed by Congress in order to eliminate antipathy and prejudiced views.⁵⁸ Third, this group of individuals is not politically powerless.⁵⁹ Finally, the Court believed that if the mentally retarded were afforded suspect status, the Court would not know where to draw the line when it came to other individuals with similar immutable disabilities.⁶⁰

After examining this holding in *Garrett*, the Court saw no reason to require anything more of the states than a rational reason in the

52. 473 U.S. 432, 438-39 (1985) (determining whether the City of Cleburne discriminated against persons with mental retardation when it denied a special permit to build a group home for such individuals and subsequently determined that people with mental retardation were not to be considered a suspect class).

53. *See id.* at 442 (explaining that the Court of Appeals was wrong to declare people with mental retardation a quasi-suspect class).

54. *See id.* at 440 (declaring only statutes affecting race, alienage, and national origin to be suspect and subject to strict scrutiny to ensure that they are narrowly tailored to serve a compelling state interest).

55. *See id.* at 440 (observing that the general rule applied to all legislation not affecting suspect classification is that the legislation will be sustained as long as the classification drawn is rationally related to a legitimate state interest).

56. *See id.* at 442-46 (creating distinctions between the disabled population and other suspect populations in order to demonstrate how the disabled cannot be included in such a classification).

57. *See Cleburne*, 472 U.S. at 442-43 (describing the difference among people with disabilities to range from those whose disabilities are not immediately evident to those who require constant care).

58. *See id.* at 443 (recognizing that Congress has already enacted section 504 of the Rehabilitation Act of 1973 to ensure the integration of people with disabilities in federally funded programs; the Developmental Disabilities Assistance and Bill of Rights Act enabling individuals with disabilities to have access to appropriate treatment and rehabilitation services; and the Education of the Handicapped Act that dedicated federal education funds to ensure that children with disabilities possess an appropriate and integrated educational setting).

59. *See id.* at 445 (acknowledging that the disabled population has the ability to have its opinions heard by government officials, as evidenced by the legislature's response).

60. *See id.* at 444-46 (expressing concern for creating a slippery slope).

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states' treatment of individuals with disabilities.⁶¹ Justice Rehnquist explained that the Fourteenth Amendment is not violated when a state decides to act upon the differences between individuals with disabilities and the rest of the population when there is a rational reason for the action.⁶² Furthermore, the majority clearly established that the presence of negative attitudes and fears in the minds of state decision-makers does not alone establish a constitutional violation.⁶³ The Court concluded that as long as states are acting rationally they are not required under the Fourteenth Amendment to make special accommodations for people with disabilities.⁶⁴ Justice Rehnquist stated, "[t]he [states] could quite hard headedly – and perhaps hardheartedly – hold to job-qualification requirements which do not make allowance[s] for the disabled."⁶⁵

b. Legislative findings do not support the enactment of the ADA

In addition to examining whether Congress was remedying constitutional violations by the states with the enactment of the ADA in order to determine whether the statute is congruent and proportional, the Court also needed to review the legislative findings of the statute.⁶⁶ In doing this, the Court recognized that Congress enacted the ADA "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities"⁶⁷ as a result of finding more than forty-three million

61. See *Garrett*, 121 S. Ct. at 963-64 (agreeing with its reasons in *Cleburne* that to hold individuals with disabilities as a quasi-suspect class would be wrong when they could not be distinguished from a variety of other groups who have similar immutable characteristics (citing *Cleburne*, 473 U.S. at 445-46)).

62. See *id.* at 963-64 (classifying states' treatment of individuals with disabilities as legitimate as long as there is a rational reason for the states to draw a distinction between individuals with disabilities and other groups of people) (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

63. See *id.* at 964 (restating the notion that state action subjected to rational basis scrutiny and found to exist to further a rational interest of the state is constitutional).

64. See *id.* (explaining that if states are required to make special accommodations for individuals with disabilities then this requirement would need to come from "positive law and not through the Equal Protection Clause"). The Court did not explain "positive law," however the Court noted that when Congress enacted the ADA all fifty states possessed some type of law that protected individuals with disabilities. *Id.* at 964 n.5. Further, most of these laws did not possess as extensive requirements as the ADA with accommodations. *Id.*

65. *Garrett*, 121 S. Ct. at 964.

66. See *id.* at 964-65 (recognizing the need to identify a history and pattern of unconstitutional employment discrimination by the states in order to find the ADA congruent); *Cf. Flores*, 521 U.S. at 531 (Thomas, J., dissenting) (believing that RFRA cannot be deemed remedial or preventive legislation after reviewing its legislative findings); *Kimel*, 528 U.S. at 88 (declaring that the Court's task is to determine whether ADEA is appropriate legislation and that one way the Court had made such a determination in the past was by examining the legislative record containing the reasons for Congress' action).

67. 42 U.S.C. § 12101(b)(2) (1994); *Garrett*, 121 S. Ct. at 965 (restating the general findings Congress made in the ADA).

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Americans with one or more physical or mental disabilities.⁶⁸ The Court also noted how Congress found that society historically has isolated individuals with disabilities.⁶⁹ Although the Court acknowledged that through these findings Congress clearly established the existence of discrimination against people with disabilities, the Court did not believe that these findings involved any activities on the part of the states.⁷⁰ The Court characterized the evidence that Congress assembled regarding state activities as merely minimal evidence of unconstitutional state discrimination in the area of employment.⁷¹

The Court continued by discounting the Appendix to Justice Breyer's dissenting opinion that listed detailed accounts of discriminatory actions on behalf of the states found within the legislative history.⁷² The Court believed that these violations were nothing more than "anecdotal accounts of 'adverse disparate treatment by state officials.'"⁷³ Furthermore, the Court noted that the Task Force on the Rights and Empowerment of Americans with Disabilities, who compiled the findings listed in Appendix C, included no findings on the subject of state discrimination in the area of employment.⁷⁴ Finally, the Court found the legislative

68. See 42 U.S.C. § 12101(a)(1) (1994).

69. See *Garrett*, 121 S. Ct. at 965 (finding that "despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem") (quoting 42 U.S.C. § 12101(a)(2) (1994)); see also 42 U.S.C. § 12101(b)(1) (recognizing the need for a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

70. See *Garrett*, 121 S. Ct. at 965 (explaining how several of the incidents of discriminatory actions by state officials cited in the legislative record "together fall far short of even suggesting the pattern of unconstitutional discrimination on which § 5 legislation must be based"); see also Charles D. Brown, Comment, *Congressional Abrogation of the Eleventh Amendment Immunity by Passing the ADEA and the ADA*, 51 BAYLOR L. REV. 339, 360 (1999) (arguing that the ADA lacks evidence of any actions by the states that are violations of the Constitution under the established Supreme Court standards).

71. See *Garrett*, 121 S. Ct. at 965-66 (noting that when the ADA was passed and Congress found some forty-three million Americans to have one or more physical or mental impairments, the states were employing four and one half million of these people) (citing U.S. Department of Commerce, Bureau of Census, Statistical Abstract of the United States 338 (119th ed. 1999) (Table 534)).

72. See *Garrett*, 121 S. Ct. at app. C (Breyer, J., with whom Stevens, Souter and Ginsburg, JJ., join, dissenting) (listing by state each violation against a person with a disability accumulated by the Task Force on Rights and Empowerment of Americans with Disabilities at the time Congress enacted the ADA).

73. See *id.* at 966 (explaining how the Court had previously determined that adverse disparate treatment does not amount to a constitutional violation where rational basis scrutiny applies).

74. See *Garrett*, 121 S. Ct. at 966 (predicting that, had Congress understood the information from the Task Force as reflecting a pattern of unconstitutional conduct on behalf of the states, Congress would have reflected this information in the legislative findings of the statute).

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findings to be insufficient when both the House and Senate committee reports on the ADA established that the only incidents of discrimination found in the area of employment existed in the private sector.⁷⁵ The Court contended that any evidence presented in the findings or history of the ADA that could amount to constitutional violations by the States in the area of employment were so general and brief that no concrete conclusions could be drawn from them.⁷⁶

C. Other Judicial Considerations

Not only did the Court find the ADA to be lacking in its initial purposes and legislative history in regards to the states, but the Court also found the ADA to be lacking in congruency since it required more of the states than the Federal Constitution.⁷⁷ One of the requirements stated within Title I of the ADA, is that employers make reasonable accommodations for their employees with disabilities as long as such accommodations do not impose undue hardships upon the employers.⁷⁸ However, the Court found fault with the statute when it defined a range of undue hardships that are rationally reasoned as unlawful.⁷⁹ The Court further contended that it was wrong for the ADA to place the burden upon the employer in explaining the reason for the undue hardship, instead of placing the burden on the complaining party to negate a reasonable basis for the employer's decision.⁸⁰ Finally, the Court believed state action that has a disparate impact upon an individual with disabilities is alone not

75. See *id.* at 966 (concluding, “[d]iscrimination still persists in such critical areas as *employment in the private sector.*”) (quoting S. REP. NO. 101-116 at 6 (1989)). The Court also found that the House Committee on Education and Labor reached similar conclusions in stating “there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the areas of *employment in the private sector . . .*”). See *id.* at 967 (citing H.R. REP. No. 101-485, at 28 (1990)).

76. See *Garrett*, 121 S. Ct. at 966 n.7 (recognizing that the majority of evidence recorded of discrimination by the states revolved around state public services and accommodations).

77. See *id.* at 967 (finding the remedies created by the ADA against the states to cause great concern with statute's congruency and proportionality).

78. See 42 U.S.C. § 12112(b)(5)(A) (1994) (requiring employers to provide employees with disabilities reasonable accommodations unless the employers can demonstrate that the accommodations would impose an undue burdens on the operation of the business).

79. See *Garrett*, 121 S. Ct. at 966-67 (setting out the example of a state employer seeking to conserve financial resources as a rational reason for the employer to hire an applicant able to use the existing facility). This is unlike the requirements of the ADA where this employer would be required to make the facility readily accessible and usable by individuals with disabilities. See *id.* (citing 42 U.S.C. §§ 12111(9), 12112(5)(B)).

80. See *id.* at 967 (stating that the Constitution requires that the complaining party show cause for why an accommodation is not an undue hardship).

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enough to constitute a violation of the Fourteenth Amendment.⁸¹

The majority concluded its opinion in *Garrett* by restating how the ADA is a statute attempting to remedy violations by the states that in fact are not violations at all.⁸² Therefore, the Court concluded that the ADA is not a remedy that is congruent and proportional to the violations it targets.⁸³ Comparing the ADA to the Voting Rights Act of 1965, the Court found “stark” differences between the two, thus rationalizing the need for one but not the other.⁸⁴

D. Considerations Not Taken Into Account by the Court

It should be noted that there are several factors the Court failed to take into consideration when it determined that a section of the ADA was not a valid act of congressional power. First, in *Cleburne v. Cleburne Independent Living Center*, the Court declared that it is initially up to the legislature, not the judiciary, to determine how the Equal Protection Clause of the Fourteenth Amendment is to be enforced.⁸⁵ With the enactment of the ADA, which occurred five years after the decision rendered in *Cleburne*, Congress had determined the way in which people with disabilities are to be treated.⁸⁶

In *Cleburne*, the Court also declared that the status of a suspect classification is to be extended to those groups of people who have had a history of purposeful unequal treatment, and have been subjected to unique disabilities on the basis of inaccurate stereotypical characteristics.⁸⁷ The Court believed that individuals in

81. See *id.* (describing how Fourteenth Amendment jurisprudence has yet to stand for the notion that a law may be unconstitutional merely because it produces a disparate impact) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)).

82. See *id.* at 967-68 (recognizing that although Congress is the final authority in establishing public policy, it cannot enable private individuals to recover monetary damages from states when there is no record of discriminatory violations in the first place).

83. See *Garrett*, 121 S. Ct. at 967-68 (finding that the ADA did not meet the requirements of the Court initially established in *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996), and to find that it does would unnecessarily broaden present congressional authority); see also text, *supra* Part I.

84. See *Garrett*, 121 S. Ct. at 968 (recognizing the ADA’s constitutional shortcomings when the record of the Voting Rights Act of 1965 possessed a significant pattern of unconstitutional action by the states that could not be prevented in any other way but with the enactment of the legislation).

85. See *Cleburne*, 473 U.S. at 439-40 (stating that “Section 5 of the Amendment empowers Congress to enforce this mandate [equal protection to all], but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation . . .”).

86. See 42 U.S.C. § 12101 (1994) (declaring people with disabilities to possess all characteristics that define a suspect class).

87. See *Cleburne*, 473 U.S. at 441 (explaining how discrimination on the basis of race and national origin, which are suspect classifications, is unlike discrimination on the basis of age) (citing *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976)).

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suspect classifications possess immutable characteristics, and statutes against such individuals have little, if any, relevance to the achievement of a legitimate state interest.⁸⁸ Congress took note of these characteristics as well as others, and declared individuals with disabilities to be a suspect classification.⁸⁹ Some have even argued that in section 12101(5) of the ADA, Congress has attempted to remove the rational basis standard applied to people with disabilities when it discusses the need to eliminate the “overprotective rules and policies” and “exclusionary qualification standards and criteria.”⁹⁰

Finally, the Court failed to take into account the fact that although the Justices stated that a rational basis analysis was applied to the questions raised in *Cleburne*, in reality the Court actually applied a much stricter standard.⁹¹ If the Court had applied a traditional rational basis test, the ordinance would have been found valid because Texas possessed legitimate concerns when denying the special permit.⁹² Instead, the Court invalidated the ordinances, but only after they were “subjected to precisely the sort of probing inquiry associated with heightened scrutiny.”⁹³

88. See *id.* at 440-41 (relaying the characteristics of previously deemed suspect classifications); see also *City of Cleburne v. Cleburne Living Ctrs.*, 473 U.S. 432, 465-68 (1985) (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in part of the judgment and dissenting in part) (drawing similarities between individuals with disabilities and other classes of people that have been deemed suspect and explaining how the disabled have been subjected to the same forms of prejudices, inequalities and discrimination).

89. See 42 U.S.C. § 12101(7) (1994) (declaring that “individuals with disabilities are a discrete and insular minority who have been . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, [based] on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions . . .”); see also *Cleburne*, 473 U.S. at 461 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in part of the judgment and dissenting in part) (declaring the disabled were subjected to a history of discrimination that can only be described as “grotesque”).

90. James B. Miller, Note and Comment, *The Disabled, the ADA, & Strict Scrutiny*, 6 ST. THOMAS L. REV. 393, 410 (1994) (arguing that certain language was placed in the ADA as a direct response to the Court’s decision in *Cleburne*).

91. See *Cleburne*, 473 U.S. at 456 (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in part of the judgment and dissenting in part) (contending that, had the majority examined the ordinance under a true rational-basis analysis, the Justices would have found it to be constitutional because that state had rational reasons for denying the permit).

92. See *id.* at 458 (explaining that the majority recognizes the City’s legitimate concerns for fire hazards, but places them aside, and instead reviews the statute’s legislative record, when under the traditional rational review standard the state’s reasoning alone would suffice, and there would be no need to review the legislative record).

93. *Id.* at 458.

II. THE EFFECTS OF THE COURT'S DECISION ON THE DISABILITY COMMUNITY

There are several ramifications for people with disabilities as a result of the Supreme Court's decision in *Garrett* which prevents private individuals from bringing suits against states and obtaining monetary damages.⁹⁴ It should be noted, however, that the Court's decision only prevents individuals from bringing suits against their state governments.⁹⁵ The holding in *Garrett* does not prevent individuals from initiating suits against local governments.⁹⁶ Therefore, as a direct result of this case state employers will no longer need to comply with ADA's requirements that ensure individuals with disabilities are not discriminated against in the work place.⁹⁷ Moreover, it is quite possible that soon states will no longer be required to comply with any of the provisions of the ADA.⁹⁸ Yet, individuals with disabilities will still have some protection against state governments as long as the ADA is recognized as being constitutional under Congress' Commerce Clause authority.

94. See *Garrett*, 121 S. Ct. at 960 (holding that suits by state employees against their employers are prohibited); Judge David L. Bazelon Center for Mental Health Law, *supra* note 11, at <http://www.bazelon.org/garrettcase.html> (explaining the different ways that people with disabilities will be affected by Supreme Court ruling in the states' favor in *Garrett*).

95. See *Garrett*, 121 S. Ct. at 965 (agreeing with the Respondents that the holding in the case applies to "state actors").

96. See *id.* at 965 (explaining the limits of Eleventh Amendment Immunity which does not extend to units of local governments (citing *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890))).

97. Judge David L. Bazelon Center for Mental Health Law, *supra* note 11, at <http://www.bazelon.org/garrettcase.html> (referring to state employers' ability to stop granting reasonable accommodations to employees with disabilities and not be prevented from refusing to hire a person simply because of their disability).

98. See *Garrett*, 121 S. Ct. at 960 n.1 (limiting the Court's decision to Title I of the ADA, the employment section, as it applies to state employers). The Court declined to review the constitutionality of Title II of the ADA, state and local governments, since the issue was not adequately briefed in the present case. See *id.* But see Linda Greenhouse, *Justices Give States Immunity From Suits by Disabled Workers*, N.Y. TIMES (Feb. 22, 2001), available at <http://www.nytimes.com/2001/02/22/politics/22SCOT.html> (reporting how the Justices will soon consider whether to grant a writ of certiorari to a case questioning state immunity claims to Title II of the ADA that requires states to make their service and programs accessible); Judge David L. Bazelon Center for Mental Health Law, *supra* note 11, at <http://www.bazelon.org/garrettcase.html> (discussing how states will no longer be required to make their buildings, programs or services accessible to individuals with disabilities). In addition, it may be possible for states to disregard the ADA's integration mandate of placing individuals with disabilities in community settings and removing them from state institutions, hospitals, and nursing homes. *Id.*

A. *The ADA is a valid exercise of Congress' Commerce Clause Authority*

In order for any individual to still have his/her rights protected by the ADA, the constitutionality of the ADA would need to rest upon Article I, Section 8, of the Constitution, which sets out Congress' authority to enact legislation to regulate commerce.⁹⁹ However, since only a minimal number of courts have had the opportunity to examine this argument, it is necessary to explain how the ADA is a legitimate act of Congress' Commerce Clause power.¹⁰⁰

The United States Constitution specifically grants Congress the ability "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."¹⁰¹ For years the Supreme Court defined this power to be a plenary power that is limited by nothing except those prescribed limitations found within the Constitution itself.¹⁰² The power to regulate commerce is understood as the legislature's ability to proscribe rules regarding how commerce is to be governed.¹⁰³ Moreover, the Court defined commerce to be not only traffic, but also commercial intercourse of anything that can be traded between countries and states.¹⁰⁴ The transportation of people, as passengers in interstate commerce, is even recognized as falling within the realm of Congress' authority.¹⁰⁵ The Court declared that no sort of trade could be carried out which this congressional power could not regulate.¹⁰⁶ Finally, the Court noted that while this power does not extend to the intercourse of any trade that may take

99. See 42 U.S.C. § 12101(b)(4) (1994) (explaining that the ADA was enacted under Congress' authority to enforce the Fourteenth Amendment and its power to regulate commerce).

100. See Ira Burnim, *Legal Theories Behind State Challenges to Constitutionality of Title II of the ADA* (Jan. 12, 2000), available at <http://www.protectionandadvocacy.com/legaltheories.html> (affirming that there are no federal court cases addressing the constitutionality of the ADA pursuant to the Commerce Clause).

101. U.S. CONST. art. I, § 8, cl. 3 (stating the limits of Congress' Commerce Clause authority).

102. See *Gibbons v. Ogden*, 22 U.S. 1, 3 (1824) (declaring the Commerce Clause power to be similar to all other vested powers of Congress, which are independent and limitless). See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 253-54 (1964) (relying on the creation of Commerce Clause jurisprudence in the *Gibbons* review of the Civil Rights Act of 1964).

103. See *Gibbons*, 22 U.S. at 3 (defining the regulation of commerce).

104. See *id.* at 189-90, 193-94 (remarking that the Commerce Clause is to be used to regulate "every species of commercial intercourse").

105. See *Heart of Atlanta Motel*, 379 U.S. at 256 (proclaiming that commerce among states consists of the intercourse of traffic as well as the transportation of people and property) (citing *Hoke v. United States*, 227 U.S. 308, 320 (1913)).

106. See *Gibbons*, 22 U.S. at 3-4 (explaining that this power can be used to regulate virtually anything traveling in commerce).

place within one state, it is to be extended to all trade that crosses multiple state lines or involves more than one state.¹⁰⁷

Over the years, the Court has recognized Congress' Commerce Clause power as a legitimate way for the legislature to regulate channels of interstate commerce, protect instrumentalities (including persons or things carrying or traveling within interstate commerce), and secure those activities that have substantial effects on interstate commerce.¹⁰⁸ Congress' ability to regulate activities that substantially affect commerce has been extended to include some intrastate actions.¹⁰⁹ These are actions that, when combined with others similarly situated, will affect commerce substantially.¹¹⁰ Thus, a two-part test established by the Court must first be satisfied in any Commerce Clause case.¹¹¹ First, a court needs to ensure that the activity being regulated by Congress is commerce affecting more than one state.¹¹² Second, the activity in question must have substantial relation to the national economy.¹¹³

One of the first cases the Supreme Court analyzed regarding Congress' use of the Commerce Clause to enact a civil rights statute was *Heart of Atlanta Motel, Inc. v. United States*.¹¹⁴ In examining the case, the Court declared that the standard for sustaining legislation as a valid action under the Commerce Clause would require Congress to possess a rational reason for the statute's enactment.¹¹⁵ Specifically,

107. *See id.* at 4 (interpreting the word "among" within the Commerce Clause to extend to commerce that concerns more than one state).

108. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276 (1981) (stating how Congress should exercise Commerce Clause powers) (citing *Perez v. United States*, 402 U.S. 146, 150 (1971)).

109. *See Heart of Atlanta Motel*, 379 U.S. at 258 (recognizing that the commerce power extends to the ability to regulate local intrastate activities if they will have substantial and harmful effects upon interstate commerce).

110. *See id.* (illustrating that the discriminatory actions of one motel is a purely local matter, but when combined with the actions of numerous local motels, substantial effects upon interstate commerce are evident).

111. *See id.* at 254-55 (taking into consideration the power of Congress and its need to maintain some amount of control over interstate commerce, but not wanting Congress' power to go too far).

112. *See id.* at 255 (noting that the first prong of the two-prong test is to ensure that the activity in question is commercial).

113. *See id.* at 255-58 (describing an activity that will significantly affect commerce includes discrimination of African Americans when it limits their ability to travel throughout the country).

114. *See Heart of Atlanta Motel*, 379 U.S. at 243-44 (determining the validity of the Civil Rights Act of 1964 enacted pursuant to the Commerce Clause). The case was brought by an appellant who claimed that the statute's Title II requirement that public accommodations serve African Americans was a taking of the appellant's liberty and property without due process. *Id.*

115. *See id.* at 258 (believing that in order to sustain the legislation, the Court needs to find Congress had a rational reason for finding that racial discriminations by motels affected

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the Court would need to find that the discrimination in question affected commerce and that the means employed by Congress to eliminate the discrimination were reasonable and appropriate.¹¹⁶ Reviewing the legislative history of the Civil Rights Act of 1964, the Court found ample evidence of the burdens racial discrimination placed upon commerce.¹¹⁷ With this evidence, the Court declared that the Civil Rights Act of 1964 was a valid act of Congress' commerce power.¹¹⁸

The ADA is a valid exercise of Congress' commerce power for a number of reasons. To begin with, the Court would need to examine the statute's legislative findings which demonstrate how discrimination against people with disabilities has led to the denial of various opportunities for such individuals and in turn substantially affected interstate commerce.¹¹⁹ Congress stated in section 12101(a)(8) of the ADA that there is a need to ensure that individuals with disabilities enjoy equality of opportunities, full participation in all areas of society, and the ability to become economically self-sufficient.¹²⁰ Congress also took note of the various statistics compiled that documented the fact that people with disabilities are severely disadvantaged not only by the fact that they occupy an inferior status within our society, but also because they are economically, socially, vocationally, and educationally deprived.¹²¹ Finally, Congress expressed in its findings that the discrimination against people with disabilities costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.¹²²

commerce).

116. *See id.* (stating that it was not sufficient for the Court to simply find that Congress had a rational reason for the statute in question; the Court also needed to find that the means Congress selected to eliminate the wrongs in question were rational and proper).

117. *See id.* at 252-53, 257 (citing that such burdens included the fact that in a time when people are increasingly mobile, African Americans must travel further to secure the same accommodations as others and that such discrimination has had a significant impact upon commerce).

118. *See id.* at 261 (holding that the Civil Rights Act of 1964 is a reasonable and valid act of congressional power even when it may be argued that Congress could have employed other methods to eliminate the discrimination it found obstructing interstate commerce).

119. *Cf. Hodel*, 452 U.S. at 276 (noting that the Court must look to the legislative findings of a statute to determine if Congress possessed a rational reason for finding that a certain activity affected interstate commerce).

120. *See* 42 U.S.C. § 12101(a)(8) (1994) (listing the nation's goals for mainstreaming individuals with disabilities).

121. *See* 42 U.S.C. § 12101(a)(6) (stating characteristics of the disabled population acquired as a result of discrimination that has affected the national economy).

122. *See* 42 U.S.C. § 12101(a)(9) (citing the costs pertaining to people with disabilities as a result of their lack of access to equal opportunities).

However, there is no requirement that a court be bound to only review the congressional findings of a statute in order to determine a rational basis for the statute.¹²³ Additionally, a court may also look to the evidence reported within the legislative history of a statute.¹²⁴ The ADA has a lengthy legislative history that supports its enactment under Congress' Commerce Clause authority.¹²⁵

In its report regarding the need for the ADA, the Senate's Committee on Labor and Human Resources attempted to explain through excerpts of various individual testimonies that the discrimination faced by people with disabilities affects not only almost every aspect of their own lives, but also the country at large.¹²⁶ This discrimination reduced individuals with disabilities to believing that they are second-class citizens who have been stripped of all feelings of pride and dignity.¹²⁷ Such discrimination has also led to individuals fearing future discrimination, thus growing reluctant to participate in programs and becoming socially isolated.¹²⁸

As a result of these actions and feelings, the committee found that a large number of individuals with disabilities are dependent upon social welfare programs costing the government and taxpayers at that time billions of unnecessary dollars.¹²⁹ Moreover, the disabled population produced a large and talented workforce that could no longer be ignored.¹³⁰ Therefore, the passage of the ADA would bring direct and tangible benefits for the country.¹³¹ With more individuals

123. See *Heart of Atlanta Motel*, 379 U.S. at 252 (explaining that while the Civil Rights Act of 1964 included no congressional findings, it was sufficient for the Court to examine the evidence found within the legislative history of the Act to determine Congress' reasoning for the statute's enactment).

124. See *Katzenbach v. McClung*, 379 U.S. 294, 299, 304 (1964) (finding that Congress' evidence of the need for the Civil Rights Act of 1964 was sufficient by itself to reasonably conclude that racial discrimination affected commerce).

125. See *Garrett*, 193 F.3d at 1218 (recognizing the extensive legislative findings prepared by Congress before the passing of the ADA); *Coolbaugh v. State of La.*, 136 F.3d 430, 438 (5th Cir. 1998) (noting the wide-range of congressional findings and evidence Congress incorporated within the ADA); *Martin v. Kansas*, 190 F.3d 1120, 1126-28 (10th Cir. 1999) (observing the various findings Congress made regarding pervasive discrimination of people with disabilities when enacting the ADA).

126. See S. REP. NO. 101-116, at 16 (1989) (emphasizing that discrimination harms all people with disabilities).

127. See *id.* (explaining how discrimination scars individuals for life).

128. See *id.* (taking note that some individuals with disabilities who were isolated from society committed suicide as a result).

129. See *id.* at 17 (statement of President George Bush) (reporting that at the time the ADA was enacted, the country was spending more than sixty billion dollars on disability benefits and programs per year).

130. See *id.* (recognizing the various abilities of the large disability population that have gone unnoticed).

131. See S. REP. NO. 101-116, at 17 (statement of Attorney General Thornburgh) (stating

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with disabilities able to work, fewer would be dependent upon the country's Social Security system and more individuals would have the ability to spend their money on consumer goods as well as increasing tax revenues through their employment.¹³² This evidence clearly supports the notion that the further integrated individuals with disabilities are within society, the less interstate commerce will be affected by their segregation. Therefore, this is a legitimate reason for Congress to invoke its Commerce Clause authority in order to pass the ADA.¹³³

However, the analysis of the ADA's validity under Congress' Commerce Clause power is not complete without discussing *United States v. Lopez* and *United States v. Morrison*, two recent cases in which the Supreme Court struck down statutes Congress passed pursuant to its Commerce Clause authority.¹³⁴ In *Lopez*, while reviewing whether a high school student could be federally convicted under the Gun-Free School Zone Act for carrying a gun to school, the Court determined that the statute extended beyond the powers of Congress' Commerce Clause because the activity it regulated did not have any substantial connection to commerce.¹³⁵

The Court's role in *Lopez* was to determine if the activity regulated by the Gun-Free School Zone Act could substantially and reasonably affect commerce; the Court held that it could not.¹³⁶ First, the Court found that the section of the statute in question was actually a criminal statute having nothing to do with commerce.¹³⁷ Second, the Court could not find a jurisdictional element within the act that a firearm could possibly affect commerce.¹³⁸ Finally, the Court declined to believe that the statute in question was justified under the

that the passage of comprehensive civil rights legislation will lead to the elimination of employment discrimination and the mainstreaming of individuals with disabilities).

132. See *id.* at 17 (asserting that discrimination increases people's dependency upon social welfare programs rather than allowing them to be taxpayers and consumers).

133. Cf. *Heart of Atlanta Motel*, 379 U.S. at 252-53 (holding that the Civil Rights Act of 1964 was a legitimate act of Congress' Commerce Clause power when the Court found evidence of how racial discrimination affects interstate commerce within the Act's legislative history).

134. See *Lopez*, 514 U.S. 549, 567-68 (1995) (holding that the Gun-Free School Zone Act was an invalid act of Congress under its Commerce Clause authority); *United States v. Morrison*, 529 U.S. at 617-18 (rejecting the idea that Congress could regulate violent acts towards women solely because such actions have an aggregate effect on interstate commerce).

135. See *Lopez*, 514 U.S. at 551-52 (confirming the fact that Congress can regulate an action under the Commerce Clause only if the action substantially affects interstate commerce).

136. See *id.* at 561-62 (citing the reasons the statute violated the Commerce Clause).

137. See *id.* at 561 (reasoning that the criminal statute had no effect on economic enterprise).

138. See *id.* at 561-62 (finding that the statute lacked any jurisdictional element that would narrow its focus upon a specific set of firearms which might have adverse effects on commerce).

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Commerce Clause due to the fact that no legislative history or findings accompanied the statute to express the regulated activities' affect on commerce.¹³⁹

In addition, the *Lopez* Court also rejected the idea of Congress' being able to "pile inference upon inference" in order to justify the effects guns in schools have on commerce.¹⁴⁰ For example, Justice Breyer argued in his dissent that guns found in schools affect the learning environment and education students receive, which in turn will produce a less educated society and have substantial effects upon the economy.¹⁴¹ However, the majority rejected this type of reasoning, believing that if it was accepted there would be no activity that Congress could not regulate through claims that it in some way affected commerce.¹⁴²

When the Court examined whether the Violence Against Women Act ("VAWA")¹⁴³ was a valid act of Congress pursuant to the Commerce Clause in *United States v. Morrison*, the Court analyzed whether the act met the same standards established by the Justices in *Lopez*.¹⁴⁴ Similar to *Lopez*, the Court found VAWA to be a criminal statute possessing little or no relation to economic activity,¹⁴⁵ and lacking a jurisdictional element that would support the fact that the statute was regulating an activity that had some impact upon interstate commerce.¹⁴⁶ However, the Court did recognize that unlike the Gun-Free School Zone Act, VAWA was supported by numerous Congressional findings regarding the impact that gender-motivated violence had upon victims and their families.¹⁴⁷ Yet, the Court

139. See *id.* at 552 (explaining that although legislative findings are not required to sustain an act, they are helpful when the Court needs to assess Congress' reasoning behind enacting a statute).

140. See *Lopez*, 514 U.S. at 567 (arguing that Congress' reasoning regarding guns' effect on commerce was insufficient since it relied upon inferences and speculation, instead of the facts).

141. See *id.* at 619 (Breyer, J., with whom Stevens, Souter, and Ginsberg, JJ., join, dissenting) (explaining how guns in schools have a direct effect upon education, producing a lower-educated society that will affect the capabilities of a growing economy).

142. See *id.* at 564 (arguing that if the Court was to accept reasoning based upon inferences, there would be no end to Congress' power to regulate activities).

143. 42 U.S.C.A. § 13981.

144. See *Morrison*, 529 U.S. at 608-13 (reviewing precedent established in *Lopez* to interpret the Violence Against Women Act ("VAWA"), a statute aimed at eliminating gender motivated violence).

145. See *id.* at 612 (rejecting the idea that gender-motivated violence affects economic activities).

146. See *id.* (finding that without a jurisdictional element, there is no evidence of a relationship between gender-motivated violence and interstate commerce).

147. See *id.* at 614 (reviewing the legislative history of VAWA and recognizing that Congress did produce evidence regarding the effects of gender-motivated violence on commerce).

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believed that these findings alone were not sufficient to sustain the legislation.¹⁴⁸ The Court noted that Congress' findings were based upon reasoning that was previously rejected in *Lopez*.¹⁴⁹ Congress argued in its legislative findings supporting VAWA, that victims of violence were less likely to travel, be employed, and transact business - all activities which in some form affect interstate commerce by diminishing national productivity and decreasing the supply and demand for interstate products.¹⁵⁰ The Court rejected this argument, labeling it a "but-for causal chain."¹⁵¹ If accepted, there would be no limits to Congress' power and would eventually lead to a complete suppression of the states' policing power.¹⁵²

Applying the standards established in *Lopez* and *Morrison*, it is clear that the ADA is a valid act of Congress pursuant to its Commerce Clause power. As noted above, the ADA was accompanied by varying evidence including testimonies, statistics, and facts, regarding the effect of discrimination against people with disabilities on interstate commerce.¹⁵³ Thus, it is clear that the ADA regulates activities that are an "essential part of a larger regulation of economic activity."¹⁵⁴ The only problem with arguing that the ADA meets the standards expressed within *Lopez* is that Title II of the statute does not explicitly possess a jurisdictional element, unlike Titles I and III.¹⁵⁵ However, it is not necessary for Congress to establish an interstate nexus in every application of the statute.¹⁵⁶ As long as Congress is able to demonstrate that the regulated activities substantially affect interstate

148. See *id.* (quoting Justice Rehnquist who stated "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so" in *Hodel*, 252 U.S. at 311 (citing *Lopez*, 514 U.S. 549, n.2 (1995))).

149. See *Morrison*, 529 U.S. at 614 (declaring that legislative findings based on inferences are invalid); see also *Lopez*, 514 U.S. at 561 (rejecting findings that required inferences to be compiled together to establish a connection).

150. See *Morrison*, 529 U.S. at 615 (citing H.R. CONF. REP. NO. 103-711, at 385 (1994) (explaining the effects of violence against women upon commerce)).

151. See *id.* (recognizing that the acceptance of this reasoning would allow Congress to use its Commerce Clause power to obliterate the Constitution's distinctions between national and local authority).

152. See *id.* (reiterating the need for separation between state powers and federal powers).

153. See S. REP. NO. 101-116, at 5-21 (reviewing the need for legislation that combated discrimination against the disabled).

154. *Lopez*, 514 U.S. at 561 (invalidating the Gun-Free School Zone Act because it did not regulate an activity which was essential to the larger economy).

155. See 42 U.S.C. §§ 12111(5)(A), 12181(1) (requiring the ADA to be enforced against businesses and public accommodations that affect commerce).

156. See *Morrison*, 529 U.S. at 612 (interpreting the holding in *Lopez* as stating that a jurisdictional element only lends support to an argument that a statute in question regulates an activity that is substantially tied to commerce).

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commerce, the ADA should be sustained.¹⁵⁷

Finally, although *Lopez* and *Morrison* are the Supreme Court's most recent cases examining Congress' Commerce Clause authority, they can be distinguished significantly from any cases questioning the constitutionality of the ADA.¹⁵⁸ While both the Gun-Free School Zone Act and VAWA are statutes that clearly deal with regulating criminal conduct, the ADA is purely a civil rights statute.¹⁵⁹ Any case dealing with the constitutionality of the ADA will be more closely related to the Supreme Court's analysis of the Civil Rights Act of 1964 than it will be the Court's examination of the Gun-Free School Zone Act or VAWA.¹⁶⁰ Moreover, the Seventh Circuit in *United States v. Wilson*¹⁶¹ took note of the fact that the Supreme Court's ruling in *Lopez* was not meant to be a complete departure from established Commerce Clause precedent, evidenced by the fact that the Court relied on precedent to render its decision.¹⁶²

B. Future of Discrimination Suits Filed under the ADA

1. Private Individuals' Suits

Assuming that the ADA is constitutional under the Commerce Clause, the only way an individual can bring a suit in an employment action against a state is if it is a suit for injunctive relief against a state official.¹⁶³ The 1908 decision rendered in *Ex parte Young*¹⁶⁴ enabling an individual to sue a state official for injunctive relief, despite the Eleventh Amendment, is still recognized by the Supreme Court

157. Cf. *id.* at 610 (recognizing that *Lopez*'s review of Commerce Clause jurisprudence indicates that a statute will be sustained as long as it has substantial effects on interstate commerce) (citing *Lopez*, 514 U.S. at 549).

158. See *Lopez*, 514 U.S. at 551 (examining the constitutionality of the Gun-Free School Zone Act); *Morrison*, 529 U.S. at 601-02 (interpreting VAWA).

159. Compare 18 U.S.C. § 922(q) (1998 ed., Supp. V) (making it a federal offense for a student to carry a firearm into a school zone), and 42 U.S.C. § 13981 (1994) (providing remedy for gender motivated violence), with 42 U.S.C. § 12101 (1994) (prohibiting discrimination against individuals with disabilities by private and public entities).

160. See *Heart of Atlanta Motel.*, 379 U.S. at 245 (reviewing the Civil Rights Act of 1964).

161. 73 F.3d 675 (7th Cir. 1995).

162. See *id.* at 685 (using the Supreme Court's analysis in *Lopez* as well as Commerce Clause jurisprudence to rule that the Freedom of Access to Clinic Entrances Act was a valid act of Congress' Commerce Clause power).

163. See *Seminole Tribe of Fla.*, 517 U.S. at 72-73 (stating that a state's Eleventh Amendment rights cannot be abrogated by Congress under Article I); *Green v. Mansour*, 474 U.S. 64, 68 (1985) (recognizing the one exception to a state's Eleventh Amendment immunity is when a suit is brought to challenge the constitutionality of a state official's actions).

164. 219 U.S. 123, 165 (1908) (analyzing what the appropriate remedy is for a case seeking injunctive relief from a state entity).

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today.¹⁶⁵ When determining whether the Attorney General of the State of Minnesota discriminated against railroad companies when he lowered the tariff railroads could charge passengers,¹⁶⁶ the Supreme Court ruled that the Attorney General could be held liable for the state's unconstitutional actions.¹⁶⁷ The Court found no Eleventh Amendment issues implicated when a suit was simply seeking injunctive relief against a state official whose conduct was unconstitutional.¹⁶⁸ Moreover, the Court declared that when relief is being sought for a constitutional violation, a state cannot "[i]mpart to the official immunity from responsibility to the supreme authority of the United States."¹⁶⁹

Yet, a plaintiff's suit against a state official for injunctive relief cannot be against a state agency or entity associated with the state.¹⁷⁰ In addition, the suit cannot include a request for any type of damages.¹⁷¹ In the case *Edelman v. Jordan*,¹⁷² the Court attempted to create a distinction between the types of equitable relief sought in *Ex parte Young* and the relief sought in the case at hand.¹⁷³ The Court did recognize that its reasoning behind this distinction was somewhat contradictory since most injunctive relief courts render affect the treasury of a state in some form.¹⁷⁴ Subsequently, the Court also made it clear that any relief granted under this Eleventh Amendment

165. See *Seminole Tribe of Fla.*, 517 U.S. at 73 (commenting on petitioner's reliance on the Court's *Ex parte Young* precedent).

166. See *Young*, 209 U.S. at 144 (stating the issue and holding of the case).

167. See *id.* at 168 (explaining that it is valid to bring a suit against the Attorney General of a state to prevent him from enforcing a statute that violates the Fourteenth Amendment's Due Process Clause).

168. See *id.* at 166-67 (holding that the only appropriate form of relief for the railroad companies is to seek a bill of chancery or equity).

169. *Id.* at 167 (remarking how an individual working on behalf of a state cannot defend himself with state immunity).

170. See *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (stating that *Ex parte Young* is only to be viewed as a narrow exception to the Eleventh Amendment).

171. See *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974) (holding that a suit requesting retroactive benefits will not mean disbursements based on equity).

172. See *id.* at 653 (arising out of the claim that the federal state programs, such as Aid to the Aged, Blind or Disabled ("AABD") were administered inconsistently according to the Fourteenth Amendment).

173. See *id.* at 667-68 (explaining that the type of relief sought in the case at bar was a form of compensation, similar to any other award of damages, requiring the state to pay the reward from its general revenues; whereas the relief sought in *Ex parte Young* only required the Attorney General of Minnesota to conform his future conduct to the principles of the Fourteenth Amendment).

174. See *id.* at 667 (noting that the Court has authorized equitable relief in cases that have had great impacts upon a state's treasury, such as its ruling in *Graham v. Richardson*, 403 U.S. 365 (1971), when state officials were enjoined from denying welfare benefits to legal aliens).

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exception to violations of federal law¹⁷⁵ can only be in the form of prospective relief and cannot be used to cure past violations.¹⁷⁶

2. *Suits Brought By the United States Government*

In addition to suits filed by individuals in hopes of obtaining injunctive relief against the actions of state officials, the United States Government can bring suit on behalf of one or more individuals against a state for a violation of the ADA.¹⁷⁷ Mostly through the work of the Department of Justice (“DOJ”) and the Equal Employment Opportunity Commission (“EEOC”), claims can be brought against states for all types of compensation, and a state cannot declare itself immune under the Eleventh Amendment.¹⁷⁸

However, it is important to understand that due to insufficient resources, it is almost impossible for federal agencies to prosecute every case of discrimination that is brought to them.¹⁷⁹ Often agencies are forced to limit the work they perform, such as only pursuing those cases that will have an effect on the lives of numerous individuals.¹⁸⁰

175. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) (ruling that the *Young* exception would be inappropriate if applied to state law, since such an application would be in direct conflict with the principles of Federalism).

176. See *Green*, 474 U.S. at 73 (holding that since there is no evidence of continuing violations in determining the eligibility of Aid to Family with Dependent Children (“AFDC”) benefits, there is no need to issue an injunction). Moreover, the Eleventh Amendment would bar the Court from issuing relief for past violations. *Id.*

177. See *Alden v. Maine*, 527 U.S. 706, 756 (1999) (declaring that, “[i]n ratifying the Constitution, the States consented to suits brought by other States or by the Federal Government”); see also *Erickson v. Bd. of Governors of State College & Univ. for Northeastern Ill.*, 207 F.3d 945, 951 (7th Cir. 2000) (recognizing that while the Eleventh Amendment prevents litigation by private citizens enforcing the ADA in federal courts, it does not bar the United States from enforcing the ADA against states through federal litigation) (citing *West Virginia v. United States*, 479 U.S. 305, 311 n.4 (1987)).

178. See *United States v. Mississippi*, 380 U.S. 128, 140 (1965) (explaining that no case has ever suggested that the United States government could not institute proceedings against a state in order to protect the constitutional rights of citizens). The Court further noted that nothing could be found in the Eleventh Amendment or the Constitution that prevented a state from being sued by the federal government. *Id.*

179. See NATIONAL COUNCIL ON DISABILITY, PROMISES TO KEEP: A DECADE OF FEDERAL ENFORCEMENT OF THE AMERICANS WITH DISABILITIES ACT 37 (June 27, 2000) (explaining that with more resources DOJ could open more ADA cases for investigation and litigation). Moreover, due to the fact that the EEOC did not receive an addition to its budget in real dollars until Fiscal Year 1999 to enforce the ADA, it has been difficult for the agency to take on all its ADA claims. *Id.* at 155. *But see* Geraldine Sealey, *Disabilities Act A Decade Later*, ABCNEWS.COM (July 26, 2000), at <http://www.abcnews.go.com/sections/us/DailyNews/ada000726.html> (reporting that President Clinton had announced an initiative to address the lack of resources dedicated to the enforcement of the ADA). The President called for an additional 2.4 million dollars, to the current 10.8 million dollar budget, in the fiscal year 2001 budget. *Id.*

180. *Cf.* 42 U.S.C. § 12188(B) (granting the Attorney General the authority to seek redress in cases where a person or entity is engaged in a pattern of practice of discrimination, or in cases of general public importance).

C. Other Disability Laws

If an individual is unable to bring suit against a state for a violation of the ADA because s/he seeks more than injunctive relief, or a federal agency is unable to bring suit on his/her behalf, then the only option remaining for the individual is to sue the state under the state's disability laws.¹⁸¹ While all fifty states have some type of law protecting individuals with disabilities from discrimination, particularly in employment settings, many state laws simply are not as comprehensive as the ADA.¹⁸² For example, although most states require employers to make reasonable accommodations for employees with disabilities as long as it would not unduly burden the employer, six states have no such requirement at all.¹⁸³ On the other hand, some states simply limit the costs that employers are required to incur when accommodating employees.¹⁸⁴

Moreover, the types of disabilities that are covered by state laws are not uniform.¹⁸⁵ Whereas the ADA not only protects those who are disabled but also individuals who are treated and viewed by others as being disabled,¹⁸⁶ only thirty-four states protect those individuals who have no current impairment but rather a history of one or are regarded as having one.¹⁸⁷ In addition, not all state laws allow an individual to bring a disability claim directly to a court of law.¹⁸⁸ Some states require individuals to exhaust all administrative remedies first;¹⁸⁹ other states only provide an individual with an administrative

181. See Brief for Petitioners, 2000 WL 821035, *4-*6, Bd. of Trs. of Univ. of Ala. v. Garrett, 121 S. Ct. 955 (arguing that Alabama laws are sufficient to adequately protect individuals with disabilities from discrimination by all entities including state agencies).

182. See *State Statutes Prohibiting Discrimination on the Basis of Disability*, [1996] ADA Employees Rights and Employers Obligations (MB) ¶ 10.1 (June 1996) (explaining the similarities and differences of state disability laws that protect against employment discrimination).

183. See *id.* ¶ 10.2 (citing Alabama, Georgia, Nevada, New Hampshire, New York, and Tennessee as states that do not require employers to reasonably accommodate employees with disabilities).

184. See *id.* (finding North Carolina and Michigan to be two examples of states limiting the costs employers are required to spend on accommodating individuals with disabilities).

185. See *id.* at n.3 (explaining that while most states cover individuals with physical and mental disabilities, states such as Alabama, Arizona and Mississippi protect only individuals with physical disabilities).

186. See 42 U.S.C. § 12102(2) (1994) (defining the term disability to include individuals with a physical or mental impairment that substantially limits one or more of their major life activities; persons who have a record of such impairment; or individuals who are regarded by others as having such an impairment).

187. See *State Statutes Prohibiting Discrimination on the Basis of Disability*, [1996] ADA Employees Rights and Employers Obligations (MB) ¶ 10.2 (describing the differences in the types of individuals that can be covered under state disability laws).

188. See *id.* (finding that some states require individuals to seek relief through administrative or mediation procedures before appealing to the court system).

189. See *id.* § 10-3 (explaining the difference in enforcement procedures among the states).

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remedy and do not enable individuals to bring their claims into state court at all.¹⁹⁰ Finally, although all states provide for back pay and loss of compensation as a form of relief to individuals who successfully pursue their claims, not all states allow for the recovery of attorney's fees, unlike a provision for relief under the ADA.¹⁹¹

D. Section 504 of the Rehabilitation Act of 1973

The last option available to an individual who is discriminated against on the basis of his/her disability is to bring suit under section 504 of the Rehabilitation Act of 1973.¹⁹² This option can only be pursued if the individual is discriminated against in a program that receives federal financial assistance or is conducted by an Executive Agency or the United States Postal Service.¹⁹³ In addition to questioning the constitutionality of the ADA, the petitioners in *Garrett* also presented the Court with the question of the constitutionality of section 504.¹⁹⁴ Even though the Supreme Court has declined to grant certiorari on that issue at the present time, there is no way to predict what effect the ruling in *Garrett* may have on the Rehabilitation Act.¹⁹⁵

III. EFFECTS UPON THE STATES HAD THE COURT UPHELD THE CONSTITUTIONALITY OF THE ADA

A. *The Foundations of Sovereign Immunity*

Although the ruling by the Supreme Court in *Garrett* invalidating the ADA will have severe consequences for the disability community, it is clear that, had the Court ruled in favor of the ADA, there would have been a great impact upon this country's system of Federalism

190. See *id.* (finding that some states only provide individuals with administrative remedies with limited or no judicial review when attempting to protect their rights).

191. See *id.* (stating that in only twenty-two states are individuals able to recovery compensatory damages when pursuing their claim, and the amount of damages can be limited in a number of states); see also 42 U.S.C. § 12205 (1994) (enabling a court presiding over a claim brought under the ADA the authority to grant the prevailing party recovery of attorney's fees).

192. See 29 U.S.C. § 794 (1994) (prohibiting qualified individuals with disabilities from being discriminated against or excluded from federal programs solely on the basis of their disabilities).

193. See *id.* §§ 794(a), 794(b)(1)(B) (defining federally funded programs to extend to various programs and activities including state and local government programs that receive federal assistance in order to operate).

194. See *Garrett*, 193 F.3d 1214 (1999) *cert. granted*, *Garrett*, 120 S. Ct. 1669 (2000) (presenting the question of whether a state waives its Eleventh Amendment immunity when it accepts federal financial assistance that Congress conditioned upon a waiver).

195. See *Garrett*, 121 S. Ct. at 960 (examining only the constitutionality of Title I as it is applies to state governments).

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and the future of states' rights.¹⁹⁶ The basic idea behind Federalism is that there is an equal division of power between the national government and state and local governments.¹⁹⁷ One major underlying principle of Federalism is that states are sovereign from the federal government,¹⁹⁸ thus free to govern the activities that take place within their jurisdiction by their own will.¹⁹⁹ As a result of the Eleventh Amendment, this sovereignty also extends to a state's ability to declare itself immune to any action "commenced or prosecuted against one of the United States."²⁰⁰ Yet, as the Supreme Court recognized in *Alden v. Maine*, this immunity is not confined by the terms of the Eleventh Amendment.²⁰¹ It is recognized as a fundamental aspect of the idea of sovereignty that is visible throughout the structure of the Constitution.²⁰²

Sovereign immunity originated in feudal England when landowners maintained their own courts and could hear or refuse any case brought against them within their court.²⁰³ This notion of control remained in the English government for centuries and became a great concern for the states after the Revolutionary War, when this nation was forming.²⁰⁴ Recognizing the states' fear,

196. See Brief for Petitioners, 2000 WL 821359, *1, *Garrett*, 121 S. Ct. 955 (arguing the need to protect the sovereign immunity of the states against unwarranted Congressional intrusion in order to maintain the balance of Federalism).

197. See OTIS H. STEPHENS JR. & JOHN M. SCHEB, II, *AMERICAN CONSTITUTIONAL LAW* 386 (1993) (contrasting the dramatic changes in the relationship between state and national government since this country began, despite states still maintaining a substantial source of power).

198. See *Alden v. Maine*, 527 U.S. 706, 714 (1999) (declaring that the ways in which the federal system preserves the sovereign status of the states include: (1) reserving a substantial source of the Nation's primary sovereignty to the states, thus making the states no more accountable to the federal government than the federal government is to them; (2) designing the government in such a way that it establishes a non-centralized structure where state and federal government have concurrent authority).

199. See *Nevada v. Hall*, 440 U.S. 410, 415 (1979) (referring to a state's sovereign immunity as a state's right to govern itself).

200. See *Alden*, 527 U.S. at 722 (referencing the foundations of state sovereign immunity) (quoting U.S. CONST. amend. XI).

201. See *id.* at 713 (recognizing that the idea of sovereign immunity is not derived from the Eleventh Amendment).

202. See *id.* (finding that state's immunity was recognized long before the ratification of the Constitution and is retained today).

203. See Camille Gearhart, Note, *Confronting the Fictions of the Eleventh Amendment: Pennhurst State School and Hospital v. Halderman*, 60 WASH. L. REV. 407, 410 n.20 (1985) (establishing that while landlords were immune to suits within their own court, they were not immune to suits of superior sovereigns); see also *Nevada*, 440 U.S. at 414-15 (recounting that the immunity doctrine was established in common law where petty lords could only be subject to suits of lords in higher courts, a system that left the King almost completely immune).

204. See *Hall*, 440 U.S. at 418 (describing how states were vitally interested in whether the creation of a sovereign federal government would have the power to subject them to suits similar to the way lower English lords were subjected to suits of higher lords).

Alexander Hamilton addressed some of these concerns in the Federalist Papers, in which he established the notion that no state should be amenable to any suit brought by an individual without the state's prior consent.²⁰⁵ Hamilton's idea is repeatedly recognized throughout the years,²⁰⁶ in addition to being relied upon when the Eleventh Amendment was enacted.²⁰⁷ Furthermore, it was this idea of Hamilton's which became the foundation for the Supreme Court to extend the interpretation of the Eleventh Amendment beyond its literal meaning in order to allow a state to prohibit suits brought by its own citizens.²⁰⁸

B. *Effects of Abrogating the States' Eleventh Amendment*

Had the Court allowed Congress to possess the authority to abrogate the states' Eleventh Amendment protection, the primary goals behind Federalism and state sovereignty would have been compromised.²⁰⁹ States would no longer be able to control aspects of their sovereignty when Congress grants private individuals the ability to sue states in federal courts.²¹⁰ Consequently, not only would states be forced to pay federal court judgments out of their own treasury,²¹¹ but they would also be forced to participate in the "coercive process

205. See THE FEDERALIST No. 81 (Alexander Hamilton) (writing that to hold a state accountable in suits they have not consented to would be counterproductive and would be as if one were "waging war against the contracting State").

206. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98 (1984) (establishing the fact that, "a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing on the construction of the Constitution of the United States that it has become established by repeated decisions of this court . . .") (quoting *Ex parte State of N.Y.* No. 8, 256 U.S. 490, 497 (1921)); *Hall*, 440 U.S. at 416 (supporting the idea that no sovereign state can be sued in its own courts without its consent); *Alden*, 527 U.S. at 716 (reconfirming the universally accepted doctrine that no state could be subjected to a suit without its expressed consent since this immunity is an essential part of a sovereign's dignity).

207. See *Alden*, 527 U.S. at 719 (recounting how the Eleventh Amendment was enacted after the Supreme Court had ruled that Article III of the Constitution authorized a private citizen of another State to sue the state of Georgia without its consent) (citing *Chisolm v. Georgia*, 2 U.S. 419 (1793)). The decision created such outrage within the country, especially for the states, that just one day later an initial proposal to amend the Constitution was introduced into the House of Representative. *Id.* at 720-21.

208. See *id.* at 727 (stating that in *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court made the determination that "sovereign immunity barred a citizen from suing his own State under federal-question . . . jurisdiction").

209. See *Seminole Tribe of Fla.*, 517 U.S. at 59 (recognizing that granting Congress the power to abrogate the states' Eleventh Amendment Rights expanding federal power at the expense of the states).

210. See *Alden*, 527 U.S. at 713 (clarifying that a state's immunity is a fundamental aspect of its sovereignty).

211. See *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994) (explaining that the Courts of Appeals have found a state's purse to be one of the most salient factors in Eleventh Amendment determinations).

of judicial tribunals at the instance of private parties.²¹² Suits brought by private individuals would require states to spend large amounts of time and resources to justify actions that some argue should be presumed legal.²¹³ Furthermore, numerous suits questioning states' practices would discourage states from taking on new initiatives that could provide for their most vulnerable populations.²¹⁴

Moreover, it would be argued that it is beyond Congress' authority, under the principles of Federalism, to be legislating the ways in which states should protect and provide for their citizens.²¹⁵ In fact, some would argue that not only did Congress overstep its boundary by mandating how the disabled are to be treated, but legislation such as the ADA has placed huge burdens upon the states that are not proportionate with its benefits.²¹⁶ In addition, the federal government has not even tried to lessen the burden or its encroachment by providing the states with money to assist in the implementation of the ADA.²¹⁷ The ADA mandates that all people with disabilities be mainstreamed in all areas of a state's jurisdiction.²¹⁸ Yet at the same time, the law disregards the lack of resources available to a state as well as a state's judgment for how to appropriately meet the needs of its disabled population.²¹⁹

212. Puerto Rico Aqueduct & Sewer Auth., 506 U.S. at 146 (observing that the states possess certain attributes of sovereignty according them with the respect owed to them as members of a federation (citing *In re Ayers*, 123 U.S. 443, 505 (1887))).

213. See Hawaii, Arkansas, Idaho, Nebraska, Nevada, Ohio and Tennessee Amici Curiae for Petitioners, 2000 WL 821359, *18, Bd. of Trs. of Univ. of Ala. in Birmingham v. Garrett, 121 S. Ct. 955 (arguing that requiring states to put resources into litigation costs and damages awards compromises states' ability to provide services to citizens).

214. See *id.* (noting the millions of dollars that lawsuits by private individuals cost the states, thus preventing them from spending their money more efficiently).

215. See *id.* at *8 (contending that Congress' authority to pass the ADA was incorrect because there was no evidence of states mistreating their disabled population or unconstitutionally discriminating against them).

216. See Marci Hamilton, *The High Cost of Look-Good, Feel-Good Legislation* CNN.COM (July 26, 2000), at <http://www.cnn.com/2000/LAW/07/columns/fl/hamilton.ada.07.26/> (referring to the fact that although the ADA is costing the states large amounts of money, states have not yet resisted since representatives are afraid of projecting poor public images by opposing the assistance to the disabled).

217. See *id.* (reporting how the ADA forces states to mainstream individuals with disabilities in the most expensive manner and does not provide any federal funds to pay for the increased costs).

218. See 28 C.F.R. § 35.130(d) (requiring entities to provide programs in the most integrated setting possible to meet the needs of the individuals with disabilities). But see *Olmstead*, 527 U.S. at 607 (declaring that while states should attempt to place individuals with mental disabilities in community-based settings, one must take into account a state's resources and the number and needs of other individuals with mental disabilities in the state).

219. See Hamilton, *supra* note 216, at <http://www.cnn.com/2000/LAW/07/columns/fl/hamilton.ada.07.26/> (referring to how the ADA applies to all aspects of a state, from how

The Eleventh Amendment's primary purpose is to preserve the sovereignty of the states and reaffirm the promises implicitly made within the Constitution's Tenth Amendment.²²⁰ However, allowing Congress to enact legislation such as the ADA would prevent states from making their own decisions and running their governments independently, as well as seriously alter the fundamental structure of the Constitution.²²¹

CONCLUSION

The decision the Supreme Court rendered in *Board of Trustees of University of Alabama in Birmingham v. Garrett* is likely to have sweeping affects for individuals with disabilities. While after ten years there have been significant advances towards accomplishing the ADA's main goals,²²² many individuals with disabilities continue to be isolated and segregated from society.²²³ For example, only three out of ten individuals with disabilities of working age are employed in full or part-time jobs, even though two out every three individuals with disabilities who are unemployed would actually prefer to work.²²⁴ As a result of this lower rate of employment for people with disabilities, such individuals are more likely to live in poverty with household incomes of \$15,000 a year or less.²²⁵ In addition to experiencing

individuals are treated in hospitals and schools, to how they are treated in prisons).

220. See *Alden v. Maine*, 527 U.S. 706, 713 (1999) (noting that the Eleventh Amendment is seen as simply restating the terms within the Tenth Amendment); see also U.S. CONST. amend. X (stating, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people").

221. See *Hawaii, Arkansas, Idaho, Nebraska, Nevada, Ohio and Tennessee Amici Curiae Brief for Petitioners*, 2000 WL 821359, *18, *Garrett*, 121 S. Ct. 955 (2001) (arguing that Congress was violating the rights of the states when enacting the ADA). As a result of the ADA, states have been relegated to the status of governmental province in a federal system. *Id.*

222. See 42 U.S.C. § 12101(b)(1)-(2) (1994) (setting comprehensive standards to ensure the end of discrimination against people with disabilities); Hill, *supra* note 25, at 17A (stating that progress has been made in achieving the goals of the ADA). Such goals include granting individuals with disabilities more freedom to choose where to live and greater opportunities to pursue their aspirations. *Id.*

223. See *Survey Program in Participation and Attitudes: The 2000 N.O.D. Harris Survey of Americans With Disabilities* (July 29, 2000), at <http://www.nod.org/hs2000.html> (examining the discrepancies between people with disabilities and people without disabilities in various areas including employment, education, household income, access to transportation, socialization, political participation, and life satisfaction).

224. See *id.* at <http://www.nod.org/hs2000.html> (comparing statistics of individuals with disabilities to individuals without and finding that eight out of ten individuals without disabilities who are of working age are employed). In other words, eighty-one percent of the non-disabled population is working, compared with only thirty-two percent of the disabled population. *Id.*

225. See *id.* at <http://www.nod.org/hs2000.html> (estimating only ten percent of the non-disabled population to live in poverty, in comparison with twenty-nine percent of the disabled population).

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problems in the area of employment, people with disabilities also have lower participation rates in areas of education and voting.²²⁶

Understandably, it is unrealistic to believe that in just ten years the ADA could achieve its primary objectives.²²⁷ However, with the ruling in *Garrett*, the Supreme Court is prohibiting further implementation of the ADA, and it is unlikely that all individuals with disabilities will ever find themselves fully integrated within society.²²⁸ In many instances, not only will individuals find themselves segregated as result of discrimination, but individuals will be unable to protect themselves and ensure their rights.²²⁹ Without the ADA, it will be significantly more difficult for individuals to seek redress for discriminatory acts resulting from their disabilities.²³⁰

Presently in the United States, there are more than fifty-seven million individuals with some form of disability.²³¹ Some even argue that the disabled population constitutes the largest minority within this country.²³² Regardless of these contentions, one thing is true: this group is the only minority that anyone can join at any point in their life.²³³ Considering this compelling point, the ADA is perhaps one of the most important pieces of modern legislation in this country.

226. See *id.* at <http://www.nod.org/hs2000.html> (finding that more than one out of five individuals with disabilities fails to complete high school, while only one out of ten persons with disabilities are able to graduate from college). In addition, reviewing statistics from the 1996 Presidential Election, it is clear that people with disabilities are not engaged in the political process to the same extent as people without disabilities. *Id.* Specifically, only sixty-two percent of the disabled population was registered to vote, compared to seventy-eight percent of the non-disabled population. *Id.*

227. See Hill, *supra* note 25, at 17A (declaring that the ADA was just a beginning and that more time is needed before the disabled community reaches its ultimate goal of full integration of individuals with disabilities into society).

228. See *id.* (reporting that if the Supreme Court holds the ADA to be unconstitutional when applied to the states, then states will discriminate without penalty).

229. See *id.* (noting that if the ADA is invalidated, society will retreat to one of segregation, fear and dependence for people with disabilities).

230. Cf. *Don't Let States Discriminate Series: Editorials*, ST. PETERSBURG TIMES, Jan. 31, 2000, at 8A (recognizing the Court is slowly limiting Congress' ability to advance the civil rights of individuals).

231. See Mary Leonard, *Disability Act's Progress, Limits Marked*, BOSTON GLOBE, July 14, 2000, at A1 (reporting the number of individuals with disabilities currently in the United States).

232. See JOSEPH SHAPIRO, *NO PITY 7* (1993) (arguing that when including individuals with learning disabilities, mental illness, and various diseases such as cancer, the number of individuals with disabilities reaches far beyond the number of individuals that constitutes other minority groups).

233. See *id.* at 7-8 (quoting Patricia Wright of the Disability Rights Education Defense Fund who stated, "Disability knows no socioeconomic boundaries You can become disabled from your mother's poor nutrition or from falling off your polo pony.").