STATE IMMUNITY AND THE AMERICANS WITH DISABILITIES ACT AFTER *BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT*

RYAN GILL*

INTRODUCTION

In recent years, the U.S. Supreme Court has consistently strengthened the State Sovereign Immunity Doctrine. As a result, it has eroded federal legislation aimed at protecting civil rights. Federal anti-discrimination laws have been particularly susceptible to these Fourteenth Amendment challenges.[1] In *Board of Trustees of the University of Alabama v. Garrett*,[2] the Court held that the states are not subject to private suits for monetary damages under Title I of the Americans with Disabilities Act (ADA or "the Act").[3] The *Garrett* Court declared that the remedies available under the ADA were not "congruent and proportional" to the constitutional violation at issue and therefore Congress could not validly grant money damages to a private plaintiff suing a state.[4] Under *Garrett*, then, state employees and job applicants are now left with little recourse in the face of discrimination by a state employer on the basis of disability.

The ADA was intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[5] Although the ADA is

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* Candidate for Juris Doctor, University of Colorado School of Law, 2003; B.A., University of Colorado, 2000.

1. *See, e.g.*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (legislation prohibiting discrimination of the basis of disability); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (legislation prohibiting discrimination on the basis of age); *see also* Melissa Hart, *Conflating Scope of Right with Standard of Review: The Supreme Court's Strict Scrutiny of Congressional Efforts to Enforce the Fourteenth Amendment*, 46 VILL. L. REV. 1091 (2001).

2. 531 U.S. 356.

3. 42 U.S.C. §§ 12111–12117 (2000).

4. *Garrett*, 531 U.S. at 374.

5. 42 U.S.C. § 12101(b)(1).

comprised of several Titles, this discussion focuses on Titles I and II because both make states amenable to private suits for money damages.[6] Title I prohibits employers, including state employers, from discriminating against "qualified individual[s] with a disability" in employment.[7] 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 any such entity."[8] The Court in *Garrett* addressed only Title I of the ADA.[9] As a result, it has yet to be determined whether private suits for money damages will continue to be available to private parties suing the states under Title II.[10] Moreover, because *Garrett* addressed only private suits for *monetary* damages against the states under Title I, there is also some question as to what alternative remedies remain available for private plaintiffs to remedy state discrimination under both Titles I and II of the ADA.[11]

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6. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

7. § 12112(a).

8. § 12132.

9. The Court stated in note 1 that although the question whether Title II is constitutional was properly before the Court on appeal, the Court would not address Title II in that case because neither party had "briefed the question whether Title II of the ADA, dealing with the 'services, programs, or activities of a public entity,' 42 U.S.C. § 12132, is available for claims of employment discrimination when Title I of the ADA expressly deals with that subject." *Garrett*, 531 U.S. at 360 n.1.

10. Several United States Circuit Courts of Appeals have addressed the issue since *Garrett*. *See infra* Section V.C.

11. The Supreme Court granted *certiorari* this term in *Medical Board of California v. Hason* to address these issues. However, because the petitioners, the California State Board of Medical Examiners withdrew their petition for appeal the Court has removed the case from its argument calendar, and the appeal will likely be dismissed. Nevertheless, the Court's grant of *certiorari* indicates that the Supreme Court is willing to hear and decide the issue. *See* Hason v. Med. Bd., 279 F.3d 1167 (9th Cir. 2002), *cert. granted*, Med. Bd. v. Hason, 123 S. Ct. 561 (2002). Also see Judge David L. Bazelon Center for Mental Health Law, *Update: California Medical Board Drops Hason petition*, *available at* http://www.bazelon.org/issues/disabilityrights/legal/hason/index.htm, which says:

> On March 7, The Supreme Court removed Hason from the argument calendar, and it is very likely the high court will dismiss the case. On February 28, the California Medical Board decided not to pursue its Supreme Court petition in the Hason case. Responding to concerns about the litigation's possible effect on the scope and enforcement of the Americans with Disabilities Act that had been voiced not only by California

This Comment analyzes the *Garrett* decision and the uncertain future of Title II of the ADA in the aftermath of *Garrett*. Section I provides a cursory overview of the ADA, the Eleventh Amendment and the Fourteenth Amendment. Section II details the establishment of the "congruence and proportionality" test in *City of Boerne v. Flores* and its application in Eleventh Amendment jurisprudence. Section III discusses the *Garrett* decision and its reasoning. Section IV analyzes the Court's requirement that Congress provide a detailed congressional record of constitutional violations before it can abrogate a state's sovereign immunity under the Eleventh Amendment. Section V considers the future of the ADA after *Garrett*, including key differences between both the remedial provisions of Titles I and II and the circuit court trends addressing private money damages under Title II. Finally, Section VI considers other remedies still available to private plaintiffs under both Titles I and II. This Comment concludes that there are significant differences between the private remedies available under Titles I and II which should warrant different treatment for Title II under the "congruence and proportionality" test. However, the circuit courts of appeals have begun a clear trend toward invalidating the private remedies under Title II. These cases make it clear that the remedial differences between Titles I and II are not viewed as significant enough to merit different treatment for Title II under the "congruent and proportionality" test. Accordingly, it is likely that, if squarely addressed, the Supreme Court would also declare Title II's private right of action to be an unconstitutional exercise of congressional power.

I. BACKGROUND INFORMATION ON THE ADA AND STATE SOVEREIGN IMMUNITY

State sovereign immunity and federal legislation that purports to abrogate that immunity involves the interplay of three areas of law: the legislation itself, the Eleventh Amendment, and the Fourteenth Amendment. Some background informa-

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disability rights activists, but also California Attorney General Bill Lockyer and Governor Gray Davis, the board voted 14-1 not to pursue the petition.

See also Supreme Court Docket 02-479, *available at* http://www.supremecourtus.gov/docket/02-479.htm.

tion on the ADA and the components of the sovereign immunity doctrine is necessary for this discussion. This section first discusses the ADA in broad terms and gives an overview of the purpose of the legislation and the rights created under it. Second, this section provides an overview of the Eleventh Amendment and the state sovereignty doctrine. Third, this section provides a broad outline of the protections guaranteed by the Fourteenth Amendment.

A. The Americans with Disabilities Act

With the passage of the ADA, Congress intended "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" and "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[12] In order to accomplish these goals, Congress invoked two of its constitutionally granted legislative powers to enact the ADA[13]: Section Five of the Fourteenth Amendment[14] and the Commerce Clause.[15] The purpose of the Act is, in part, "to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."[16]

Under the ADA's statutory scheme, a "disability" can be defined in one of three ways: first, as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;" second, as "a record of such an impairment;" and third, as the perception of "having such an impairment."[17] The Act not only prohibits invidious discrimination against disabled persons but also mandates that employers provide "reasonable accommodations" for a "qualified individual with a disability" unless it can be demonstrated that such an accommodation would cause undue hardship for the employer.[18] Failure to make such reasonable accommodations

12. 42 U.S.C. §§ 12101(b)(1), 12101(b)(2).
13. 12101(b)(4).
14. U.S. CONST. amend. XIV, § 5.
15. U.S. CONST. art. I, § 8, cl. 3.
16. 42 U.S.C. § 12101(b)(4).
17. § 12102(2).
18. § 12112(b)(5)(A).

in the absence of undue hardship constitutes actionable discrimination under the ADA.[19]

Under Title I, covered employers,[20] including all state employers,[21] are prohibited from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual."[22] Title II is broader than Title I in that it applies to all public places and public services and applies to all disabled people, not just disabled employees.[23] Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[24]

Both Titles I and II allow for money damages to be sought by private plaintiffs against a covered entity that violates the ADA.[25] As previously stated, however, under *Garrett* the pri-

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19. *Id.*

20. Section 12111(5)(A) states:

> The term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

21. Section 12202 states that "a State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act." *Id.* at § 12202.

22. *Id.* at § 12112(a). The general rule states "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* at § 12112(a). A "[c]overed entity" is defined as "an employer, employment agency, labor organization, or joint labor-management committee." *Id.* at § 12111(2). The Act also provides that "The terms 'person,' 'labor organization,' 'employment agency,' 'commerce,' and 'industry affecting commerce,' shall have the same meaning given such terms in section 2000e of this title." *Id.* at § 12111(7).

23. *Id.* at § 12132.

24. *Id.*

25. Section 12117(a) states:

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title [705, 706, 707, 709, and 710 of the Civil Rights Act of 1964] shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of

vate monetary remedies permitted by Title I were found unconstitutional when challenged by the States. Moreover, under various federal circuit courts' of appeals decisions that followed *Garrett*, the monetary remedies permitted by Title II have been successfully resisted by states that argue such awards violate their sovereign immunity guaranteed by the Eleventh Amendment.[26]

B. The Eleventh Amendment

The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[27] The Eleventh Amendment was proposed in response to *Chisholm v. Georgia*,[28] where the Supreme Court upheld federal jurisdiction over a contract action brought by citizens of South Carolina against the state of Georgia for payment for goods sold to the state.[29]

Although the plain text of the Eleventh Amendment only bars suits against a state by citizens of a different state, the Supreme Court in *Hans v. Louisiana*[30] took the concept of state sovereign immunity a step further. There, the Court held that despite its explicit language, the Eleventh Amendment granted immunity to the states against suits from their own citizens.[31] The Court in *Hans* stated that because state immunity existed prior to the passage of the Eleventh Amendment it was not limited by the language of that amendment.[32]

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disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

Id. at § 12117(a). Section 12133 states:

The remedies, procedures, and rights set forth in section 794a of title 29 [section 505 of the Rehabilitation Act of 1793] shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

Id. at § 12133.

26. *See infra* Section V.C.
27. U.S. CONST. amend. XI.
28. 2 U.S. (2 Dall.) 419 (1793).
29. *Chisholm*, 2 U.S. (2 Dall.) at 419–20.
30. 134 U.S. 1 (1890).
31. *Id.* at 15–16.
32. *Id.*

Despite *Hans*, Congress's ability to permit private suits for damages against non-consenting states in federal statutes pursuant to its Commerce Clause powers largely went unquestioned during the 106 years between *Hans* and *Seminole Tribe v. Florida*.[33] The Supreme Court's modern state sovereignty jurisprudence[34] stems from a constitutional test derived from a line of cases beginning with *Seminole Tribe*.

In *Seminole Tribe*, the Court overruled precedent[35] and held that Congress could not abrogate states' Eleventh Amendment sovereign immunity through its Article I Commerce Clause powers.[36] To reach this result, the Court set forth a two-tiered analysis to evaluate a statute that purports to abrogate the states' Eleventh Amendment immunity. Under the analysis, the Court must first determine whether Congress "unequivocally expressed its intent to abrogate the immunity."[37] Second, the Court must determine whether Congress acted "pursuant to a valid exercise of power."[38]

Applying this test to the statute in *Seminole Tribe*, the Court stated that Congress had clearly expressed its intent to abrogate state sovereign immunity,[39] but had not acted pursu-

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33. Seminole Tribe v. Florida, 517 U.S. 44 (1996); *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (upholding commerce clause power as a source of power to abrogate state sovereignty). *Seminole Tribe* is analyzed in more depth *infra*, Section I.B.

34. The Eleventh Amendment has a lengthy and rich history; however, the modern approach to state sovereignty took a dramatic shift with *Seminole Tribe* and that is where the "modern" revivalist approach to state sovereignty begins.

35. Prior to *Seminole Tribe*, Congress was clearly allowed to utilize the commerce clause as a source of authority to abrogate state sovereignty. *See, e.g.*, Hoffman v. Conn. Dep't of Income Maint., 492 U.S. 96 (1989) (allowing for congressional authority on commerce grounds, but not a valid abrogation of the Eleventh Amendment on other grounds); *Union Gas Co.*, 491 U.S. at 1; Welch v. Tex. Dep't of Highways and Pub. Transp., 483 U.S. 468 (1987); Quern v. Jordan, 440 U.S. 332 (1979) (referring to commerce clause power as power to abrogate the Eleventh Amendment); Employees of Dep't of Pub. Health and Welfare v. Dep't of Pub. Health and Welfare, 411 U.S. 279 (1973); Parden v. Terminal Ry. of Ala. Docks Dep't, 377 U.S. 184, 191 (1964) ("[T]he States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce.").

36. *Seminole Tribe*, 517 U.S. at 66.

37. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000).

38. *Seminole Tribe*, 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)); *see also* Dellmuth v. Muth, 491 U.S. 223, 228 (1989) (holding that Congress must make its intention to abrogate the states' Eleventh Amendment immunity unmistakably clear in the language of the statute).

39. *Seminole Tribe*, 517 U.S. at 56 ("Congress has in § 2710(d)(7) provided an 'unmistakably clear' statement of its intent to abrogate.").

ant to a valid exercise of power.[40] To reach that decision, the Court held that Congress does not have the authority under the Commerce Clause to abrogate state sovereign immunity from private suits in federal courts because such an exercise would amount to an impermissible expansion of the courts' Article III jurisdiction.[41] Importantly, Article III sets forth the entire catalog of permissible federal court jurisdiction and the bounds of Article III can only be expanded by the Fourteenth Amendment.[42] This results because the Fourteenth Amendment was ratified *after* the Eleventh Amendment and therefore "expand[ed] federal power at the expense of state autonomy" thereby "fundamentally alter[ing] the balance of state and federal power struck by the Constitution."[43]

After *Seminole Tribe*, the only way Congress can abrogate state sovereign immunity is through valid legislation passed under its legislative powers found in Section Five of the Fourteenth Amendment. As will be seen below, this means Congress can only provide a private damage remedy against the states in response to a pattern and history of state behavior that violates a person's Fourteenth Amendment guarantees.

C. The Fourteenth Amendment

In its broadest outline, the Fourteenth Amendment ensures that all persons similarly situated receive the same treatment by the government.[44] There are five different sections of the Fourteenth Amendment. For purposes of this discussion, only Sections 1 and 5 are important. Section 1 states that:

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40. The statute at issue (the Indian Gaming Regulatory Act) was passed pursuant to the Indian Commerce Clause; however, the court states that "no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause." *Id.* at 63. The statute allowed a tribe to sue a state in federal court for violating the duty to negotiate with the tribe. *Id.* at 47.

41. *Id.* at 65.

42. *Id.*

43. *Id.* at 59.

44. *See, e.g.*, Ross v Moffitt, 417 U.S. 600, 609 (1974) ("'Due process' emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. 'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.").

> 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.[45]

In order to give effect to Section 1, Section 5 gives Congress the authority "to enforce, by appropriate legislation, the provisions of this article."[46] This legislative authority was clarified in *Ex parte Virginia*,[47] where the Supreme Court held that:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever *tends to enforce* submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.[48]

This statement of congressional authority under Section 5, although cited in Section 5 cases frequently, does not remain entirely accurate today. The test for "appropriate legislation" has shifted from "tends to enforce" the Fourteenth Amendment prohibitions to a "congruence and proportionality" test[49] as set forth in *City of Boerne v. Flores*.[50]

II. THE CONGRUENCE AND PROPORTIONALITY TEST: *CITY OF BOERNE V. FLORES* AND ITS APPLICATION

A. City of Boerne v. Flores

In 1997, the Supreme Court decided *City of Boerne v. Flores*, which narrowed congressional power to enact legislation by restricting the understanding of proper legislation under Section Five of the Fourteenth Amendment.[51] In *Flores*, the Court reviewed the validity of the Religious Freedom Restoration Act

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45. U.S. CONST. amend. XIV, § 1.
46. *Id.* at § 5.
47. 100 U.S. 339 (1879).
48. *Ex parte Virginia*, 100 U.S. at 345–46 (emphasis added).
49. *See* discussion in Section II, *infra*.
50. 521 U.S. 507 (1997).
51. *Id.*

(RFRA). The RFRA was established to prohibit the "government" from substantially burdening[52] an individual's exercise of religion unless it could demonstrate a compelling governmental interest and show that the means are the least restrictive way of furthering the interest.[53] In passing the RFRA, Congress purported to be acting under its Section Five powers.[54]

Congress may use its Section Five authority to enforce Fourteenth Amendment rights by appropriate legislation.[55] In defining the scope of Congressional power to enforce constitutional rights, the Court agreed that legislation that remedies or deters constitutional violations is within Congress's enforcement powers, even if it prohibits some conduct that is not in itself unconstitutional and intrudes into state autonomy.[56]

Under *Flores*, however, the Court declared that legislation passed under the Fourteenth Amendment is subject to a two-tiered congruence and proportionality test. Under this test, Congress must first identify and provide evidence of a constitutional wrong or "evil" that is to be remedied or prevented.[57] Second, the Court stated that "[t]he appropriateness of remedial measures must be considered in light of the evil presented."[58] Accordingly, the Court held that there must be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[59] Recall that Congress is only allowed to enforce the existent guarantees of the Fourteenth Amendment and cannot create new rights under it. According to the Court in *Flores*, where legislation is not "congruent and proportional" to the constitutional

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52. "Governments should not substantially burden religious exercise without compelling justification." 42 U.S.C. § 2000bb(a)(3) (2000).

53. 42 U.S.C. § 2000bb-1(a) ("Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b)."); *see also Flores*, 521 U.S. at 515–16.

54. *Flores*, 521 U.S. at 516–17, saying:

> The parties disagree over whether RFRA is a proper exercise of Congress' § 5 power 'to enforce' by 'appropriate legislation' the constitutional guarantee that no State shall deprive any person of 'life, liberty, or property, without due process of law' nor deny any person 'equal protection of the laws.'

55. *Id.* at 517–18.

56. *Id.* at 518.

57. *Id.* at 530, 532.

58. *Id.*

59. *Id.*

wrong, the legislation is no longer remedial, but substantive in nature and oversteps the powers afforded to Congress under Section Five.[60] Where legislation prohibits more constitutional than unconstitutional conduct, it will fail the "congruence and proportionality" test.

In *Flores*, the plaintiff church sued a municipality arguing that the city's building codes, applicable to churches, burdened the exercise of religion in violation of the RFRA. Here, the city's codes restricted the church's plans for physical expansion because they did not comport with the city ordinance.[61] Because the RFRA did in fact prohibit the application of the building codes to religious institutions, the city challenged the constitutionality of the RFRA, arguing that it exceeded Congress's constitutional authority. The Supreme Court agreed, finding that the effect of the RFRA was to ban hundreds of laws of neutral applications—like the building codes at issue—for mere incidental, unintentional burdens on First Amendment rights.[62] Because the First Amendment—and, by extension, the Fourteenth Amendment—does not prohibit minor, unintended burdens on the practice of religion, the RFRA prohibited much more *constitutional* conduct than it did *unconstitutional* conduct. Accordingly, the RFRA, which permitted private plaintiffs to sue cities for inherently constitutional laws, was held to be neither "congruent" nor "proportional" to the "evil" to be remedied or prevented.[63] Thus, in passing the RFRA, Congress went beyond its remedial enforcement powers of Section Five and created new substantive constitutional rights, which it cannot do without a constitutional amendment.[64]

Nevertheless, according to the *Flores* Court, broad prophylactic or preventative legislation is sometimes appropriate under Congress's Section Five remedial powers.[65] In order to justify such legislation, however, Congress must establish a strong evidentiary record of unconstitutional behavior of the type to be remedied or prevented by the statute in question.[66] Even if the statute prohibits a broad swath of both constitutional and un-

60. *Id.*
61. *Id.* at 511–12.
62. *Id.* at 532.
63. *Id.* at 520.
64. *Id.* 519–20.
65. *Id.* at 530.
66. *Id.* at 530–32.

constitutional conduct, it will be "congruent and proportional" to the "evil" it prevents or remedies *if* Congress proves that the evil—unconstitutional conduct by the government—exists. According to the *Flores* court, Congress can only prove the evil exists through a substantial congressional record made in passing the statute.[67]

In *Flores*, the Court began the trend of looking at the legislative record and comparing that record to the record established for the Voting Rights Act in *South Carolina v. Katzenbach*.[68] The Court held *Katzenbach* out as an example of a situation where Congress was justified in enacting strong prophylactic legislation in response to substantial evidence of egregious constitutional violations.[69] The Court then stated that "[i]n contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry."[70]

B. South Carolina v. Katzenbach

South Carolina v. Katzenbach,[71] although a much older case, serves as a good contrast to *Flores*. *Katzenbach* has been cited by the Supreme Court for the principle that "the appropriateness of remedial measures must be considered in light of the evil presented."[72] The Court cites *Katzenbach* to illustrate the type of pervasive unconstitutional state behavior that warrants remedial legislation under the Fourteenth Amendment.[73]

In *Katzenbach*, the Court upheld the Voting Rights Act of 1965 because the Act was created in response to what Congress saw as a pattern of serious and egregious constitutional violations by the southern states that created substantial obstacles

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67. *Id.*

68. 383 U.S. 301 (1966).

69. *Flores*, 521 U.S. at 525–26.

70. *Id.* at 530.

71. 383 U.S. 301 (1966).

72. *Flores*, 521 U.S. at 530; *see also* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000); *Katzenbach*, 383 U.S. at 308.

73. *Katzenbach* is neither a Fourteenth Amendment case nor an Eleventh Amendment case. Rather, it is a Fifteenth Amendment case. The Fifteenth Amendment is similar to the Fourteenth in that it allows Congress to remedy racial discrimination in state voting practices by "appropriate legislation." *Flores* analogized to *Katzenbach* because of the similar "appropriateness" inquiry that must be made under the Fifteenth Amendment.

for minority voters.[74] In *Katzenbach*, the Court determined that the statute was appropriate because it was a narrowly tailored remedial scheme designed to enforce the Fifteenth Amendment only in those states where there was a great deal of evidence of states denying minorities their voting rights.[75]

The evidentiary record compiled when enacting the Voting Rights Act was used as a standard for comparison in *Flores*. The Court saw the constitutional violations addressed in the Voting Rights Act as a good example of a situation in which Congress would be empowered to enact substantive legislation under the Fourteenth Amendment. In *Katzenbach*, Congress had established a clear record of rampant voting discrimination on the basis of race in the southern states.[76] *Flores* indicated that "strong remedial and preventive measures [were justified] to respond to the widespread and persisting deprivation of constitutional rights resulting from this country's history of racial discrimination."[77] Moreover, in *Katzenbach* there was evidence that states had purposefully defied the mandates of the constitution, the courts, and Congress by devising methods to perpetuate voting discrimination based on race.[78] Yet, the *Flores* Court's endorsement of *Katzenbach* shows that the "congruence and proportionality" test is likely to be different for groups that have historically been discriminated against by the states. As will be seen below, statutes designed to protect other groups that do not have such a long and insidious history of discrimination—like the aged and the disabled—will have a harder time passing the test.

C. Kimel v. Florida Board of Regents

In 2000, the Supreme Court applied its "congruence and proportionality" test to the Age Discrimination in Employment Act of 1967 (ADEA)[79] in *Kimel v. Florida Board of Regents*.[80]

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74. *Katzenbach*, 383 U.S. at 312, 315.

75. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 373 (2001).

76. *Katzenbach*, 383 U.S. at 308.

77. *Flores*, 521 U.S. at 526. The Court also compared the RFRA to the Voting Rights Act in terms of the Voting Rights Act's limited application to only those areas of the country where there was a bona fide discrimination problem. *Id.* at 532–33.

78. *Katzenbach*, 383 U.S. at 309 ("Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.").

79. 29 U.S.C. §§ 621–634 (2000).

Here, the Court concluded that the ADEA provision allowing private suits for damages against the states did not constitute "appropriate" legislation under Section Five of the Fourteenth Amendment.[81] The Court determined that the "substantive requirements imposed on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[82]

Importantly, the *Kimel* court was the first to consider the "congruence and proportionality" test for a federal statute that purported to abrogate state sovereign immunity by permitting private suits in response to state discrimination. In this setting, the Court declared, the test would be guided by a traditional equal protection analysis—that part of constitutional law that forbids discrimination by the government. For this reason, a brief overview of the Fourteenth Amendment equal protection doctrine is valuable. The Equal Protection Clause is part of Section One of the Fourteenth Amendment and provides that states cannot "deny to any person within its jurisdiction the equal protection of the laws."[83] The Supreme Court has established a three-tiered standard of review for legislation that classifies or categorizes groups of individuals, in order to determine if state laws deny their citizens the equal protection of the laws: strict scrutiny, intermediate scrutiny, and rational basis review.[84]

Under this three-tiered approach, laws that discriminate against or are based on "suspect classifications" receive strict scrutiny.[85] All classifications on the basis of race and national origin are subject to strict scrutiny.[86] Laws touching on "quasi-suspect classifications" receive intermediate scrutiny.[87] Intermediate scrutiny applies primarily in the case of gender discrimination.[88] Laws involving all other classifications or groups receive rational basis review.[89]

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80. 528 U.S. 62 (2000).
81. *Kimel*, 528 U.S. at 82–83.
82. *Id.* at 83.
83. U.S. CONST. amend. XIV, § 1.
84. Kittery Motorcycle, Inc. v. Rowe, 320 F.3d 42, 47 (1st Cir. 2003).
85. *Id.*
86. Clark v. Jeter, 486 U.S. 456, 461 (1988).
87. *Kittery Motorcycle*, 320 F.3d at 47.
88. *See, e.g.*, Concrete Workers v. City & County of Denver, 321 F.3d 950, 959 (10th Cir. 2003).
89. *Kittery Motorcycle*, 320 F.3d at 47.

These three standards differ primarily in the showing that the government is required to make to show that the classification at issue is constitutional. Strict scrutiny requires that there be a "compelling governmental interest" and that the means be "narrowly tailored" to address that interest.[90] Intermediate scrutiny requires that there be an "important governmental purpose" and that the means to effectuate that purpose are "substantially related" to the objective.[91] Rational basis review requires only that there be a "legitimate state objective" and that the means are "rationally related" to achieving that objective.[92]

The level of scrutiny a group or classification receives is often determinative as to whether that classification is unconstitutional. Strict scrutiny classifications are almost always found unconstitutional.[93] Rational basis review classifications are almost always constitutional.[94] Intermediate scrutiny classifications can go either way, and tend not to be determinative.[95]

The Court in *Kimel* looked to its prior equal protection case law to determine the applicable standard of review for discrimination on the basis of age.[96] These cases stood for the proposition that state discrimination based on age was subject only to rational basis review.[97] Thus, the Court stated that the "congruence and proportionality" of the ADEA would be determined under the rational basis test.

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90. Republican Party v. White, 122 S. Ct. 2528, 2534–35 (2002) ("Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest."); *see also* Attorney General v. Soto-Lopez, 476 U.S. 898, 904 (1984).

91. Craig v. Boren, 429 U.S. 190, 197 (1979); *see also* Frontiero v. Richardson, 411 U.S. 677 (1973).

92. *Kittery Motorcycle*, 320 F.3d at 47.

93. Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) (citing Korematsu v. United States, 323 U.S. 214 (1944)).

94. *Id.* at 319–20 (Marshall, J., dissenting) (citing New Orleans v. Dukes, 427 U.S. 297 (1976).).

95. *See, e.g.*, Linda M. Cunicelli, Note, Gregory v. Ashcroft*: Setting the Stage to Overrule* Garcia *in the Context of Mandatory Retirement of State Judges*, 2 WIDENER J. PUB. L. 139, 181 (1992) ("The simple fact that intermediate scrutiny is utilized is not determinative of the outcome; choosing the middle tier, however, opens up the possibility of meaningful analysis about whether the standard has actually been met, unlike strict scrutiny or mere rationality.").

96. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000); *see also*, Gregory v. Ashcroft, 501 U.S. 452 (1991); Vance v. Bradley, 440 U.S. 93 (1979); *Murgia*, 427 U.S. at 307 (*per curium*).

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

Under rational basis review, "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[98] Moreover, "a State may [also] rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests."[99] The court noted several legitimate state interests that could be rationally furthered by discriminating on the basis of age.[100] Although the Court cited to physical preparedness as a legitimate state interest for which age could be used as a proxy,[101] there are other examples of even less substantial state interests that are legitimate. For example, state discrimination on the basis of age to save the state money in administrative costs would also be constitutional because saving money is a legitimate state interest, and discriminating on the basis of age to save money is rationally related to that goal.

However, the Court did acknowledge that invidious state discrimination on the basis of age would be unconstitutional, and that such discrimination would "require powerful remedies."[102] An example of such irrational discrimination might be if a state official fired people of a certain age merely because he did not like people of that age. However, the Court explained that the vast majority of state age discrimination was likely to be constitutional.[103] Thus, the Court determined, like the RFRA, the ADEA prohibited substantially more *constitutional* than unconstitutional conduct.[104] Moreover, without a record of evidence showing a history and pattern of *invidious* age discrimination by the states, the broad prophylactic remedies available under the ADEA were invalid against the states because they were not "congruent and proportional" to the "evil"

98. *Id.*

99. *Id.* at 84.

100. *Id.* at 84–85 (noting such age can serve as a proxy for such interests as physical health and fitness and deterioration of job performance with old age).

101. *Id.*

102. *Id.* at 88.

103. "Our Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it is probably not true that those reasons *are valid in the majority of cases*." *Id.* at 86 (quotations omitted) (emphasis added).

104. "The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard." *Id.* at 86.

to be prevented or remedied.[105] What is also important to note here is that if there had been a substantial record of *unconstitutional* state age discrimination—like the Voting Rights Act had in *Katzenbach*—then the private monetary damages remedy would likely have been constitutional. But, without a significant Congressional record, the ADEA was not congruent and proportional to the evil in question, since the evil in question included more constitutional than unconstitutional behavior.[106]

III. THE *GARRETT* DECISION

The United States Supreme Court continued this Eleventh and Fourteenth Amendment jurisprudential trend in *Board of Trustees of the University of Alabama v. Garrett*,[107] where it found that the private actions for monetary damages available under Title I of the ADA were an unconstitutional violation of state sovereign immunity. This was perhaps inevitable given its recent decision in *Kimel*.

Garrett was a consolidation of two cases, both involving employees of the State of Alabama.[108] Respondent Patricia Garrett was employed as a nurse for an Alabama state hospital while she underwent treatment for cancer.[109] After her leave of absence for this treatment, she was forced to give up her position and take a lower paying position with the hospital.[110] Respondent Milton Ash was a security officer for the Alabama Department of Youth Services ("Department") who suffered from chronic asthma and sleep apnea.[111] The Department refused to grant Ash any accommodations for either medical condition, in apparent violation of the ADA.[112]

Both respondents brought an ADA claim against their state employer in the United States District Court for the Northern District of Alabama, which granted the state's motion

105. *Id.* at 88–89.
106. *Id.* at 91.
107. 531 U.S. 356 (2001).
108. *Id.* at 362.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* Ash's requested accommodations for his asthma were that his schedule be modified in order to minimize his exposure to carbon monoxide and cigarette smoke. He also requested that he be assigned only to daytime shifts to accommodate his sleep apnea. *Id.*

for summary judgment on Eleventh Amendment (sovereign immunity) grounds.[113] The Eleventh Circuit Court of Appeals reversed the district court, holding that the ADA was a valid abrogation of state sovereign immunity.[114] The Supreme Court granted *certiorari* and Chief Justice Rehnquist delivered the Court's opinion, reversing the Court of Appeals.[115]

At issue before the Court was the propriety of a private suit for money damages against the states under the ADA given the Court's recent decision in *Kimel*. The Court began by defining what is required of congressional legislation that abrogates Eleventh Amendment immunity from the cases discussed in Part II of this Comment.[116] Based on the Court's various decisions in this area, the Court essentially applied a three-part test to determine whether the ADA had validly abrogated the states' Eleventh Amendment immunity. First, the Court stated that under *Kimel*, Congress can abrogate state immunity only when it makes its intention to do so clear.[117] Second, the Court stated that it must determine the scope of the constitutional right at issue.[118] Third, the Court stated that it must determine whether the remedy is congruent and proportional to the targeted constitutional violation under its Fourteenth Amendment jurisprudence.[119]

A. *Congressional Intention to Abrogate State Sovereign Immunity*

In *Garrett*, the Court first acknowledged that Congress's intention to abrogate state immunity was not contested. Title I of the ADA stated clearly that "a State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."[120] The remaining question was then whether Congress acted within

113. *Id.* at 362–63 (citing Garrett v. Univ. of Ala. Bd. of Trs., 989 F. Supp. 1409, 1410 (N.D. Ala. 1998)).

114. *Id.* at 363 (citing Garrett v. Univ. of Ala. Bd. of Trs., 193 F.3d 1214 (11th Cir. 1999)).

115. *Id.* at 360, 363.

116. *Id.* at 363–66.

117. *Id.* at 363; Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000).

118. *Garrett*, 531 U.S. at 365–66.

119. *Id.* at 374.

120. 42 U.S.C. § 12202 (2000).

its power under the Fourteenth Amendment. In order to determine whether Congress acted pursuant to valid Fourteenth Amendment authority, the Court first had to determine the scope of the constitutional right at issue.

B. Scope of the Constitutional Right at Issue

In order to define the scope of the constitutional right at issue, the Court had to determine to what extent Section 1 rights were implicated by the states' treatment of the disabled. Like the Court in *Kimel*, the *Garrett* Court first looked to its precedent on the classification at issue—in this case, the disabled. Here, the Court relied upon *City of Cleburne v. Cleburne Living Center*,[121] a Fourteenth Amendment case that addressed the constitutionality of discrimination against the disabled. There, the Court stated that the "mentally retarded"[122] constituted a non-suspect class and thus discrimination against them would be reviewed under the rational basis standard.[123] The Court in *Garrett* then likened the class of "mentally retarded" to the class of the "disabled," holding that, like the "mentally retarded," the disabled are also a non-suspect class reviewed under the rational basis standard for equal protection purposes.[124] Thus, as in *Kimel*, the *Garrett* court declared that legislation or conduct that discriminated against employees on the basis of a disability would be subject only to rational basis review, rather than a higher level of scrutiny.

As noted in the *Kimel* discussion, under the rational basis standard of review, the distinction between rational and irrational discrimination is key. "Rational" discrimination is any discrimination, so long as it is minimally related to a legitimate state goal.[125] Any conceivably rational explanation for the discrimination will require that the discrimination itself be deemed rational, and thus constitutional.[126] Moreover, a "legitimate" state goal is defined broadly enough to encompass administrative efficiency and saving the state money. Under such a standard, very little discrimination short of outright in-

121. 473 U.S. 432 (1985).

122. Although perhaps not the politically correct terminology, it is the terminology of the Court. *See Garrett*, 531 U.S. at 366.

123. *Cleburne Living Center*, 473 U.S. at 435.

124. *Garrett*, 531 U.S. at 367.

125. *Id.*

126. Heller v. Doe, 509 U.S. 312, 320 (1993).

vidious discrimination will be deemed "irrational." According to *Cleburne*, invidious discrimination against a rational basis group, such as the disabled, would include "a bare . . . desire to harm" that group.[127] Moreover, discrimination that rests on fear, negative attitudes or irrational prejudice toward the rational basis groups would be similarly invidious forms of discrimination and would therefore be unconstitutional.[128] However, only where negative attitudes or fear are the *sole* reason for the legislation—i.e., where there is no legitimate state interest—will there be a Fourteenth Amendment violation under rational basis review.[129] The result of defining the scope of the constitutional right in such a narrow fashion is that states may, in effect, openly discriminate against the disabled so long as there is a conceivably legitimate end, and the discrimination is a minimally rational way to achieve this end.

The Court in *Garrett* took issue with the ADA's focus on "reasonable accommodation" discrimination largely because this form of discrimination is almost *per se* not invidious.[130] A failure to make reasonable accommodations will nearly always be justified as a rational way for the state to save money, because accommodations require expenditures. The Court stated that "it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities."[131] Employers, the ADA says, must only "mak[e] existing facilities used by employees readily accessible to and usable by individuals with disabilities."[132] Thus, the Court determined that the constitutional right at issue—a classification based on disability—did not constitutionally require employers to make "reasonable accommodations."[133] Thus, like age discrimination, the vast majority of disability discrimination is "rational" and thus constitutional. And, therefore, like the ADEA in *Kimel*, the ADA's validity against the states would depend on its "congruence and proportionality," as measured by the congressional record.

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127. *Garrett*, 531 U.S. at 381 (Breyer, J., dissenting) (quoting *Cleburne*, 473 U.S. at 447) (quotations omitted).

128. *Id.*

129. *Id.*

130. *Id.* at 372.

131. *Id.* at 358.

132. *Id.* at 372.

133. *Id.*

C. *Congruence and Proportionality and the History and Pattern of Unconstitutional Discrimination by the States*

Similar to the Court in *Kimel*, the Court in *Garrett* continued to refine the "congruence and proportionality" test into a dissection of the legislative history of the Act. In *Garrett* the Court *required* that Congress provide sufficient evidence of a "history and pattern" of unconstitutional state discrimination.[134] The majority stated that the general finding by Congress that historically, discrimination against the disabled is a "pervasive social problem"[135] was not supported by sufficient evidence in the congressional record.[136] The Court further questioned whether the record's few examples of discriminatory state conduct were instances of unconstitutional behavior.[137] The majority rejected Justice Breyer's listing of a number of discriminatory practices[138] by states on the grounds that they were not legislative findings but were rather unexamined accounts of adverse disparate treatment that were submitted not directly to Congress but to the Task Force on the Rights and Empowerment of Americans with Disabilities (the "Task Force").[139] However, as Justice Breyer stated, the Task Force was in fact created by Congress to assess the need for legisla-

134. *Id.* at 368 ("Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled.").

135. 42 U.S.C. § 12101(a)(2) (2000) ("historically, society has tended to isolate and segregate individuals with disabilities . . . [and this] continue[s] to be a . . . pervasive social problem.").

136. *Garrett*, 531 U.S. at 369. The Court refused to consider the examples of local government's actions because they are not state actors protected by the Eleventh Amendment, and are therefore subject to private claims under the ADA. *Id.* at 368–69 (citing Lincoln County v. Luning, 133 U.S. 529, 530 (1890)). Congress does not have to rely on the Fourteenth Amendment to regulate local government. *Id.* However, as Justice Breyer asserts in the dissent, it is not as easy as the majority opines to distinguish local government action from state action and will frequently require extensive review of state law. *Id.* at 378–79 (Breyer, J., dissenting).

137. *Id.* at 370.

138. *Id.* at 378–79, 391–424.

139. *Id.* at 370–71. The Task Force was congressionally created "to assess the need for comprehensive legislation." Hearings were held in every state to gather information relating to discrimination against disabled people. *Id.* at 377 (Breyer, J., dissenting).

tion to protect the disabled.[140] Because Congress did not provide sufficient evidence of a pattern of state discrimination, the Court inferred that there was *in fact* no pattern of such behavior. Thus, the Court found that the remedies were not a congruent and proportional response to a constitutional wrong.[141]

The Court compared the evidence of a pattern of constitutional violations against the disabled to the evidence of a pattern of constitutional violations that the Voting Rights Act was responding to in *South Carolina v. Katzenbach*.[142] Despite obvious differences between the two statutes,[143] the Court in *Garrett* held out *Katzenbach* as an icon of "appropriate" legislation largely because of the impressive record set out by Congress when it assessed the problem of discrimination in voting.[144] *Garrett* cited language in *Katzenbach* stating that "Congress explored with great care the problem of racial discrimination in voting."[145] The Court concluded that the ADA had no similar documentation of constitutional violations and totally lacked the kind of narrow tailoring that made the Voting Rights Act a proportional response to the problem it sought to solve.[146]

However, it is important to note that the racial discrimination in *Katzenbach* differs substantially from the disability discrimination in *Garrett*. According to the Court's three-tiered equal protection review, racial discrimination is subject to strict scrutiny, while disability discrimination is subject only to rational basis review. Classifications made according to race are thus more likely to be held unconstitutional and it is therefore easier to identify evidence of a pattern of unconstitutional race discrimination by states than a pattern of unconstitutional discrimination based on disability.

The majority held that even if it were possible to find a pattern of discriminatory behavior, the ADA would not be congruent and proportional unless it provided a record of *unconstitutional* discriminatory behavior. Without that, the remedies

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140. *Id.*
141. *Id.* at 372.
142. 383 U.S. 301 (1966).
143. The Voting Rights Act was a Fifteenth Amendment case involving racial discrimination.
144. *Garrett*, 531 U.S. at 373 (citing South Carolina v. Katzenbach, 383 U.S. 301, 312 (1966)).
145. *Id.* at 373.
146. *Id.* at 374.

afforded by the ADA were not congruent and proportional to the evil presented because the evidence provided only listed examples of constitutionally permissible discrimination,[147] even as the failure to make reasonable accommodations. The Court stated that almost all of the discrimination contemplated by the ADA and engaged in by the states was *rational discrimination*, and thus constitutional. Without a record of *invidious* and therefore unconstitutional, violations by the state, no private suits for damages could be pursued against the states under the ADA.

IV. THE CONGRESSIONAL RECORD REQUIREMENT AS DERIVED FROM *KIMEL* AND *GARRETT*

After *Kimel* and *Garrett*, it is clear that the Court will require a congressional record of unconstitutional state conduct in order for legislation that purports to abrogate the Eleventh Amendment to be "congruent and proportional." However, it remains unclear exactly what is required from Congress when preparing this type of record. The Court has so far failed to clarify what Congress must do in order to prepare a passable record.

A. Type of Evidence the Court Will Require from the Congressional Record

In *Garrett*, both the majority and the dissent agreed that state conduct would violate the Fourteenth Amendment where there is no rational relationship between the disparate treatment of disabled individuals and a legitimate governmental purpose.[148] However, the majority found legislation granting a private right of action for such a violation to be inappropriate absent a detailed history of such unconstitutional state behavior. Thus, a fairly strict congruence and proportionality fit is required. This "fit" is where the majority departs substantially from the dissent. The majority's position is that legislation providing money damages against the states must be a response only to state conduct that is certifiably unconstitutional

147. *Id.* at 372.
148. *Id.*

under the "rational basis" review test for equal protection.[149] Thus, the current state of law will require a detailed record of state conduct that violates rational basis review. However, there is little guidance as to how detailed the evidence of such unconstitutional conduct must be. *Garrett* implies that Congress must provide specific and detailed evidence for every distinct type of conduct it wishes to regulate.

The Court in both *Garrett* and *Kimel* compartmentalized and categorized the evidence presented by Congress.[150] In *Kimel*, the Court held that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation,"[151] calling the evidence produced by petitioners "isolated sentences clipped from floor debates and legislative reports."[152] However, the Court in *Garrett* went one step further by requiring evidence of state *employment* discrimination on the basis of disability, rather than just state discrimination on the basis of disability.[153] Although this may seem like a small difference, the question remains whether Congress is required to document examples of absolutely every distinct type of conduct that it deems necessary to legislate.

In *South Carolina v. Katzenbach*, the Court stated merely that the remedial measures must be considered in light of the evil presented.[154] By the time of *Kimel* and *Garrett*, "in light of the evil presented" had transformed into a full fledged requirement for Congress to painstakingly and intricately document that "evil." This dissection of the congressional record is a recent turn of events, and is of questionable propriety.[155]

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149. *Id.* at 368 ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.").

150. *Id.* at 380 (Breyer, J., dissenting) ("Nor has the Court traditionally required Congress to make findings as to state discrimination, or to break down the record evidence, category by category."); *see also* Katzenbach v. Morgan, 384 U.S. 641, 652–56 (1966) (record scrutinized for reasonableness alone).

151. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000)

152. *Id.*

153. *Garrett*, 531 U.S. at 370 ("Congress assembled only such minimal evidence of unconstitutional state discrimination *in employment* against the disabled." (emphasis added)).

154. City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (citing South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966)).

155. *See* Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 666 (1994) (stating that the judiciary's sole obligation is to assure that Congress had drawn reasonable inferences based on substantial evidence).

Moreover, the comparison to the extensive record in *South Carolina v. Katzenbach* is both unfair and unworkable. The Court in *Garrett*, while comparing the ADA record to the Voting Rights Act record said nothing about the different level of scrutiny operating in *Katzenbach*. *Katzenbach* involved racial discrimination, which is subject to strict scrutiny. It will inevitably be easier to compile a record of unconstitutional behavior where the constitutional right is subject to strict scrutiny because nearly all classifications based on strict scrutiny are unconstitutional. In cases such as disability discrimination, however, there will be fewer cases of outright unconstitutional discrimination to document because the level of review provides that much discriminatory conduct is constitutional. Comparing the legislative history of the ADA and other antidiscrimination legislation not subject to strict scrutiny is thus not a fair comparison.

This type of rigorous review of legislation could have a detrimental effect on future antidiscrimination legislation through the invalidation of more legislation where the evidence of state abuse is not clearly spelled out and where the abuse does not affect a suspect classification as in *Katzenbach*.[156] This is arguably counterproductive. It makes it harder for Congress to remedy less flagrant Fourteenth Amendment violations than the egregiously unconstitutional conduct that was rampant in the 1960's and which instigated the Voting Rights Act. Shortly after *South Carolina v. Katzenbach*, another challenge to the Voting Rights Act was brought in *Katzenbach v. Morgan*,[157] where the Court stated, "it is for Congress in the first instance to determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference." This principle of deference is not respected where the Court usurps the congressional task by analyzing the evidence in support of legislation.

156. After the *Garrett* decision, Congress will undoubtedly document very well instances of state abuse where the states are a target of the legislation. However, the *Garrett* decision requires more from the congressional record than did the sovereign immunity doctrine prior to *Garrett*. Thus, there is an abundance of legislation which presumably may not meet the criteria set out in *Garrett*, due only to the fact that Congress did not know it was required until this decision.

157. 384 U.S. 641 (1966).

B. Types of Evidence the Court Will Not Consider

Instead of clarifying what types of evidence the Court will require from a congressional record, the Court has only defined the type of evidence it will *not* consider. First, the Court will not consider evidence of general society-wide discrimination; any legislative findings have to specifically focus on states' conduct.[158] The reason for this limitation is obvious: in order for Congress to be able to abrogate a state's sovereign immunity under the Eleventh Amendment, it must show that there is a record of unconstitutional discrimination by the states.

However, Justice Breyer described a more deferential position in his dissent in *Garrett*. He stated that the congressional record of the ADA supported the legislation largely due to congressional findings of pervasive discrimination against the disabled *in society* generally, which he believed was sufficient evidence to infer discriminatory conduct by the states.[159] After all, he explained, states are an integral part of society and society-wide discrimination would indicate that states also engage in such discrimination.

Second, the Court stated that it would not consider actions taken by local governmental units, such as cities and counties, because these units of local government are not protected by state immunity and are thus subject to private suits for money damages without the need to abrogate state sovereign immunity.[160] However, as Justice Breyer asserted in his dissent in *Garrett*, the distinction to be drawn between state action and local government action is not always as easy and clear-cut as the majority purports.[161]

Third, the Court in *Garrett* rejected the evidence found in the Congressional Task Force Report,[162] which was specifically created to assess the need for comprehensive legislation.[163] The Report outlined a great number of state discriminatory practices, but because the report did not specifically address discrimination in employment and Congress did not make any in-

158. *Garrett*. 531 U.S. at 369. This is essentially the exact opposite of the dissent who advocate that society-wide discrimination necessarily includes the states. *Id.* at 378 (Breyer, J., dissenting).

159. *Id.* at 378.

160. *Id.* at 368–69.

161. *Id.* at 378 (Breyer, J., dissenting).

162. *Id.* at 370–71.

163. *Id.* at 377.

dication that the Report showed a pattern of discrimination, the majority rejected this evidence.[164] This Task Force Report includes information derived from hearings held in every state, attended by over 30,000 people, many of whom recited first-hand experience of discrimination.[165] Moreover, the Task Force was a congressionally created entity, established explicitly for the purpose of investigating disability discrimination and the need for comprehensive legislation.[166]

Fourth, the majority stated that the lack of specific mention of state discrimination in congressional hearings reflects the congressional judgment that no such pattern of discrimination in fact existed at the time the statute was enacted.[167] It is important to note that the ADA was comprehensive legislation, which took into account all manner of discrimination against the disabled. Therefore the assertion that there should be more evidence of specific state employment discrimination is a stretch. If Congress had to compile a pattern of every specific type of discrimination conducted by the states, it would take an inordinate amount of time to pass such legislation.

The Court interpreted the lack of numerous examples of state employment discrimination against the disabled in congressional hearings and the congressional record as conclusive evidence that there was no evidence of such discrimination. However, the clear inclusion of states in the actual Act should weigh in favor of an interpretation that is in line with congressional intent, because Congress was in the best position to interpret the evidence garnered from the hearings and reports presented to Congress.[168]

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164. *Id.* at 370–71. The Court stated that:

> [T]he Task Force on the Rights and Empowerment of Americans with Disabilities . . . made no findings on the subject of state discrimination in employment. See the Task Force's Report entitled From ADA to Empowerment (Oct. 12, 1990). And, had Congress truly understood this information as reflecting a pattern of unconstitutional behavior by the States, one would expect some mention of that conclusion in the Act's legislative findings.

Id.

165. *Id.* at 377 (Breyer, J., dissenting).

166. *Id.*

167. *Id.* at 372.

168. The inclusion of the states in the coverage of the ADA very clearly shows that Congress believed that there was a problem that needed to be remedied.

This raises the question why the Supreme Court seemingly paid more attention to the information gleaned from the congressional hearing than to the actual text of the ADA itself. The text of the ADA states very clearly that it was the finding of Congress that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[169] States, as among the largest employers in the United States, are surely part of "society." Yet the Court gave little deference to the Congressional determination that states should be included under the ambit of the ADA.

V. THE ADA AFTER *GARRETT*

In *Garrett*, the United States Supreme Court had the chance to clear up a very complicated area of law, yet chose to address only Title I, rather than both Titles I and II. The Court opted only to address Title I of the ADA, stating in footnote 1 that it was "not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation."[170] This footnote in the Court's opinion leaves some question as to whether there are fundamental differences between the remedies of the two sections that would merit a different outcome. Thus, the Court left open the question whether the private monetary remedies available under Title II are still valid.

A. Differences between the Remedies Afforded under Titles I and II of the ADA

Importantly, the *Garrett* court noted that the remedial scheme provided pursuant to Title II is different than the remedial scheme provided under Title I.[171] Because the Court de-

169. 42 U.S.C. § 12101(a)(2) (2000).

170. *Garrett*, 531 U.S. at 360 n.1.

171. The *Garrett* Court noted in footnote 1 that the remedial provisions of Titles I and II are somewhat different. *Id.* Specifically, Title I in 42 U.S.C. § 12117(a) states that:

> The powers, remedies, and procedures set forth in sections 2000e–4, 2000e–5, 2000e–6, 2000e–8, and 2000e–9 of this title shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis

clined to address Title II in Garrett, in part based on the different remedial provisions, these differences may well be important in an analysis of continued validity of the private remedy under Title II.

Title II's remedial scheme incorporates the remedial scheme of the Rehabilitation Act of 1973.[172] The Rehabilitation Act, in turn, incorporates the remedies of Title VI of the Civil Rights Act of 1964.[173] The remedial scheme of Title VI includes a *judicially implied* private cause of action.[174]

Title I, on the other hand, incorporates the remedies found in Title VII of the Civil Rights Act of 1964. Title VII has an *explicit* private right of action. Thus, the differences that the Court in *Garrett* referred to in footnote 1 of its opinion may well be referring to the differences between implied and express remedies.[175]

B. Title II of the ADA

Aside from the differences in the remedial provisions of the two titles, there are also fundamental differences in what is covered by Titles I and II. Title II applies to a greater variety of state conduct, where Title I applies strictly to employment discrimination.[176] Title II is broader than Title I and applies to discrimination in all public places and public services and applies to all disabled people, not just disabled employees.[177] Significantly, Title II applies to the very broad category of all "services, programs or activities of a public entity."[178]

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of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

Title II in 42 U.S.C. § 12133 states that:

> The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 USCS § 12132].

172. 29 U.S.C. §794a(a)(2) (2000).

173. 42 U.S.C. §§2000d–2000d-7.

174. Garcia v. State Univ. of New York Health Sci. Ctr., 280 F.3d 98, 111 (2d Cir. 2001); *see also* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 594–95 (1983).

175. *See* discussion of implied versus express remedies in relation to the Second Circuit's decision in *Garcia*, *infra* Section V.C.iii.

176. 42 U.S.C. §§ 12111–12112, 12202.

177. *Id.* at § 12132.

178. *Id.*

Because of the greater breadth of coverage under Title II, there is likely more evidence in the congressional record of unconstitutional behavior by the states of the conduct prohibited by Title II. In fact, the Court in *Garrett* acknowledged that there are more examples of unconstitutional state conduct when it stated that "the overwhelming majority of these accounts [referring to examples of discrimination in the congressional record] pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA."[179] The *Garrett* majority also quoted both the House and the Senate Committee hearings, which recited that discrimination was rampant in the areas of public services, transportation, and public accommodations, among others.[180] These are areas which would be covered by Title II of the ADA. Because the Court in *Garrett* only examined the congressional record as it related to state *employment* discrimination, it is unclear whether the congressional record as to state constitutional violations in the Title II sphere would be seen to establish a pattern of unconstitutional state discrimination.

However, the Supreme Court did not decide the issue and therefore the Circuit Courts of Appeal must each decide whether the monetary remedies of Title II are more constitutionally sound than those of Title I under the analysis set forth in *Garrett*.

C. *Circuit Court Decisions Regarding the Validity of Money Damages under Title II of the ADA*

There is some disagreement among the circuits that have addressed the validity of private suits for damages under Title II after *Garrett*.[181] Recall that in the first footnote of *Garrett*, the Supreme Court acknowledged that Title II has somewhat different remedial provisions, and thus the analysis will not be identical with that of Title I.[182] There are also portions of the majority opinion that might imply that the congressional re-

179. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 371 n.7 (2001).

180. S. REP. NO. 101-116, at 6 (1989); H.R. REP. NO. 101-485, at 28 (1990).

181. Some of this split in the circuit courts is because the Title II review was made prior to the *Garrett* decision.

182. *Garrett*, 531 U.S. at 360 n.1.

cord is more substantial for Title II.[183] Despite these obvious differences between Title I and II, a trend of invalidating Title II on the basis of the congruence and proportionality test is already emerging in the lower courts.

Four Circuit Courts of Appeals have circumscribed Title II's enforceability against the states under reasoning similar to or patterned from *Garrett's*.[184] Only the Ninth Circuit has held Title II to be valid in its entirety.[185] Two circuits, on the other hand, have held Title II to be valid only when applied to actual constitutional violations by the state.[186] These circuit court decisions will now be addressed in turn.

1. Circuit Courts Holding Title II's Monetary Remedies Against States Invalid

There are four circuit courts of appeals that have held private suits for monetary damages under Title II invalid. The Fourth Circuit Court of Appeals was the first to invalidate private suits for monetary damages under Title II, in the pre-*Garrett* decision of *Brown v. North Carolina Division of Motor Vehicles*.[187] Relying primarily upon the reasoning found in *Seminole Tribe* and *Flores*, the court held that the ADA provision prohibiting states from charging fees to handicapped individuals to recover the costs of accessibility programs was invalid because Congress had not validly abrogated the states' sovereign immunity under the Eleventh Amendment.[188] Also prior to *Garrett*, in *Alsbrook v. City of Maumelle*,[189] the Eighth Circuit Court of Appeals invalidated private remedies under Title II of the ADA against the states.[190] Unlike the *Garrett* decision, however, the Eighth Circuit's opinion rested largely on the "congruence and proportionality" test without resort to dissection of the congressional record.[191] The Court stated that

183. *Id.* at 371–72.

184. The 4th, 5th, 6th and 10th Circuits; *see* cases discussed *infra* section V.B.i.

185. Hason v. Med. Bd., 279 F.3d 1167 (9th Cir. 2002), *cert. granted*, Med. Bd. v. Hason, 123 S. Ct. 561 (2002); Wroncy v. Or. Dept. of Trans., 2001 WL 474550 (9th Cir. 2001) (not selected for publication in Federal Reporter).

186. The 1st and 2nd Circuits; *see* cases discussed *infra* section V.B.iii.

187. 166 F.3d 698 (4th Cir. 1999).

188. *Brown*, 166 F.3d at 701.

189. 184 F.3d 999 (8th Cir. 1999).

190. *Alsbrook*, 184 F.3d at 1002.

191. *Id.* at 1007–08.

"[w]e do not dispute that in passing the ADA *Congress made extensive findings* regarding the discrimination faced by disabled citizens."[192] However, the court went on to say that "the state of the legislative record, alone, cannot suffice to bring Title II within the ambit of Congress's Section 5 powers if Title II is not adapted to the mischief and wrong which the Fourteenth Amendment was intended to provide against."[193] The court held that under *Cleburne*, ADA remedies must address constitutional violations and enforce the "rational relationship standard recognized by the Supreme Court in *Cleburne*."[194] The Eighth Circuit later re-affirmed *Alsbrook* in *Klingler v. Dir., Dept. of Revenue*, decided after *Garrett*, although interestingly the court made no mention of *Garrett* in its decision.[195]

The Fourth Circuit also later re-affirmed its pre-*Garrett* decision in *Wessel v. Glendening*,[196] which held that Congress did not validly abrogate state sovereignty as the analysis laid out in *Garrett*. *Wessel* held that the congressional record supporting Title II was inadequate to show a history and pattern of unconstitutional discrimination and that, even if there were an adequate record, the remedy was neither congruent nor proportional to the problem.[197]

In *Thompson v. Colorado*,[198] the Tenth Circuit Court of Appeals held that Title II of the ADA was not a valid abrogation of state immunity.[199] There, the court illustrated three types of unconstitutional state discrimination against the disabled:

> First, facial distinctions between the disabled and nondisabled are unconstitutional unless rationally related to a legitimate state interest. Second, invidious state action against the disabled is unconstitutional, even if facially neutral toward the disabled (such as neutral statutory language). Finally, in certain limited circumstances [referring to the Due Process Clause's incorporation of the Bill of Rights] such as those involving voting rights and prison

192. *Id.* at 1007 (emphasis added).
193. *Id.* at 1008 (internal quotations omitted).
194. *Id.*
195. Klingler v. Dir., Dept. of Revenue, 281 F.3d 776 (8th Cir. 2002).
196. 306 F.3d 203 (4th Cir. 2002).
197. *Wessel*, 306 F.3d at 213–14.
198. 258 F.3d 1241 (10th Cir. 2001).
199. *Thompson*, 258 F.3d at 1255.

> conditions, states are required to make at least some accommodations for the disabled.[200]

As in *Garrett*, the Tenth Circuit rejected the sufficiency of the congressional record because it lacked sufficient examples of these three types of unconstitutional discrimination.[201] The court found that without this evidentiary "foundation," Title II is not preventative or remedial legislation congruent and proportional to the constitutional violation.[202]

Other circuits that have held money damages under Title II invalid include the Sixth Circuit in *Popovich v. Cuyahoga County Court of Common Pleas*,[203] which held that private monetary remedies against the state under Title II were invalid under the Supreme Court's decision in *Garrett*.[204] However, the court went on to hold that Title II validly enforced the Due Process Clause.[205] The Fifth Circuit in *Reickenbacker v. Foster*[206] held that *Garrett* effectively overruled that circuit's prior decision in *Coolbaugh v. Lousiana*,[207] in which the court held Title II to be a valid exercise of congressional authority.

Overall, these cases show a clear trend among the circuits toward invalidating private actions against the states under Title II, based on a "congruence and proportionality" analysis pursuant to *Flores*, *Kimel*, and *Garrett*. However, the trend is not absolute, and the cases which follow show that some courts have found ways to distinguish Titles I and II, maintaining private actions under Title II to varying degrees.

2. The Ninth Circuit's Holding: Title II Remedies Are Valid

The Ninth Circuit Court of Appeals is the only federal appellate court to hold that Title II remains valid in its entirety, even after *Garrett*. Prior to *Garrett*, in *Clark v. California*,[208] the Ninth Circuit held that Congress effectively abrogated the

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200. *Id.* at 1253.
201. *Id.*
202. *Id.* at 1255.
203. 276 F.3d 808 (6th Cir. 2002).
204. *Popovich*, 276 F.3d at 808.
205. *Id.* at 813. The due process analysis is beyond the scope of this Comment; the focus of *Garrett* was on enforcement of equal protection guarantees.
206. 274 F.3d 974 (5th Cir. 2001).
207. 136 F.3d 203 (5th Cir. 1998).
208. 123 F.3d 1267 (9th Cir 1997).

states' Eleventh Amendment immunity in passing Title II of the ADA.[209] The court cited *Katzenbach v. Morgan* for the proposition that congressional powers "under the Fourteenth Amendment extend beyond conduct which is unconstitutional, and Congress may create broader equal protection rights than the Constitution itself mandates."[210] The court further stated that under *Katzenbach v. Morgan*, Congress acts within its authority if the court can perceive a basis upon which Congress might find that state action "constituted an invidious discrimination in violation of the Equal Protection Clause."[211] The court also noted that the disabled are protected against discrimination by the equal protection clause given the result of *Cleburne*.[212] In a somewhat unusual opinion, the court reasoned along the lines of Justice Breyer's (future) dissent in *Garrett*, noting that there was no reason "why the court's choice of a level of scrutiny for judicial review should be the boundary of the legislative power under the Fourteenth Amendment."[213] At the time, there were no cases standing for the proposition that Congress's powers to enforce the Fourteenth Amendment should be similarly limited.[214]

After *Garrett*, the Ninth Circuit decided *Hason v. Medical Board of California*[215] in which it again upheld Title II of the ADA, upholding its decision in *Clark* despite *Garrett*.[216] The court justified its decision on grounds that *Garrett* had not specifically addressed Title II and thus had no effect on the Ninth Circuit's decision in *Clark*.[217] This was the extent of the court's attempt to analytically distinguish *Garrett*. Although the Ninth Circuit is the only court to hold Title II valid in its entirety, there are other courts which have upheld Title II in limited circumstances.

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209. *Clark*, 123 F.3d at 1269.

210. *Id.* at 1270.

211. *Id.* (quoting Katzenbach v. Morgan, 384 U.S. 641, 656 (1966)).

212. *Id.*

213. *Id.* at 1271; *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 384–85 (2001) (Breyer, J., dissenting).

214. *Clark*, 123 F.3d at 1271.

215. 279 F.3d 1167 (9th Cir. 2002).

216. *Hason*, 279 F.3d at 1171.

217. *Id.* at 1170 ("We have previously held that in enacting Title II of the ADA Congress validly abrogated state sovereign immunity, and thus states and their agencies may be sued pursuant to Title II.").

3. Circuit Courts Holding Title II Valid under Actual Constitutional Violations by the States

The First and Second Circuits upheld the validity of private damage remedies under Title II but only under circumstances where the plaintiff has proven actual unconstitutional state conduct. This approach requires that the courts engage in a case-by-case analysis.

The Second Circuit, in *Garcia v. S.U.N.Y. Health Sciences Center*,[218] did not completely eliminate Title II, but rather narrowed its private right of action to apply only where it is shown that the state has acted irrationally, and, therefore, unconstitutionally.[219] The court stated that the operative inquiry in an Eleventh Amendment analysis is the extent to which Title II allows for private damage claims against the state.[220] The Court then looked to the differences in the remedial scheme provided under Title II.

As previously noted,[221] Title II has an implied private right of action by virtue of its incorporation of Title VI's remedial scheme.[222] The remedial scheme of Title VI includes a judicially implied private cause of action.[223] This differs from Title I, which incorporates the remedies found in Title VII of the Civil Rights Act of 1964, which has an explicit private right of action.

The *Garcia* Court held that the key difference between Titles I and II is the difference in the nature of the private right of action—an implied private action under Title II and an explicit private right of action under Title I. The court noted that when dealing with an implied right of action, courts are free to "shape a sensible remedial scheme that best comports with the statute."[224] The court then made the novel assertion that because of the nature of an *implied private right of action*, it can limit those private actions against the state under Title II to

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218. 280 F.3d 98 (2nd Cir. 2001).

219. *Garcia*, 280 F.3d at 111–12.

220. *Id.* at 110–11.

221. *See* discussion *supra*, Section V.A.

222. Title II's remedial scheme is the same as that of the Rehabilitation Act of 1973, which in turn incorporates the remedies of Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C. §§ 2000d–2000d-7 (2000); *see also*, *Garcia*, 280 F.3d at 111.

223. *Garcia*, 280 F.3d at 111; *see also* Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 594–95 (1983).

224. *Garcia*, 280 F.3d at 111 (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 284–85 (1998).

situations that comport with Congress's Section Five authority. In order to accomplish this limitation, the Court held that private damage suits must be limited to situations where the government's actions are based on invidious discrimination.[225] Thus, the court narrowed the private right of action under Title II to apply only in situations where the conduct in that particular case was unconstitutional.[226] This type of limited remedy was not possible under Title I of the ADA because the private right of action is explicit and cannot be limited by the courts in the same manner as an implied private right of action.

The First Circuit took essentially the same approach in *Kiman v. New Hampshire Dept. of Corrections*,[227] which held that "Congress acted within its powers in subjecting the states to private suit under Title II of the ADA, at least as that Title is applied to cases in which a court identifies a constitutional violation by the state."[228] Yet the court distinguished its holding from *Garcia* because, in that court's opinion, the Second Circuit had allowed wider latitude in some situations which may not be constitutional violations by the state.[229] However, its distinction from *Garcia* is minimal. Thus, the First Circuit also narrowly construed the validity of Title II to situations where the court specifically identifies unconstitutional behavior by the state.

D. Conclusions: The Future of Title II

The federal district courts, like the appeals courts and the Supreme Court, are now examining the congressional record for a tight congruence and proportionality fit for Title II, as mandated in *Garrett*. Requiring a detailed record of unconstitutional state conduct represents a fairly significant departure from the methodology used prior to *Flores*, *Kimel*, and *Garrett*, where the courts simply looked to the reasonableness of the congressional findings.

The question remains, however: how much support is required from the congressional record? The answer that appears to be given by the Supreme Court in *Garrett* and other

225. *Id.* at 111–12.
226. *Id.*
227. 301 F.3d 13 (1st Cir. 2002).
228. *Kiman*, 301 F.3d at 24.
229. *Id.* at 24 n.8.

courts since is that very strong evidence of manifest state unconstitutional discrimination must be present in the congressional record. The Court in *Flores*, *Kimel*, and *Garrett* all lauded *Katzenbach* as the measure of an adequate congressional record. In essence, by using *Katzenbach* as the yard stick for "appropriate legislation," the courts will require something approaching the intolerable abuses present in the racial discrimination context that gave rise to the Voting Rights Act of 1965. It is unlikely that discrimination so flagrant and invidious will ever be seen again.

States tend not to discriminate so openly or blatantly anymore, yet the courts are restricting Congress to remedying only the type of blatant, manifest discrimination presented in support of the Voting Rights Act. However, to argue that there is no state discrimination in modern times would be naïve. Rather, discrimination exists but is masked more readily by institutional structures. Under current Supreme Court jurisprudence, it appears that Congress will not be permitted to allow for damages in response to less flagrant types of discrimination absent a substantial record of evidence in the form of numerous examples of irrational and therefore unconstitutional discrimination by the states. This clear trend in the Supreme Court will likely result in the invalidation of private suits for money damages against states under Title II should the Supreme Court decide the issue. The court could of course fashion a remedy similar to the Court in *Garcia*. However, given the current federalist disposition of the Court this seems unlikely.

VI. OTHER REMEDIES FOR STATE DISCRIMINATION UNDER ADA TITLES I AND II

Because private suits for money damages under Title I are invalid against the states, and many circuits are holding that the same is true for Title II, it is more important than ever to consider alternative ADA enforcement methods against the states. The remedies that can be used to combat disability discrimination are suits for injunctive relief by either the United States or private plaintiffs, suits for monetary damages by the United States, and use of the case-by-case implied private right of action recognized in *Garcia*. However, the *Garcia* court's formulation has not yet been accepted or rejected by the Supreme Court.

A. Prospective Injunctive Relief under the ADA

The most important remedy outside of the private claim for damages may be the private action for prospective injunctive relief, under the *Ex parte Young* doctrine.[230] This doctrine rests on the legal fiction that when a state actor violates the Constitution or federal law, that official is acting *ultra vires* and is no longer entitled to sovereign immunity, because he stops being a state official when he contradicts federal law.[231] The Supreme Court in *Garrett* indicated that such injunctive relief would continue to exist for Title I ADA violations.[232] The Court stated that:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*. (citation omitted).

Although the *Garrett* Court's endorsement of injunctive relief was limited to Title I, there is no reason to think that the same would not hold true for Title II as well.

The Court held similarly in *Seminole Tribe* that the Eleventh Amendment does not bar federal jurisdiction in suits by private plaintiffs against state officials in order "to end a continuing violation of federal law."[233] Although the Court in *Seminole Tribe* held that injunctive relief was not available in that case, the reasoning for that decision does not apply with equal force to the case of the ADA. *Seminole Tribe* involved the Indian Gaming Regulatory Act (IGRA), which differs in key respects from the ADA. There, the Court held "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting

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230. *See Ex parte* Young, 209 U.S. 123 (1908).

231. Gibson v. Arkansas Dept. of Corrections, 265 F.3d 718 (8th Cir. 2001).

232. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001).

233. Seminole Tribe v. Florida, 517 U.S. 44, 73 (1996); *Gibson*, 265 F.3d at 720–21 (quoting *Seminole Tribe*).

an action against a state officer based upon *Ex parte Young*."[234] In other words, where Congress has tried to *limit* the remedies available to private plaintiffs, the courts should hesitate to *expand* the remedies available. In contrast to the IGRA, under the ADA there is not a similar provision regulating the procedure to be adhered to where there are continuing violations of the law.

The Eighth Circuit in *Gibson v. Arkansas Department of Corrections*[235] made some very adept distinctions between the ADA and the IGRA (at issue in *Seminole Tribe*) when it upheld an *Ex Parte Young* suit for ADA enforcement after the *Garrett* decision.[236] In the IGRA, Congress had explicitly set out a very limited remedial framework for plaintiffs.[237] The Court held that allowing for an injunctive suit against a state official would actually broaden the remedies Congress *explicitly* sought to limit, which would be impermissible in all cases.[238] In contrast, the ADA authorizes a broad range of remedies.[239] Thus, unlike the IGRA, injunctive relief was explicitly permitted by Congress and thus an *Ex Parte Young* suit is within the range of allowable remedies specified by Congress.[240]

B. Claims Brought under the Authority of the Federal Government

The United States can bring both legal and equitable (injunctive) actions against the states for violations of the ADA, since the United States is not barred from suing a state under the Eleventh Amendment.[241] The states do not retain any sovereign immunity from suits brought by the federal govern-

234. *Seminole Tribe*, 517 U.S. at 74.
235. 265 F.3d 718.
236. *Id.* at 720–21.
237. *Seminole Tribe*, 517 U.S. at 74–75; *see also* 25 U.S.C. § 2710 (2000).
238. *Seminole Tribe*, 517 U.S. at 74–75.
239. *See Gibson*, 265 F.3d at 721:
> The ADA makes all the remedies of Title VII of the Civil Rights Act of 1964 applicable to ADA Title I plaintiffs. This means that remedies such as equitable orders and contempt proceedings are possible. Equitable relief such as injunctions are also available to enforce ADA rights. Thus, the ADA stands in stark contrast to the IGRA, which only permits the district court to order 60 days of negotiations and then call in a mediator.

240. *Id.* at 720–21.
241. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001).

ment.[242] This is because the states consented to suits brought under the authority of the federal government when they ratified the Constitution.[243] Indeed, the *Garrett* Court explicitly stated that a federal suit for money damages was not foreclosed by the Eleventh Amendment.[244] At least one circuit court has upheld the power of the United States to sue on behalf on an individual under the ADA. The Fifth Circuit Court of Appeals in *United States v. Mississippi Department of Public Safety*[245] held that the Eleventh Amendment was not a bar to the United States suing a state to enforce federal law and obtain relief authorized by the ADA, including monetary damages.[246] The court rejected the proposition that the federal government is subject to the Eleventh Amendment restrictions when it "seeks to circumvent the safeguards of the Eleventh Amendment and obtain personal relief for private individuals."[247] Thus, the court held that the Federal government may do on behalf of individuals what the individuals themselves could not do. The reasoning behind this is that the U.S. has an interest apart from the private interests of the individual litigants to see that the ADA is enforced.[248] Thus, an action brought on behalf of an individual does not turn the United States into a "proxy" for the individual.[249]

C. The Implied Private Right of Action under Title II

The case-by-case implied private right of action discussed in *Garcia* is also very promising for private ADA plaintiffs.[250] By limiting the Title II implied private right of action to those claims where the plaintiff has proven irrational discrimination, the private right of action is limited to constitutional violations. This was first conceptualized by the Second Circuit in *Garcia*. The *Garcia* court based its decision on the fact that the remedial scheme of Title II of the ADA is based on Title VI of the

242. West Virginia v. United States, 479 U.S. 305, 312 n.4 (1987).
243. Alden v. Maine, 527 U.S. 706, 755–56 (1999).
244. *Garrett*, 531 U.S. at 374 n.9.
245. 321 F.3d 495 (5th Cir. 2003).
246. *Miss. Dep't. of Pub. Safety*, 321 F.3d at 498–99.
247. *Id.* at 498.
248. *Id.* at 498–99.
249. *Id.* at 499.
250. *See* Section V.C.iii, *supra* (discussing *Garcia*).

Civil Rights Act which has an implied private right of action.[251] The theory is that with a narrowly tailored remedy that applies only where there is an actual constitutional violation, there should be a valid abrogation of state sovereign immunity. However, the validity of this theory has not been tested by the Supreme Court.

CONCLUSION

There are important reasons that private suits for monetary damages under Title II should not be invalidated. First, the Supreme Court should not continue to expand the *Garrett* approach of dissecting the congressional record. Second, under the *Garrett* analysis, the Court must look at qualitatively different evidence of state discrimination because of the differences in the conduct covered between Titles I and II. Third, under the *Garrett* analysis, the Title II remedies should stand because the remedial provisions differ from Title I.

At the time the ADA was enacted there was no indication that the Supreme Court would later require a detailed record of a history and pattern of discrimination by the states in order to overcome Eleventh Amendment immunity. Instead, Congress was merely trying to comply with the standards set forth in *South Carolina v. Katzenbach* and *Katzenbach v. Morgan*. Under that standard, the courts looked to whether the conclusions made by Congress were reasonable in light of the evidence. Now, courts are dissecting the congressional record to require extensive documentation and numerous examples of very specific types of discrimination.

The Court has turned to *South Carolina v. Katzenbach* as a yard stick to measure the appropriateness of legislation by comparing the legislative record of the Voting Rights Act to the legislative record of the challenged legislation.[252] However, this comparison is not appropriate. The discrimination in *Katzenbach* was rampant and flagrant race discrimination. To hold that Congress is confined to remedying and preventing only this level of unconstitutional conduct is too strict a standard by which to measure all anti-discrimination legislation today. In modern times, it stands to reason that there will be few in-

251. *See supra* Sections V.A and V.C.3.
252. *Garrett*, 531 U.S. at 358, 373.

stances where constitutional violations rise to *Katzenbach*'s level of egregiousness, nor will such discrimination be as clear. Holding Congress to remedying only the most flagrant and vicious forms of discrimination is counterproductive to a progressive society.

Moreover, the Court's comparison is more fundamentally flawed in that the conduct in *Katzenbach* was race discrimination—a strict scrutiny classification. This is in contrast to the disability classification, which is subject only to a rational basis review. Any evidence of discrimination on the basis of race is likely to be unconstitutional, whereas under a rational basis review classification very little will be unconstitutional. This, in effect, prohibits Congress from legislating against discrimination unless the classification is based on race or some other higher scrutiny classification; or unless there is a plethora of evidence of irrational discrimination, which is not a likely scenario in this day and age.

These problems encouraged Justice Breyer's dissent, where he stated that it is inappropriate for the Court to impose the standard of equal protection review to judge the evidence presented by Congress when enacting legislation.[253] It is the place of Congress, not the courts, to determine facts relevant to the exercise of its Section Five powers.[254] Congress is uniquely situated to have access to the problems, will, and desires of the people whom it represents.[255] Instead of heeding to this principle, the Supreme Court used the "constitutional right at issue" to severely limit legislative power and give the courts a quasi-legislative function.[256]

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253. *Id.*

254. *Id.* at 382–85. In the dissent, Justice Breyer said:

> There is simply no reason to require Congress, seeking to determine facts relevant to the exercise of its § 5 authority, to adopt rules or presumptions that reflect a court's institutional limitations. Unlike courts, Congress can readily gather facts from across the Nation, assess the magnitude of a problem, and more easily find an appropriate remedy.

255. *Id.* at 384 (Breyer, J., dissenting) ("Unlike Courts, Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification"); *see also* Hart, *supra* note 1, at 1004–05.

256. *Garrett*, 531 U.S. at 369, 377 ("Congress assembled only . . . minimal evidence of unconstitutional state discrimination in employment."). The tension between the majority view and the dissenting view is in the scope of evidence that Congress may consider. The majority narrows the scope of permissible evidence in order to declare that evidence insufficient.

There are additional reasons that Title II should withstand an Eleventh Amendment challenge. First, there is substantial evidence in the congressional record of the ADA to demonstrate that there was a pattern of unconstitutional behavior by the states in the realm of the "benefits of the services, programs, or activities of a public entity." Both the House and Senate reports included public accommodations, public services, and transportation as critical areas where discrimination is still pervasive.[257] Title II of the ADA includes a broader scope of conduct than does Title I, which applies only to state employment.[258] Second, as was recognized by the Court in *Garrett*, Title II has a somewhat different remedial scheme than Title I.[259]

The import of the difference in remedial schemes was seized upon by the Second Circuit in *Garcia*,[260] which is one of the only courts to adequately address the implications of the different remedies between the two titles. The Second Circuit opted to keep the private right of action where there is irrational discrimination. Because the remedy under Title II is implied, the *Garcia* court was able to tailor the remedy to apply to only constitutional violations. This is perhaps the most creative and effective solution to the problem at hand.

However, the Supreme Court is unlikely to turn from its recent state sovereignty precedent and there is little reason to think that *Garrett* is a stopping point. Given the Court's determination in *Cleburne* that the disabled are not a suspect or quasi-suspect class, and the fact that Title II does prohibit conduct that could be seen as minimally "rational," it is likely that the Title II private right of action will suffer a similar fate to that of Title I if or when the Supreme Court decides a Title II case.

257. *Id.* at 371.
258. *Id.* at 360 n.1; *see also* 42 U.S.C. §§12112, 12132 (2000).
259. *Garrett*, 531 U.S. at 360 n.1.
260. *See* Section V.C.iii., *supra* (discussion of *Garcia*).