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THE AMERICANS WITH DISABILITIES ACT AFTER
UNIVERSITY OF ALABAMA V. GARRETT: SHOULD THE
STATES BE IMMUNE FROM SUIT?

NICOLE S. RICHTER*

INTRODUCTION

The Americans with Disabilities Act (“ADA”) was signed into law in 1990 to establish a “comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”¹ Its provisions significantly expanded the legal rights of forty-three million Americans with physical or mental disabilities,² provided protection from employment discrimination and guaranteed the provision of public services and accommodations.³ As enacted, the ADA applied to state actors, local actors, private employers and private businesses.⁴

However, the ADA’s application to the states was called into doubt by the Supreme Court’s decision in *Kimel v. Florida Board of Regents*.⁵ In *Kimel*, the Court held that the Age Discrimination in

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1. Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213, 12101(b)(1) (1995). President Bush signed the ADA into law on July 26, 1990. Randy Chapman, *The Americans with Disabilities Act: Civil Rights for Persons with Disabilities*, 19 COLO. LAW. 2233, 2233 (1990).

2. 42 U.S.C. § 12101(a)(1) (finding that “some 43,000,000 Americans have one or more physical or mental disabilities”).

3. See Americans with Disabilities Act, Subchapter I (“Title I”), 42 U.S.C. §§ 12111–12117 (1995). “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment.” *Id.* § 12112(a); see also Americans with Disabilities Act, Subchapter II (“Title II”), 42 U.S.C. §§ 12131–12165 (1995). Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.” *Id.* § 12132.

4. 42 U.S.C. § 12111(5). Recipients of federal funds are also subject to the Rehabilitation Act, which prohibits discrimination against applicants or employees with disabilities. See Barbara A. Lee, *Reasonable Accommodation Under the Americans with Disabilities Act: The Limitations of Rehabilitation Act Precedent*, 14 BERKELEY J. EMP. & LAB. L. 201, 205 (1993).

5. 528 U.S. 62 (2000). In recent cases, the Court has invalidated other statutes as they apply to the states. See generally *United States v. Morrison*, 529 U.S. 598 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v.*

Employment Act (“ADEA”) was unconstitutional as applied to the states.⁶ The Court reasoned that the ADEA was not a valid exercise of Congress’s power under Section Five of the Fourteenth Amendment (“Section Five”).⁷ Thus, it held that states are immune from lawsuits by private actors for money damages under the ADEA because Congress did not validly abrogate the states’ Eleventh Amendment immunity.⁸

After *Kimel*, several legal commentators expressed concern that the ADA would suffer a similar fate⁹ and the federal courts of appeals were split on the issue.¹⁰ This speculation arose because the ADA and the ADEA are similar in many respects.¹¹ For example, like age discrimination, disability discrimination is scrutinized under the deferential rational basis standard applied in Equal Protection review.¹² However, there are also distinguishing factors. Some commentators found that, unlike the ADEA, the ADA is supported by a “voluminous congressional record”¹³ and findings of discrimination by the states against the disabled.¹⁴

Against this background, the Supreme Court granted certiorari in *University of Alabama v. Garrett*¹⁵ to resolve the issue.¹⁶ In *Garrett*, the Court invalidated the ADA as applied against the states by

Flores, 521 U.S. 507 (1997).

6. *Kimel*, 528 U.S. at 91.

7. *Id.*; see *infra* note 38 for the language of the Fourteenth Amendment.

8. *Kimel*, 528 U.S. at 91. The Eleventh Amendment states that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

9. See Erwin Chemerinsky, *A Major Change in Civil Rights Litigation*, 36 TRIAL 94 (2000); John W. Parry, *Trend—The Supreme Court and the ADA: Sovereign Immunity Musical Chairs*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 186 (2000); Susan E. Sutor & Susan Elizabeth Grant Hamilton, *The Constitutional Status of the ADA: An Examination of Alsbrook v. City of Maumelle in Light of Recent Supreme Court Decisions Concerning the Eleventh Amendment*, 19 REV. LITIG. 485 (2000).

10. See *infra* note 62.

11. See generally Keith R. Fentonmiller & Herbert Semmel, *Where Age and Disability Discrimination Intersect: An Overview of the ADA for the ADEA Practitioner*, 10 GEO. MASON U. CIV. RTS. L.J. 227 (2000).

12. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985); *Dandridge v. Williams*, 397 U.S. 471, 485–86 (1970).

13. Chemerinsky, *supra* note 9, at 95.

14. See *infra* Section III.B.

15. 531 U.S. 356 (2001). The Supreme Court granted certiorari in two prior cases but both cases settled before the Court heard them. See *Fla. Dep’t of Corr. v. Dickson*, 528 U.S. 1132 (granting certiorari), *cert. dismissed*, 528 U.S. 1184 (2000); *Alsbrook v. Arkansas*, 528 U.S. 1146 (granting certiorari), *cert. dismissed*, 529 U.S. 1001 (2000).

16. *Garrett*, 531 U.S. 356, 363 (2001).

holding that the Eleventh Amendment prevents private individuals from suing states in federal court for money damages.¹⁷ This holding has important implications for employees across the country. Many federal antidiscrimination statutes that protect employee rights from state infringement are enforced through private litigation.¹⁸ Limitations on this option could severely restrict the enforcement of these statutes altogether.¹⁹ Furthermore, the Court's analysis of the ADA in *Garrett* failed to distinguish the ADA from the ADEA, leaving the future of Section Five litigation uncertain.²⁰ With these concerns in mind, this Note argues that the ADA should apply to the states because it is a valid congressional abrogation of states' Eleventh Amendment immunity. It will compare the Court's findings in *Kimel* with the findings in *Garrett* to show that unlike the ADEA, the ADA is a valid exercise of Congress's power under Section Five.

Section I of this paper will discuss the ADEA and the Supreme Court's decision in *Kimel*.²¹ It will show how the Court reached the conclusion that ADEA does not validly abrogate the states' Eleventh Amendment immunity. Section I will also discuss the ADA, focusing on the Title I provisions on employment discrimination to show why the ADA is vulnerable to constitutional challenge. Next, Section II will discuss the Supreme Court's decision in *Garrett*, where the Court held that a private individual cannot sue a state in federal court for money damages under the ADA. Section III will draw upon the reasoning in *Kimel* and *Garrett* to show that why the ADA is distinguishable from the ADEA and why the ADA should apply to the states. Finally, this Note will conclude that the ADA validly abrogates the states' sovereign immunity.

17. *Id.* at 356.

18. See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 450–51 (2000) (finding that most federal antidiscrimination law is normally enforced through private law suits against the states); see also *infra* note 56.

19. *Id.* at 441–42. After *Garrett*, a private plaintiff can still sue a state under the ADA in federal court for an injunction and may be able to sue a state under the ADA in state court. *Id.* at 451 n.44.

20. *Id.* at 443–44 (stating that the Supreme Court's Section Five jurisprudence could develop in different directions depending on how *Kimel* is interpreted).

21. 528 U.S. 62 (2000).

I. BACKGROUND

A. *The Age Discrimination in Employment Act*

The ADEA was enacted in 1967. Under the ADEA it is unlawful for an employer to “fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual’s age.”²² It protects individuals who are forty years of age or older²³ from age discrimination in the conditions and privileges of employment.²⁴ The ADEA applies to private sector employers with twenty or more employees and the federal government.²⁵ It was amended in 1974 to allow suits against the states and their subdivisions.²⁶ However, the Supreme Court recently held in *Kimel* that a state cannot be sued under the ADEA.²⁷

In *Kimel*, the Eleventh Circuit consolidated three cases that alleged ADEA violations against state employers and, in a divided panel opinion, held that the ADEA did not validly abrogate the states’ Eleventh Amendment immunity.²⁸ The Supreme Court granted certiorari to resolve the split in the federal courts of appeals of whether the ADEA validly abrogated the states’ Eleventh Amendment immunity.²⁹ The Court began its opinion with a discussion of the Eleventh Amendment and found that it protects nonconsenting states from lawsuits in federal court.³⁰ The Court stated that Congress may abrogate the states’ sovereign immunity and it articulated the following two-part test to determine if an abrogation is valid: (1) “whether Congress unequivocally expressed its intent to

22. 29 U.S.C. § 623(a)(1) (1995). The ADEA was enacted to “promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.” *Id.* § 621(b).

23. *Id.* § 631(a). The remedial provisions of the ADA were adopted from the FLSA. H. Lane Dennard, Jr. & Kendall L. Kelly, Price Waterhouse: *Alive and Well Under the Age Discrimination in Employment Act*, 51 MERCER L. REV. 721, 727 (2000).

24. *See* 29 U.S.C. § 623(a)(1).

25. *Id.* §§ 630(b)–(d), 631(b). Under the ADEA, an employer has five affirmative defenses to a claim of age discrimination: (1) age is a bona fide occupation qualification that is reasonably necessary to the normal operations of the business; (2) the action is based on factors other than age; (3) the observation of the terms of a bona fide seniority system; (4) the observation of the terms of a bona fide employee benefit plan; and (5) discharge or discipline for good cause. *Id.* § 623(f).

26. *Id.* § 630(b).

27. 528 U.S. 62 (2000).

28. *See Kimel v. Fla. Bd. of Regents*, 139 F.3d 1426, 1433 (1998).

29. *Kimel*, 528 U.S. at 72 (citing *Kimel v. Fla. Bd. of Regents*, 525 U.S. 1121 (1999)).

30. *Id.*; *see also Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 634–65 (1999); *Seminole Tribe of Fla. v. Florida.*, 517 U.S. 44, 54 (1996).

abrogate [a state's sovereign] immunity;" and (2) "if it did, whether Congress acted pursuant to a valid grant of constitutional authority."³¹ The Court proceeded by applying the test to the ADEA.³²

In applying the first prong of the test, the Court stated that Congress may abrogate the states' immunity from suit in federal court only by "making its intention unmistakably clear in the language of the statute."³³ The Court then analyzed Section 216(b) of the Fair Labor Standards Act ("FLSA"), a section of the ADEA, which states that employees can maintain actions for back pay "against any employer (including a public agency) in any Federal or State Court of competent jurisdiction."³⁴ The Court found that this language, interpreted in conjunction with other sections of the ADEA, clearly expressed Congress's intent to abrogate the states' immunity.³⁵

Next, the Court analyzed the ADEA to determine whether it passed the second prong of the test: whether Congress acted pursuant to a valid grant of constitutional authority when it authorized suits against the states under the ADEA.³⁶ The Court summarily dismissed the argument that Congress could derive its authority from the Commerce Clause.³⁷ Turning to an analysis of Section Five, the Court found that Congress can abrogate the states' immunity under this provision.³⁸ The Court found that Section Five is an affirmative grant

31. *Kimel*, 528 U.S. at 73 (citing *Seminole Tribe*, 517 U.S. at 55).

32. *Id.*; see generally Tanya Smith, *Current Event: Kimel v. Florida Bd. of Regents* 120 S. Ct. 631 (2000), 8 AM. U. J. GENDER SOC. POL'Y & L. 553 (2000).

33. *Kimel*, 528 U.S. at 73 (quoting *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989)).

34. *Id.* at 73-74; see also 29 U.S.C. § 216(b) (1995).

35. *Kimel*, 528 U.S. at 74. The Court relied on several provisions of the ADEA and the FLSA in reaching this conclusion. *Id.* at 73-74. It began with 29 U.S.C. § 626(b) (1995), which states that "[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216, . . . and 217 of [the Fair Labor Standards Act of 1938]." *Id.* at 73. The Court interpreted this section in light of 29 U.S.C. § 216(b) of the Fair Labor Standards Act, which authorizes actions for back pay "against any employer . . . in any Federal or State Court of competent jurisdiction." *Id.* at 73-74. The Court found that these provisions, when read as a whole, showed Congress's intent to abrogate the states' Eleventh Amendment immunity. *Id.* at 74.

36. *Kimel*, 528 U.S. at 80.

37. *Id.* The Commerce Clause provides, "The Congress shall have the power to . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cls. 1, 3.

38. *Kimel*, 528 U.S. at 80. The Fourteenth Amendment provides, in pertinent part:

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend XIV, §§ 1, 5.

of power to Congress to enforce the provisions of the Fourteenth Amendment.³⁹ The Court warned, however, that there are limitations on this power. While Congress can enforce the provisions of the Fourteenth Amendment, it cannot define what comprises a violation of the Fourteenth Amendment.⁴⁰

To determine whether Congress had overstepped its boundaries when it enacted the ADEA, the Court applied a congruence and proportionality test: whether there was a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”⁴¹ The Court began with an analysis of age discrimination to determine if the ADEA could pass the test.⁴² The Court’s analysis relied heavily on the fact that age is not a suspect class and, thus, does not receive heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment.⁴³ The Court held that age discrimination receives rational basis review, which allows states to discriminate on the basis of age if the discrimination is rationally related to a legitimate state interest.⁴⁴ The Court reasoned that the ADEA’s broad restriction on age discrimination was a disproportionate remedy because it prohibited what would be otherwise constitutional conduct under the deferential rational basis standard.⁴⁵

The Court also examined the ADEA’s legislative history to determine if the ADEA was “congruent and proportional.”⁴⁶ It found that Congress did not identify a pattern of age discrimination by the states when the ADEA was enacted.⁴⁷ The Court rejected the

39. *Kimel*, 528 U.S. at 80–81.

40. *Id.* The Court stated that the ultimate interpretation of the Fourteenth Amendment’s substantive provisions is the “province” of the judicial branch. *Id.*

41. *Id.* (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)). *Flores* applied the standard to the Religious Freedom Restoration Act and held the act to be inappropriate legislation under Section Five.

42. *Kimel*, 528 U.S. at 83.

43. *Id.* There are three levels of Equal Protection review: strict scrutiny, intermediate scrutiny, and rational basis scrutiny. See Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of Cleburne Living Center, Inc.*, 88 KY. L.J. 591, 595–96 (1999–2000).

44. *Kimel*, 528 U.S. at 83.

45. *Id.* The Court reasoned that age classifications were distinguishable from race or gender classifications because race and gender are “so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.” *Id.* (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985)).

46. *Kimel*, 528 U.S. at 88. The Court stated that “[d]ifficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation.” *Id.*

47. *Id.* at 89. The Court found that Congress’s extension of the ADEA to the states was

congressional findings of age discrimination, finding that they were little more than “isolated sentences clipped from floor debates and legislative reports.”⁴⁸ The Court concluded that, absent a legislative finding that the states were unconstitutionally engaging in age discrimination, broad, prophylactic legislation was unnecessary and, thus, the ADEA was not a congruent remedy.⁴⁹ Accordingly, the Court found that the ADEA was not a valid exercise of Congress’s power under Section Five and that its extension to the states in 1974 was, therefore, unconstitutional.⁵⁰ This decision threatened the validity of the ADA and continues to threaten many other civil rights statutes.⁵¹

B. *The Americans with Disabilities Act*

Congress enacted the ADA in 1990 to protect a “discrete and insular minority who . . . have been subjected to a history of purposeful unequal treatment.”⁵² Title I of the ADA prohibits employment discrimination because of disability in job application procedures, hiring, advancement, discharge, compensation, training, and other terms, conditions, and privileges of employment.⁵³ To be covered by the Act, an individual must have a “physical or mental impairment that substantially limits one or more of the major life activities,” must have “record of such impairment,” or must be “regarded as having such an impairment.”⁵⁴ Moreover, she must be qualified to perform

“an unwarranted response to a perhaps inconsequential problem.” *Id.*

48. *Id.*

49. *Id.* at 91. The Court held that Congress’s failure to document a pattern of significant discrimination by the states, while not dispositive, confirmed the Court’s finding that broad, prophylactic legislation was not necessary to remedy age discrimination. *Id.*

50. *Id.* at 91. The Court stated, however, that aggrieved employees could still seek redress under state age discrimination statutes. *Id.* at 91–92.

51. See Chemerinsky, *supra* note 9, at 95–96. Other federal civil rights statutes, such as the Family and Medical Leave Act and the Equal Pay Act, are vulnerable to constitutional attack after *Kimel*. *Id.* While race and gender discrimination statutes will still be upheld, the Court considers these types of discrimination to be different because they receive a higher level of judicial scrutiny. *Id.* Thus, the Court accords Congress more power to remedy these forms of discrimination than it does for other types of discrimination that receive rational basis review. *Id.*

52. 42 U.S.C. § 12101(a)(7) (1995).

53. *Id.* § 12112(a). For a detailed discussion of prohibited employment practices, see Jeffrey Ivan Pasek et al., *Compliance by the Private Sector with the Americans with Disabilities Act*, 62 PA. B. ASS’N. Q. 139, 144–45 (1991).

54. 42 U.S.C. §§ 12102(2)(A)–(C). Equal Employment Opportunity Commission (“EEOC”) regulations define “substantially limits” as:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or

the essential functions of the job “with or without reasonable accommodation.”⁵⁵

Title I of the ADA applies to private employers with fifteen or more employees and federal and state governments.⁵⁶ Congress specifically abrogated the states’ immunity under section 12202 of the ADA, declaring “[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.”⁵⁷ However, the ADA, as applied to the states, was subject to some of the same attacks that led to the invalidation of the ADEA in *Kimel*. First, under Equal Protection analysis, disabled individuals are accorded only rational basis review.⁵⁸ Traditional rational basis scrutiny does not afford much protection from unjust government action.⁵⁹ Second, some legal commentators attacked the legislative history of the ADA, claiming that it did not contain adequate findings of state discrimination against the disabled.⁶⁰ Thus, the United States Supreme Court granted certiorari in *Board of Trustees of the University of Alabama v. Garrett* to resolve the issue of whether the ADA validly abrogated the states’ Eleventh Amendment immunity.⁶¹

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

EEOC Regulations to Implement the Equal Employment Provisions of the ADA, 29 C.F.R. § 1630.2(j)(1) (1996). Major life activities include “functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” *Id.* § 1630.2(i).

55. 42 U.S.C. § 12111(8). Under the ADA, reasonable accommodations include, but are not limited to, making existing facilities accessible to and usable to individuals with disabilities, job restructuring, part-time work, modified work schedules, reassignment to a vacant position, modification of equipment, and the provision of qualified readers or interpreters. *Id.* § 12111(9)(A),(B). However, employers are not required to provide reasonable accommodations if they would cause an “undue hardship on the operation of the business.” *Id.* § 12112(b)(5)(A).

56. *Id.* § 12111(5)(A). The ADA is enforced through the provisions of Title VII of the Civil Rights Act of 1964. *See id.* § 12117. Generally, an aggrieved individual must file a complaint with the EEOC. *Id.* § 2000e-5(e). If the EEOC issues a right to sue letter after reviewing the claim, the individual may proceed with a private civil action. *See* Anne E. Beaumont, Note, *This Estoppel Has Got to Stop: Judicial Estoppel and the Americans with Disabilities Act*, 71 N.Y.U. L. REV. 1529, 1542 (1996).

57. 42 U.S.C. § 12202 (1995).

58. *See* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985); *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

59. *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term Forward: Implementing the Constitution*, 111 HARV. L. REV. 56, 79 (1997) (finding that judicial scrutiny under rational basis review is a “virtual rubber stamp”); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 314 (1993) (stating that rational basis review is the “paradigm of judicial restraint”).

60. *See, e.g., infra* note 79.

61. 531 U.S. 356 (2001).

II. THE SUPREME COURT'S DECISION IN *BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT*

After *Kimel*, several federal appellate courts wrote opinions on whether the ADA could be enforced against the states.⁶² However, the courts were split on the issue and thus left it unresolved. The United States Supreme Court settled the issue in *Board of Trustees of the University of Alabama v. Garrett*,⁶³ by ruling that the states are immune from private suits under the ADA for money damages in federal court.⁶⁴

A. *The Majority Opinion*

The Supreme Court granted certiorari in *Garrett* to determine whether employees of the State of Alabama could recover money damages in a suit against the State for a violation of Title I of the ADA.⁶⁵ After a brief discussion of the relevant provisions in Title I of the ADA, the Court addressed the first question articulated in *Kimel*: whether Congress unequivocally expressed its intent to abrogate the

62. The Tenth Circuit and the Second Circuit upheld the ADA as applied to the states after *Kimel*. See *Cisneros v. Wilson*, 226 F.3d 1113, 1128 (10th Cir. 2000); *Kilcullen v. N.Y. State Dep't of Labor*, 205 F.3d 77 (2d Cir. 2000). Other courts also decided cases in favor of the ADA prior to *Kimel*. See *Garrett v. Bd. of Trs. of the Univ. of Ala.*, 193 F.3d 1214, 1218 (11th Cir. 1999); *Dare v. California*, 191 F.3d 1167, 1175 (9th Cir. 1999); *Muller v. Costello*, 187 F.3d 298, 311 (2d Cir. 1999); *Amos v. Md. Dept. of Pub. Safety*, 178 F.3d 212, 222–23 (4th Cir. 1999); *Coolbaugh v. Louisiana*, 136 F.3d 430, 438 (5th Cir. 1998); *Jones v. Commonwealth*, 2000 WL 15073 (E.D. Pa. 2000); *Johnson v. State Tech. Ctr. at Memphis*, 24 F. Supp. 2d 833, 842 (W.D. Tenn. 1998); *Thrope v. State*, 19 F. Supp. 2d 816, 821–22 (S.D. Ohio 1998); *Lamb v. John Umstead Hosp.*, 19 F. Supp. 2d 498, 510 (E.D.N.C. 1998); *Meekison v. Voinovich*, 17 F. Supp. 2d 725, 730 (S.D. Ohio 1998); *Anderson v. Dep't. of Pub. Welfare*, 1 F. Supp. 2d 456, 468 (E.D. Pa. 1998); *Williams v. Ohio Dept. of Mental Health*, 960 F. Supp. 1276, 1282–83 (S.D. Ohio 1997).

The Third and the Seventh Circuits found that the ADA was invalid after *Kimel*. See *Lavia v. Pennsylvania*, 224 F.3d 190, 204–05 (3d Cir. 2000); *Erickson v. Bd. of Governors*, 207 F.3d 945, 952 (7th Cir. 2000). Other jurisdictions also held that the ADA was not valid as applied to the states before *Kimel*. See *DeBose v. Nebraska*, 186 F.3d 1087, 1088 (8th Cir. 1999); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1009–10 (8th Cir. 1999); *Brown v. N.C. Div. of Motor Vehicles*, 166 F.3d 698, 708 (4th Cir. 1999); *Hedgepeth v. Tennessee*, 33 F. Supp. 2d 668, 675 (W.D. Tenn. 1998); *Nihiser v. Ohio Envtl. Prot. Agency*, 979 F. Supp. 1168, 1175 (S.D. Ohio 1997).

63. 531 U.S. 356 (2001).

64. *Id.* at 374. Chief Justice Rehnquist wrote the majority opinion; Justices O'Connor, Scalia, Kennedy, and Thomas joined. Justice Breyer wrote a dissenting opinion and was joined by Justices Stevens, Souter, and Ginsburg. *Id.* at 376.

65. 531 U.S. 356 (2001). In *Garrett*, there were two plaintiff/respondents. *Id.* at 356. Patricia Garrett, a registered nurse, sued the University of Alabama in Birmingham because the university Hospital had removed her from her position as Director of Nursing after she took a substantial leave to treat breast cancer. *Id.* at 362. As a result, she was forced to take a lower-paying job. *Id.* Milton Ash, a security officer, filed suit after the Alabama Department of Youth Services failed to honor his requests for reasonable accommodations. *Id.*

states' sovereign immunity.⁶⁶ Without hesitation, the Court found that this requirement was met by section 12202 of the ADA.⁶⁷ The Court then turned to the second question addressed in *Kimel*: whether Congress acted within its constitutional authority under Section Five when it abrogated the states' immunity.⁶⁸

As it had in *Kimel*, the Court prefaced its analysis of the ADA with an acknowledgment that Congress's power to enforce the Fourteenth Amendment includes the power to remedy and to deter violations of the Amendment.⁶⁹ It stated that in doing so, Congress may "prohibit[] a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."⁷⁰ However, the Court also warned that it, not Congress, retains the power to define the substantive meaning of the provisions of the Fourteenth Amendment.⁷¹

With these principles in place, the Court proceeded by identifying the scope of the constitutional right at issue.⁷² Relying on *City of Cleburne v. Cleburne Living Center, Inc.*,⁷³ it held that disability discrimination receives rational basis scrutiny.⁷⁴ The Court stated that a classification based upon disability does not violate the Equal Protection Clause of the Fourteenth Amendment if there is a rational relationship between the disparity of the treatment and a legitimate government purpose.⁷⁵ Thus, it found that the states are not required to make special or reasonable accommodations for the disabled under the Equal Protection Clause as long as their actions are rational.⁷⁶

66. *Id.* at 363–64; *see also supra* note 31.

67. *Garrett*, 531 U.S. at 363–64; *see also supra* note 57 and accompanying text for the language of 42 U.S.C. § 12202.

68. *Garrett*, 531 U.S. at 364. The Court turned to Section Five of the Fourteenth Amendment because it found that the Eleventh Amendment prevented Congress from enacting the ADA under its Article I Commerce Clause power. *Id.* The Court's recent limitations on Congress's Section Five power has led some legal commentators to speculate that opponents of federal antidiscrimination laws will view *Garrett* as an invitation to challenge statutes enacted under Congress's Spending Clause power. *See generally* David G. Savage, *The Next Federalism Frontier: After ADA Case, States' Rights Activists May Test Congress' Spending Power*, A.B.A. J., Apr. 2001, at 30–32.

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

70. *Id.* (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 63 (2000)).

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

72. *Id.*

73. 473 U.S. 432 (1985); *see infra* notes 114–16 and accompanying text for a discussion of *Cleburne*.

74. *Garrett*, 531 U.S. at 365–66.

75. *Id.* at 367 (citing *Heller v. Doe*, 509 U.S. 312, 320 (1993)).

76. *Garrett*, 531 U.S. at 366–67.

After establishing the permissible scope of disability discrimination, the Court examined the legislative history of the ADA to determine whether Congress identified a history and pattern of unconstitutional employment discrimination by the states against the disabled.⁷⁷ While the Court acknowledged that Congress made general findings of discrimination against individuals with disabilities, it reasoned that these findings did not show a pattern of discrimination by the states.⁷⁸ With regard to findings in the record that specifically involved the states, the Court found that these findings were “unexamined, anecdotal accounts of ‘adverse, disparate treatment by state officials.’”⁷⁹ The Court also found that Congress’s failure to mention the states in its legislative findings indicated that it did not find a pattern of discrimination by the states.⁸⁰ Thus, even though the ADA had a more developed legislative history with regard to the states than the ADEA had, the Court nonetheless found that this evidence was not enough.⁸¹

Finally, the Court stated that even if the legislative history could be interpreted to show a pattern of disability discrimination by the states, the ADA failed to abrogate the states’ Eleventh Amendment immunity because it was not “congruent and proportional.”⁸² The Court reasoned that the reasonable accommodations requirement of the ADA, which was designed to limit an employer’s liability, still requires state employers to go beyond what is constitutionally required by rational basis scrutiny.⁸³ Under the reasonable accommodations standard, an employer can avoid liability by showing that the accommodation would pose an undue hardship on the operation of the business.⁸⁴ However, the Court reasoned that, even with the undue hardship standard, the reasonable accommodation standard is unconstitutional because it “makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing

77. *Id.* The Court held that evidence of state violations does not include discrimination by local governments. *Id.* at 368–69.

78. *Id.* at 370.

79. *Id.* at 370–71 (citations omitted). In *Erickson v. Board of Governors*, the Seventh Circuit also found that the legislative history of the ADA did not include examples of “irrational” discrimination by the states. 207 F.3d 945, 951 (7th Cir. 2000).

80. *Garrett*, 531 U.S. at 370–71.

81. *Id.* at 372–73; *see also supra* notes 46–48 (discussing the insufficient findings of age discrimination in the legislative history of the ADEA).

82. *Garrett*, 531 U.S. at 370–74.

83. *Id.*

84. *See supra* note 55 for a discussion of reasonable accommodations.

an ‘undue burden’ upon the employer.’⁸⁵ Based on these findings, the Court concluded that the ADA was not a valid abrogation of the states’ Eleventh Amendment immunity.⁸⁶

B. *The Dissenting Opinion*

While the majority opinion found that the ADA could not apply to the states, four Justices, led by Justice Breyer, dissented, finding that the ADA is appropriate enforcement legislation.⁸⁷ The dissenting opinion began with an examination of the legislative history of the ADA.⁸⁸ It found that Congress had compiled a “vast legislative record” indicating “massive, society-wide discrimination” against the disabled.⁸⁹ The dissent reasoned that these findings, although general, implicate state governments because they are part of general society.⁹⁰

Justice Breyer also found that there are roughly three hundred examples of state discrimination against disabled individuals in the legislative history of the ADA.⁹¹ He responded to the majority’s criticism that these findings were anecdotal evidence by stating that Congress is not required to make the same factual findings as a court of law.⁹² He reasoned that, unlike a court, Congress often relies upon general conclusions from anecdotal and opinion-based evidence.⁹³ He

85. *Garrett*, 531 U.S. at 372–74. The Court also found that the undue hardship provision of the ADA goes beyond the boundaries of rational basis review because it shifts the burden to the employer to prove that it would suffer an undue hardship, while rational basis review requires the plaintiff to negate the reasonable basis for the employer’s decision. *Id.*; see also *supra* note 60.

86. *Id.* at 372–76. The Court stated that to uphold the ADA as applied to the states “would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court.” *Id.* at 374. Justice Kennedy, who was joined by Justice O’Connor, wrote a concurring opinion to emphasize that he agreed with the majority’s finding only insofar as it held that a private individual could not sue an unconsenting state for money damages in federal court. *Id.* at 374–76.

87. *Id.* at 376–78.

88. *Id.* at 377–82.

89. *Id.* at 377 (citations omitted). In a dissenting opinion in *Erickson v. Board of Governors*, Judge Wood found that unlike the ADEA, the ADA was supported by legislative findings of discrimination by the states. 207 F.3d 945, 957 (7th Cir. 2000). She observed that Congress made findings of discrimination in areas that are traditionally controlled by state and local governments, such as education, health services, and transportation. *Id.* at 957–58.

90. *Garrett*, 531 U.S. at 377–79. He reasoned that states are not immune from the “stereotypical assumptions” that Congress found to be present in society at large. *Id.*

91. *Id.* Appendix C to Justice Breyer’s dissenting opinion lists hundreds of findings of state discrimination against the disabled. *Id.* at 390–423.

92. *Id.* at 379–83. Justice Breyer stated “the Congress of the United States is not a lower court.” *Id.* at 383. He also noted that, traditionally, the Court has not required Congress to undertake an “extensive investigation” of evidence before it. *Id.* at 380.

93. *Id.*

found that Congress's fact-finding role is distinguishable from a court's because Congress can "readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy."⁹⁴

After analyzing the legislative history of the ADA, Justice Breyer turned to the issue of congruence and proportionality.⁹⁵ With regard to the reasonable accommodations requirement, he acknowledged that the standard may require a state employer to take measures that go beyond the mandates of the Equal Protection Clause.⁹⁶ However, he reasoned that this does not make the ADA invalid because, under the Court's own reasoning, Congress is allowed to go beyond the minimum power granted by Section Five to regulate conduct that is constitutional.⁹⁷ Under this principle, the reasonable accommodations provision is a valid exercise of congressional power even though it may be broader than constitutionally necessary.⁹⁸

Justice Breyer also found the Court's decision was contrary to the very purpose of the Fourteenth Amendment.⁹⁹ He stated that the Fourteenth Amendment was enacted specifically to expand the power of the federal government and to limit the power of the states.¹⁰⁰ Overall, he found that the Court's decision "saps § 5 of independent force" and concluded that the ADA is proper legislation under Section Five of the Fourteenth Amendment.¹⁰¹

94. *Id.* at 384. Justice Breyer also noted that Congress is distinguishable from a court of law because acts of Congress directly reflect the will of the people. *Id.* Members of Congress can collect information directly from their constituents, which allows them to better understand the extent of discrimination by the states. *Id.*

95. *Id.* at 385–86.

96. *Garrett*, 531 U.S. at 385–86.

97. *Id.* at 385–88.

98. *Id.* In *Erickson v. Board of Governors*, Judge Wood also found that the ADA was not as broad as the ADEA in its mandates. 207 F.3d 945, 956–57 (7th Cir. 2000) (Wood, J., dissenting). She found that, while the ADEA prohibits all employment discrimination against individuals forty and above, with few limited exceptions, the reasonable accommodation standard of the ADA is more narrowly tailored. *Id.* For the defenses to age discrimination, see *supra* note 25.

99. *Garrett*, 531 U.S. at 387–88.

100. *Id.*

101. *Id.* at 388–89.

III. THE AMERICANS WITH DISABILITIES ACT VALIDLY ABROGATES THE STATES' ELEVENTH AMENDMENT IMMUNITY

In *Board of Trustees of the University of Alabama v. Garrett*, the Supreme Court held that the ADA does not validly abrogate the states' Eleventh Amendment immunity.¹⁰² However, several federal appellate courts and four United States Supreme Court Justices disagreed.¹⁰³ Given the impact that *Garrett* could have on federal antidiscrimination law, and given the Court's failure to analyze the ADA with regard to the ADEA, it is important to determine whether the Court came to the correct conclusion concerning the ADA.¹⁰⁴

This Section will analyze the ADA by comparing it to the ADEA and show why private individuals should be able to bring suit against the states in federal court under the ADA. It will apply the two-part test from *Kimel* and *Garrett* in the analysis.¹⁰⁵ However, because all agree that Congress "clearly and unequivocally" intended to abrogate the states' Eleventh Amendment immunity,¹⁰⁶ this Note will focus on the second prong of the test and show why Congress acted pursuant to a valid grant of constitutional authority under Section Five.

A. *The ADA Is a Congruent and Proportional Response to Disability Discrimination*

Congress abrogated the states' Eleventh Amendment immunity under Section Five when it enacted the ADA.¹⁰⁷ When Congress enacts legislation under its Section Five powers, the remedy must be "congruent and proportional" to the injury that it seeks to prevent.¹⁰⁸ Specifically, "[Congress] must identify conduct transgressing the Fourteenth Amendment's substantive provisions and must tailor its

102. *Id.* at 371–74.

103. *See supra* notes 62 and 87–101 and accompanying text.

104. *See Post & Siegal, supra* note 18, at 440–43, 450–51.

105. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) (citing *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55 (1996)). For clarity, this Note will also address the issues in the order that the Court used in *Kimel*, even though a slightly different order was used in *Garrett*. This is not necessarily, however, the order that the Court will use in future cases.

106. *See Garrett*, 531 U.S. at 363–64; *Cisneros v. Wilson*, 226 F.3d 1113, 1119 (2000) (stating that there is "no doubt" that Congress unequivocally expressed an intent to abrogate the states' Eleventh Amendment immunity).

107. 42 U.S.C. § 12101(b)(4) (1995) (stating "[i]t is the purpose of [the ADA] . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment").

108. *See supra* note 41 and accompanying text.

legislative scheme to remedying or preventing such conduct.”¹⁰⁹ Under this standard, the following Section shows why the provisions of the ADA are a congruent and proportional response to disability discrimination.

1. Disability Discrimination Receives Heightened Rational Basis Scrutiny

In *Garrett*, the ADA suffered the same fate as the ADEA because age and disability discrimination both receive rational basis review.¹¹⁰ Under rational basis scrutiny, government action is constitutional as long there is a legitimate state interest behind it that is rationally related to the means chosen by the government.¹¹¹ In particular, when the Supreme Court decided *Garrett*, it found that a wide range of discriminatory treatment toward the disabled is constitutional.¹¹² However, the Supreme Court overlooked the fact that it analyzed disability discrimination under a higher level of rational basis review, referred to as second order rational basis scrutiny¹¹³ in *City of Cleburne v. Cleburne Living Center, Inc.*¹¹⁴ Under

109. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

110. See *supra* notes 43–45 and accompanying text.

111. See *supra* note 75 and accompanying text.

112. *Garrett*, 531 U.S. at 367 (2001). When discussing rational basis scrutiny as it applies to disability discrimination, the Court stated, “States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational.” *Id.* “They could quite hardheadedly—and perhaps hardheartedly—hold to job qualification requirements which do not make allowance for the disabled.” *Id.*

113. See *Erickson v Bd. of Governors*, 207 F.3d 945, 956–57 (7th Cir. 2000) (Wood, J., dissenting). While Judge Wood acknowledged that age and disability discrimination receive rational basis scrutiny, she found that the Supreme Court analyzed disability discrimination under a heightened form of rational basis review in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). *Erickson*, 207 F.3d at 956–57. In *Cleburne*, the Court carefully analyzed an ordinance that discriminated against the mentally retarded, striking it down because it was based upon “irrational prejudice against the mentally retarded.” 473 U.S. at 450. Judge Wood interpreted the Court’s use of “careful scrutiny” to indicate that the ADA was enacted to prohibit irrational discrimination against the disabled, dispelling the idea that like the ADEA, the ADA prohibits constitutional actions. *Erickson*, 207 F.3d at 956; see also Sutor & Hamilton, *supra* note 9, at 501–02. While Sutor and Hamilton point to the deference accorded the states under traditional rational basis review as a reason why the ADA is a disproportional measure, they fail to address the Court’s use of second order rational basis review in *Cleburne*. *Id.*

114. 473 U.S. 432 (1985). In *Cleburne*, the Supreme Court analyzed whether the City of Cleburne violated the Equal Protection Clause when it denied a special use permit to a group home for the mentally retarded under a local zoning ordinance. *Id.* at 447–55. When analyzing the City’s basis for treating the group home differently, the Court departed from traditional rational basis review to conduct a “searching inquiry” into the City’s reasons. *Id.* at 460. In a dissenting opinion, Justice Marshall called this form of rational basis review “second order” rational basis review. *Id.* at 458.

second order rational basis review, the Court takes an “active” rather than a passive role in evaluating the government’s offered reasons for the discrimination. The Court often looks beyond the government’s objective reasons to determine if they are a pretext for “irrational” action.¹¹⁵ In *Cleburne*, the Court applied second order rational basis scrutiny to a zoning ordinance that discriminated against the mentally retarded and found that it was unconstitutional because it was based, in part, on “irrational prejudice.”¹¹⁶

Thus, the ADA is distinguishable from the ADEA. Unlike age discrimination, disability discrimination receives more protection under second order rational basis review.¹¹⁷ This expands the amount of behavior that Congress can regulate under Section Five of the Fourteenth Amendment. Therefore, unlike the ADEA, there is less potential for the ADA to regulate constitutional state practices.

2. The ADA Targets Specific Employment Practices

Furthermore, the ADA is distinguishable from the ADEA because it regulates specific employment practices.¹¹⁸ While the Supreme Court found that the mandates of the ADA, most specifically the reasonable accommodations requirement, were overbroad because they extended beyond the permissible scope of Fourteenth Amendment remedial measures,¹¹⁹ it failed to consider that Congress has broad powers to both remedy and deter violations of the Fourteenth Amendment.¹²⁰ In the dissenting opinion to *Garrett*, Justice

115. See Alfonso Madrid, Comment, *Rational Basis Review Goes Back to the Dentist’s Chair: Can the Toothless Test of Heller v. Doe Keep Gays in the Military?*, 4 TEMP. POL. & CIV. RTS. L. REV. 167, 171–72 (1994). After *Cleburne*, the concept of second order rational basis review was weakened by the Court’s decision in *Heller v. Doe*, 509 U.S. 312 (1993). See Saphire, *supra* note 43, at 635. However, the Court appeared to use a higher form of rational basis review in *Romer v. Evans*, 517 U.S. 620 (1996), indicating that second order rational basis review is still viable.

116. *Cleburne*, 473 U.S. at 448.

117. Age discrimination is also distinguishable from disability discrimination because unlike those aged forty and above, the disabled are a “discrete and insular” minority who have been subjected to a history of discrimination. See *Erickson*, 207 F.3d at 956 (Wood, J., dissenting). In contrast, “all persons, if they live out their normal life spans, will experience [old age].” *Id.* (quoting *Kimmel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000)). *But see* Sutor & Hamilton, *supra* note 9, at 499 (arguing that the ADA is an improper exercise of Congress’s power because disability discrimination receives rational basis review).

118. See *Muller v. Costello*, 187 F.3d 298, 310 (2d Cir. 1999) (finding that “[t]he ADA targets particular practices—in this case, discrimination in employment—and provides a remedy following the time-tested model provided by the anti-employment discrimination provisions of the Civil Rights Act of 1964”).

119. See *Erickson*, 207 F.3d at 951.

120. See *Garrett*, 531 U.S. at 365.

Breyer pointed out that the Court has repeatedly confirmed that Congress is allowed to prohibit conduct that is constitutional as long as it does not redefine the substance of the Fourteenth Amendment.¹²¹

As Judge Wood found in her dissenting opinion in *Erickson v. Board of Governors*,¹²² the ADA does not regulate all employment discrimination against the disabled.¹²³ The ADA requires an employer to make reasonable accommodations for a disabled employee only if such accommodations would not impose an undue burden on the employer.¹²⁴ Therefore, if an employer is faced with significant difficulty or expense in implementing reasonable accommodations, the ADA does not require them to do so.¹²⁵

Thus, in contrast to the ADEA, the ADA does not prohibit all, or almost all, discrimination against a given classification. It merely prevents an employer from refusing to offer reasonable accommodations where they would be feasible.¹²⁶ While this standard may prohibit some constitutional conduct, under the Court's reasoning Congress is allowed to regulate some constitutional behavior.¹²⁷ Therefore, the reasonableness standard for accommodations validly enforces the Equal Protection Clause of the Fourteenth Amendment. Its provisions do not go so far as to redefine the meaning of the Equal Protection Clause because the reasonableness standard and the undue hardship provision limit the amount of state conduct that Congress can regulate.

Therefore, the ADA is congruent and proportional; it regulates only the most severe state discrimination against the disabled. If an accommodation would create an undue burden on an employer, it can rationally deny employment to a disabled individual, even under second order rational basis scrutiny. Unlike the ADEA, the provisions of the ADA do not expand or redefine constitutional protection for the disabled. They merely prevent an employer from engaging in irrational discrimination such as the failure to provide reasonable accommodations to an otherwise qualified employee. However, as

121. *See id.* at 974–75.

122. 207 F.3d 945 (7th Cir. 2000).

123. *Id.* at 957.

124. *See supra* note 55 and accompanying text. It is estimated that when employers make reasonable accommodations for disabled employees the average cost is less than one hundred dollars. Margaret Graham Tebo, *Which Way for the ADA?*, A.B.A. J., Dec. 2000, at 58.

125. *See* 42 U.S.C. § 12111(10) (1995).

126. *Id.*; *see also id.* § 12111–12112.

127. *See Garrett*, 531 U.S. at 365.

the Court found in *Kimel*, the inquiry does not necessarily end with a finding on the constitutionality of the regulated conduct; the Court can ask whether Congress enacted reasonably prophylactic legislation by examining the legislative record.¹²⁸

B. The ADA Is Supported by Significant Legislative Findings of Disability Discrimination by the States

The ADA is also distinguishable from the ADEA because an examination of the ADA's legislative record reveals that the ADA is a proportionate response to the problem of disability discrimination. In *Kimel*, the Court found that "Congress never identified any pattern of age discrimination by the states."¹²⁹ In contrast, in *Garrett* Justice Breyer's dissent found that Congress engaged in an extensive investigation of disability discrimination before enacting the ADA.¹³⁰ It commissioned two reports from the National Council on the Handicapped, an independent federal agency, to discuss the sufficiency of existing federal laws.¹³¹ Congress also held thirteen hearings on the ADA,¹³² sponsored sixty-three public forums across the country,¹³³ and reviewed evidence from almost five thousand individuals on the issue of disability discrimination.¹³⁴

With regard to the states, these resources uncovered pervasive discrimination against the disabled by state and local governments.¹³⁵ The finding included discrimination in areas under state control, such as employment,¹³⁶ education,¹³⁷ voting and political access,¹³⁸ public

128. See *supra* note 49 and accompanying text.

129. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000).

130. See *Garrett*, 531 U.S. 356, 377–78 (2001); see also *Erickson*, 207 F.3d at 958 (Wood, J., dissenting) (finding that Congress compiled an "immense legislative record" when it decided whether to enact the ADA); 42 U.S.C. § 12101(a).

131. See Brief for the United States at 9, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (No. 99-1240).

132. See Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 393 n.1 (1991) (listing the hearings). Cook documented the history of discrimination against the disabled by the states. *Id.* at 399–407. He pointed out that "virtually every state" had laws that segregated people with disabilities, finding that they were a "blight on mankind." *Id.* at 400, 402.

133. See Brief for the United States at 11, *Garrett*.

134. *Id.* at 12.

135. See *infra* notes 136–42. But see Reply Brief at 4, *Garrett* (No. 99-1240) (stating that there are no findings that the states engaged in unconstitutional disability discrimination).

136. See *infra* notes 141–42 and accompanying text.

137. See Brief for United States at 20–22, *Garrett* (No. 99-1240) (citing approximately twenty examples of state discrimination in education from at least six different states). For example, the Brief cited a finding that Ryan White, a child with AIDS, was denied access to a public school because local parents feared that he would "infect" other children, when in fact his

transportation,¹³⁹ and law enforcement.¹⁴⁰ Specifically, Congress made significant findings in the area of employment discrimination. For example, one witness told Congress that he “was told by the Essex Junction School System that they were not hiring me because I used a wheelchair. I suspected it in other situations, but in that one, they actually said that this was the reason.”¹⁴¹ Another witness, who suffered from arthritis, reported that she was “denied a job, not because she could not do the work but because ‘college trustees [thought] normal students shouldn’t see her.’”¹⁴²

These, along with other findings, distinguish the ADA from the ADEA. Contrary to the Supreme Court’s finding that the Congressional findings “fall short of even suggesting [a] pattern of unconstitutional discrimination,”¹⁴³ Congress identified numerous instances where the states have irrationally discriminated against the disabled.¹⁴⁴ Furthermore, as Justice Breyer found, Congress is not a

disease was not contagious through casual contact. See 136 CONG. REC. H2480 (daily ed. May 17, 1990) (statement of Rep. McDermott). Another example is a report of a student in Vermont who had to attend class with students two grade levels behind him because he could not climb a staircase that led to upper-level classrooms. See *Education for All Handicapped Children 1973–1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare*, 93d Cong., 1st Sess. 384 (1973) (statement of Peter Hickey).

138. See Brief of United States at 22–25, *Garrett* (No. 99-1240) (citing approximately thirty-one examples, from at least twelve different states, in which the states denied disabled individuals equal access to the voting and political process). As an illustration, the Brief cited a finding that a deaf individual was told that he or she could not vote because “you have to be able to hear your voice” to vote. See *Equal Access to Voting for Elderly and Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (Equal Access to Voting Hearings).

139. See Brief for United States at 25, *Garrett* (No. 99-1240) (citing approximately seven instances of state discrimination against the disabled in the provision of public transportation from at least three different states). For example, one report found that busses often pass individuals in wheelchairs, with walkers, or with crutches because the drivers do not want to take the time to pick them up. See 2 LEG. HIST. 1097 (statement of Bill Dorfer).

140. See Brief for United States at 26–27, *Garrett* (No. 99-1240) (citing approximately seventeen examples where law enforcement officers discriminated against individuals with disabilities from at least six different states). In one case, the police would not investigate a rape allegation by a blind woman because she was not capable of making a visual identification. See N.M. 1081; see also Brief for Amici Curiae Law Professors in Support of Respondents at 15–16, *Garrett* (No. 99-1240) (finding that “individuals with handicaps are all too often excluded from schools and educational programs, barred from employment or are underemployed because of archaic laws, denied access to transportation, buildings and housing . . . and are discriminated against by public laws which frequently exclude citizens with handicaps”).

141. See Brief for United States at 18, *Garrett* (No. 99-1240) (quoting 2 LEG. HIST. 1076) (statement of John Nelson).

142. See Brief for United States at 18, *Garrett* (No. 99-1240) (quoting S. REP. No. 116, at 7 (1989)).

143. *Garrett*, 531 U.S. at 366.

144. *Erickson v. Bd. of Governors*, 207 F.3d 945, 952 (7th Cir. 2000) (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 89–91 (2000)). In *Erickson*, Judge Wood said that “[c]ombining the explicit coverage of the sectors in which the states are the principal actors, with the deliberate

court of law.¹⁴⁵ It has broad fact-finding powers and its findings are not held to the same evidentiary standard as a court of law.¹⁴⁶ Under this standard, Congress acted reasonably when it abrogated the states' Eleventh Amendment immunity. Thus, unlike the ADEA, the provisions of the ADA are simply a response to pervasive and documented discrimination by the states.

CONCLUSION

Given the broad implications that the decision in *Board of Trustees of the University of Alabama v. Garrett* will have on other federal antidiscrimination statutes, the Court should have found that the ADA is a congruent and proportional response to disability discrimination by the states. The ADA is distinguishable from the ADEA because Congress appropriately tailored the remedies of the ADA to include only reasonable measures against employment discrimination. Furthermore, Congress supported the ADA with extensive findings regarding discrimination by the states against the disabled. Thus, private individuals should be able to bring suit for money damages against a state employer in federal court under the ADA.

decision of Congress to make the states subject to the statute, and finally with the enormous legislative record documenting the depth of the problem of disability discrimination, I find the second part of the *Kimel* approach satisfied by the ADA." *Erickson*, 207 F.3d at 959 (Wood, J., dissenting).

145. *Garrett*, 531 U.S. at 377–85 (Breyer, J., dissenting).

146. *Id.* at 381–85 (Breyer, J., dissenting).