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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." Its provisions significantly expanded the legal rights of forty-three million Americans with physical or mental disabilities, provided protection from employment discrimination and guaranteed the provision of public services and accommodations. As enacted, the ADA applied to state actors, local actors, private employers and private businesses.

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. In Kimel, the Court held that the Age Discrimination in

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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).

Employment Act ("ADEA") was unconstitutional as applied to the states. The Court reasoned that the ADEA was not a valid exercise of Congress's power under Section Five of the Fourteenth Amendment ("Section Five"). 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.

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

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


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.


14. *See infra* Section III.B.


holding that the Eleventh Amendment prevents private individuals from suing states in federal court for money damages. 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. Limitations on this option could severely restrict the enforcement of these statutes altogether. 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. 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. 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).
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." It protects individuals who are forty years of age or older from age discrimination in the conditions and privileges of employment. The ADEA applies to private sector employers with twenty or more employees and the federal government. It was amended in 1974 to allow suits against the states and their subdivisions. However, the Supreme Court recently held in *Kimel* that a state cannot be sued under the ADEA.

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. 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. The Court began its opinion with a discussion of the Eleventh Amendment and found that it protects nonconsenting states from lawsuits in federal court. 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).


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).


abrogate [a state's sovereign] immunity;" and (2) "if it did, whether Congress acted pursuant to a valid grant of constitutional authority.\textsuperscript{31} The Court proceeded by applying the test to the ADEA.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{36} The Court summarily dismissed the argument that Congress could derive its authority from the Commerce Clause.\textsuperscript{37} Turning to an analysis of Section Five, the Court found that Congress can abrogate the states' immunity under this provision.\textsuperscript{38} The Court found that Section Five is an affirmative grant

\textsuperscript{31} Kimel, 528 U.S. at 73 (citing Seminole Tribe, 517 U.S. at 55).


\textsuperscript{33} Kimel, 528 U.S. at 73 (quoting Dellmuth v. Muth, 491 U.S. 223, 228 (1989)).

\textsuperscript{34} Id. at 73–74; see also 29 U.S.C. § 216(b) (1995).

\textsuperscript{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.

\textsuperscript{36} Kimel, 528 U.S. at 80.

\textsuperscript{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.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{41} The Court began with an analysis of age discrimination to determine if the ADEA could pass the test.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{45}

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

\begin{itemize}
  \item 39. \textit{Kimel}, 528 U.S. at 80–81.
  \item 40. \textit{Id.} The Court stated that the ultimate interpretation of the Fourteenth Amendment's substantive provisions is the “province” of the judicial branch. \textit{Id.}
  \item 41. \textit{Id.} (quoting \textit{City of Boerne v. Flores}, 521 U.S. 507, 520 (1997)). \textit{Flores} applied the standard to the Religious Freedom Restoration Act and held the act to be inappropriate legislation under Section Five. \\
  \item 42. \textit{Kimel}, 528 U.S. at 83.
  \item 44. \textit{Kimel}, 528 U.S. at 83.
  \item 45. \textit{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.” \textit{Id.} (quoting \textit{City of Cleburne v. Cleburne Living Ctr.}, Inc., 473 U.S. 432, 440 (1985)).
  \item 46. \textit{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.” \textit{Id.}
  \item 47. \textit{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."

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. 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. This decision threatened the validity of the ADA and continues to threaten many other civil rights statutes.

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." 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. 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." Moreover, she must be qualified to perform "an unwarranted response to a perhaps inconsequential problem."
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(j).

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(c). 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).


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

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.\textsuperscript{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,\textsuperscript{63} by ruling that the states are immune from private suits under the ADA for money damages in federal court.\textsuperscript{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.\textsuperscript{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


\textsuperscript{63} 531 U.S. 356 (2001).

\textsuperscript{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.

\textsuperscript{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. Without hesitation, the Court found that this requirement was met by section 12202 of the ADA. 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.

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. 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.” However, the Court also warned that it, not Congress, retains the power to define the substantive meaning of the provisions of the Fourteenth Amendment.

With these principles in place, the Court proceeded by identifying the scope of the constitutional right at issue. Relying on City of Cleburne v. Cleburne Living Center, Inc., it held that disability discrimination receives rational basis scrutiny. 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. 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.

66. Id. at 363–64; see also supra note 31.
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)).
72. Id.
73. 473 U.S. 432 (1985); see infra notes 114–16 and accompanying text for a discussion of Cleburne.
75. Id. at 367 (citing Heller v. Doe, 509 U.S. 312, 320 (1993)).
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. 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. 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." 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. 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.

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." 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. 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. 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).
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).
83. *Id.*
84. See supra note 55 for a discussion of reasonable accommodations.
an ‘undue burden’ upon the employer.” Based on these findings, the Court concluded that the ADA was not a valid abrogation of the states’ Eleventh Amendment immunity.

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. The dissenting opinion began with an examination of the legislative history of the ADA. It found that Congress had compiled a “vast legislative record” indicating “massive, society-wide discrimination” against the disabled. The dissent reasoned that these findings, although general, implicate state governments because they are part of general society.

Justice Breyer also found that there are roughly three hundred examples of state discrimination against disabled individuals in the legislative history of the ADA. 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. He reasoned that, unlike a court, Congress often relies upon general conclusions from anecdotal and opinion-based evidence.

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 Breyers’ 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.”

After analyzing the legislative history of the ADA, Justice Breyer turned to the issue of congruence and proportionality. 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. 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. Under this principle, the reasonable accommodations provision is a valid exercise of congressional power even though it may be broader than constitutionally necessary.

Justice Breyer also found the Court’s decision was contrary to the very purpose of the Fourteenth Amendment. 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. 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.

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.


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. However, several federal appellate courts and four United States Supreme Court Justices disagreed. 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.

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. However, because all agree that Congress "clearly and unequivocally" intended to abrogate the states' Eleventh Amendment immunity, 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. When Congress enacts legislation under its Section Five powers, the remedy must be "congruent and proportional" to the injury that it seeks to prevent. 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.
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."\textsuperscript{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 \textit{Garrett}, the ADA suffered the same fate as the ADEA because age and disability discrimination both receive rational basis review.\textsuperscript{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.\textsuperscript{111} In particular, when the Supreme Court decided \textit{Garrett}, it found that a wide range of discriminatory treatment toward the disabled is constitutional.\textsuperscript{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 scrutiny\textsuperscript{113} in \textit{City of Cleburne v. Cleburne Living Center, Inc.}\textsuperscript{114} Under

\begin{itemize}
\item \textsuperscript{110} See supra notes 43–45 and accompanying text.
\item \textsuperscript{111} See supra note 75 and accompanying text.
\item \textsuperscript{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." \textit{Id.} "They could quite hardheartedly—and perhaps hardheaded—hold to job qualification requirements which do not make allowance for the disabled." \textit{Id.}
\item \textsuperscript{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 \textit{City of Cleburne v. Cleburne Living Center, Inc.}, 473 U.S. 432 (1985). Erickson, 207 F.3d at 956–57. In \textit{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 \textit{Cleburne}. \textit{Id.}
\item \textsuperscript{114} 473 U.S. 432 (1985). In \textit{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. \textit{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. \textit{Id.} at 460. In a dissenting opinion, Justice Marshall called this form of rational basis review "second order" rational basis review. \textit{Id.} at 458.
\end{itemize}
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. 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." Thus, the ADA is distinguishable from the ADEA. Unlike age discrimination, disability discrimination receives more protection under second order rational basis review. 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. 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, it failed to consider that Congress has broad powers to both remedy and deter violations of the Fourteenth Amendment. In the dissenting opinion to *Garrett*, Justice

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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.
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

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128. See supra note 49 and accompanying text.
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).
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, and law enforcement. 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." 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.'"

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," Congress identified numerous instances where the states have irrationally discriminated against the disabled. Furthermore, as Justice Breyer found, Congress is not a
court of law.\textsuperscript{145} It has broad fact-finding powers and its findings are not held to the same evidentiary standard as a court of law.\textsuperscript{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.

\textsuperscript{145} Garrett, 531 U.S. at 377–85 (Breyer, J., dissenting).

\textsuperscript{146} Id. at 381–85 (Breyer, J., dissenting).