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GARRETT UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT: ITS BROAD IMPLICATIONS TO CIVIL RIGHTS LAWS

INTRODUCTION

As of 2001, 32.1 million working-aged individuals in the United States had a disability. Of those, only one in four were part of the work force, even though a larger number could potentially work. The Americans with Disabilities Act of 1990 (ADA) was enacted as "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." This law in part was designed to help disabled individuals maintain employment or enter the work force if unable to do so before. Thus, these disabled individuals look to laws, such as the ADA, for protection. Evidence indicates that since this law has been in effect, the proportion of disabled individuals working has increased from 46% to 56%. However, the ADA has come under attack, specifically in the public sector, because during the past decade there has been a resurgence in the Supreme Court's use of Eleventh Amendment immunity to limit Congress's power over the states. Under the Court's view, a state is protected from suits for damages in federal court brought without its consent, even when the litigant seeks to vindicate important federal
rights such as the right to be free from disability discrimination. This movement has led to new interpretations and debates over the meaning of the Eleventh Amendment and abrogation of that power leaving "state employees . . . with fewer rights in the workplace than their private sector counterparts enjoy." This evolving jurisprudence leaves many questions unanswered, such as what Congress must document to abrogate Eleventh Amendment immunity in new legislation and how this resurgence of state's rights will affect legislation already passed by Congress, such as the ADA.

A recent Supreme Court case falling under a strict application of the Eleventh Amendment was Board of Trustees of the University of Alabama v. Garrett. Garrett held that the Eleventh Amendment bars "[s]uits in federal court by state employees to recover money damages by reason of the State's failure to comply with Title I of the ADA . . . ." However, the Court left one issue for another day: whether Title II of the ADA is available for claims of state employment discrimination. Because Garrett barred Title I from claims of employment discrimination, disabled state employees must rely on Title II for federal protection.

This Comment analyzes whether Garrett would have been decided differently under Title II. To answer this question, a two-part analysis is necessary: whether Title II is available for claims of employment discrimination, and if so, whether Title II is appropriate legislation to abrogate sovereign immunity under the Eleventh Amendment.

Part II of this Comment gives a brief background of four areas necessary to understand Garrett's outcome and any future implications. It begins with a short history of the ADA and a synopsis of the Garrett case. Part II also gives an overview of the split in the Courts of Appeals concerning whether Title II is available for claims of employ-

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8. Id. at 688.
10. Id. at 356.
11. Id. at 360 n.1 (explaining that "[t]o the extent the Court granted certiorari on the question whether respondents may sue their state employers for damages under Title II of the ADA . . . that portion of the writ is dismissed as improvidently granted").
12. See infra notes 253-307 and accompanying text.
13. See infra notes 308-338 and accompanying text.
15. Garrett, 531 U.S. at 356. See infra notes 31-54 and accompanying text.
ment discrimination,\textsuperscript{16} as well as a history of Eleventh Amendment immunity and recent case law interpreting Congress’s rights and duties.\textsuperscript{17}

Part III of this Comment discusses two issues. First, it explains the arguments concerning whether Title II is available for claims of employment discrimination and the strengths and weaknesses to reveal that employment discrimination was not intended to be actionable under Title II of the ADA.\textsuperscript{18} Second, it considers the current trends in sovereign immunity and what Congress must do to abrogate that immunity within Section 5 of the Fourteenth Amendment.\textsuperscript{19}

Part IV of this Comment discusses the impact of a similar Supreme Court case under Title II, leading to the same result as the \textit{Garrett} case under Title I, and alternatives for individuals confronted with such a situation.\textsuperscript{20} In addition, this part discusses how far the Court is willing to extend Eleventh Amendment immunity, and what that means for the future of Congress’s power over the states.\textsuperscript{21}

\textsuperscript{16} \textit{Compare} Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998) (holding that employment discrimination is within the confines of Title II of the ADA), \textit{with} Zimmerman v. Or. Dep’t of Justice, 170 F.3d 1169 (9th Cir. 1999) (holding that Title II of the ADA is not available for claims of employment discrimination when Title I explicitly does so). \textit{See infra} notes 55-136 and accompanying text.

\textsuperscript{17} \textit{See Garrett}, 531 U.S. 356 (2001) (holding that “suits in federal court by state employees to recover money damages by reason of the State’s failure to comply with Title I of the ADA are barred by the Eleventh Amendment”); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that although the ADEA contains a clear statement of Congress’s intent to abrogate the States’ immunity, the abrogation exceeded Congress’s authority under Section 5 of the Fourteenth Amendment); City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that Congress did not have the power under Section 5 of the Fourteenth Amendment to enact the RFRA); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (holding that even though Congress did not abrogate immunity through Section 5 of the Fourteenth Amendment, the legislation was valid as an act pursuant to its powers under the Interstate Commerce Clause), \textit{rev’d by} Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (overruling the \textit{Union Gas} holding that Congress could act pursuant to its power under the Interstate Commerce Clause and instead focusing on whether Congress validly abrogated immunity through Section 5 of the Fourteenth Amendment); Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (announcing a two-pronged test to determine when abrogation of the Eleventh Amendment is appropriate); Hans v. Louisiana, 134 U.S. 1 (1890) (holding that the Eleventh Amendment barred a private suit against a state by one of its own citizens). \textit{See infra} notes 137-252 and accompanying text.

\textsuperscript{18} \textit{See infra} notes 253-307 and accompanying text.

\textsuperscript{19} \textit{See infra} notes 308-338 and accompanying text.

\textsuperscript{20} \textit{See infra} notes 344-352 and accompanying text.

\textsuperscript{21} \textit{See infra} notes 370-384 and accompanying text.
II. BACKGROUND: THE HISTORY OF TITLE II IN MATTERS OF
EMPLOYMENT DISCRIMINATION AND SOVEREIGN IMMUNITY

There are several details necessary to understand before analyzing whether the outcome in Garrett would be the same if decided under Title II of the ADA. First, this part explains the purpose and groundwork of the ADA. Next, it summarizes the holding and rationale of Garrett to show the deficiencies that need to be remedied to attain a reverse holding. Third, this part highlights both sides of the argument concerning whether employment discrimination falls within the protection of Title II. Finally, a history of the Supreme Court's push toward a strict interpretation of federalism is briefly outlined.

A. History of the ADA and Its Application

The ADA passed both the House of Representatives and Senate "with unusual bipartisan support, reflecting a legislative consensus on the need for a national mandate to forbid discrimination against individuals with disabilities." Many viewed the ADA as a "second-generation" civil rights statute. When debating the merits of enacting the ADA, Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." Based on these findings, the ADA was enacted as "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Further, Congress explicitly viewed the ADA as a "sweep of congressional authority, including the power to enforce the [F]ourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities."
The ADA is broken down into five titles, two of which are relevant to the issues raised in Garrett, Title I and Title II. Title I of the ADA, generally known as the employment title, states in part, "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability 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." This means that Title I was explicitly intended to cover employment issues. Title II states in pertinent part, "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." Thus, the language indicates that Title II was intended to cover services, programs, and activities of a public entity, but it does not explicitly list employment as part of its coverage.

B. Board of Trustees of the University of Alabama v. Garrett

The Supreme Court examined Congress’s power to enact Title I of the ADA in Garrett, which involved two consolidated cases. Respondent Patricia Garrett was a registered nurse for the University of Alabama at the Birmingham Hospital. Garrett’s supervisor forced her to give up her position as Director of Nursing after she returned to work from a lumpectomy, radiation treatment, and chemotherapy. The second respondent, Milton Ash, was a security officer for the Alabama Department of Youth Services who suffered from both chronic asthma and sleep apnea. Upon a refusal to accommodate Ash for his conditions, Ash filed a discrimination claim for equitable relief with the Equal Employment Opportunity Commission (EEOC). After filing with the EEOC, he noticed that his performance evalu-

28. See John J. Coleman, III & Marcel L. Debruge, A Practitioner's Introduction to ADA Title I, 45 Ala. L. Rev. 55, 56 (1993) ("Title I governs employment. Title II concerns public services, public employment, public communications, and public transportation. Title III addresses public accommodations, and Title IV deals with telecommunications. Finally, Title V contains miscellaneous provisions.").
30. Id. § 12132.
32. Id.
33. Id. at 362-63.
34. Id. at 362.
35. Id.
36. Id.
tions were lower, triggering Ash to file his discrimination claim in federal court for money damages.  

The State of Alabama moved for summary judgment in both cases, arguing that the ADA exceeded Congress's authority to abrogate sovereign immunity. The United States District Court for the Northern District of Alabama granted summary judgment against both respondents in a single opinion. The United States Court of Appeals for the Eleventh Circuit reversed, holding "that the ADA validly abrogates the State's Eleventh Amendment immunity." Upon this decision, the Supreme Court granted certiorari to resolve a split among the Courts of Appeals on the question of whether an individual may sue a State for money damages in federal court under the ADA." Writing for the five to four majority, Chief Justice William Rehnquist held that the Eleventh Amendment bars "suits in federal court by state employees to recover money damages by reason of the State's failure to comply with Title I of the ADA . . . ." In reaching its decision, the Court focused on whether Congress found a pattern of discrimination by the states. The majority found that when enacting the ADA, Congress failed to establish a pattern of irrational state discrimination to justify such affirmative steps as a remedy. Although the congressional findings contained numerous examples of discrimination, the respondents only cited a "half a dozen examples from the

38. Id.
39. Id.
40. Id. at 363.
41. Id. See Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 193 F.3d 1214 (11th Cir. 1999) (adhering to its intervening decision in Kimel v. Fla. Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998), which followed a loose interpretation of sovereign immunity).
43. Compare Popovich v. Cuyahoga County Ct. of Common Pleas, 227 F.3d 627 (6th Cir. 2000) (holding that defendant was immune from suit because Congress exceeded its powers under Section 5 of the Fourteenth Amendment), and Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) (same), with Garrett v. Univ. of Ala. at Birmingham Bd. of Trs., 193 F.3d 1214 (11th Cir. 1999) (holding that defendant was not immune from suit because Congress did not exceed its powers under Section 5 of the Fourteenth Amendment); Muller v. Costello, 187 F.3d 298 (2d Cir. 1999) (same); Dare v. California, 191 F.3d 1167 (9th Cir. 1999) (same); Alsbrook v. City of Maumelle, 156 F.3d 825 (8th Cir. 1998) (same); Coolbaugh v. Louisiana, 136 F.3d 430, (5th Cir. 1998) (same); Clark v. California, 123 F.3d 1267 (9th Cir. 1997) (same).
44. The majority was comprised of Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas. The dissenters consisted of Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer.
45. Garrett, 531 U.S. at 356.
46. See id. at 389-424 (listing a detailed history of the House and Senate Committee Hearings reviewed and 562 specific submissions made by individuals to the Task Force on Rights and Empowerment of Americans with Disabilities citing discrimination).
47. Id. at 370.
record that did involve States," which fell "far short of even sug-
gest ing a pattern of unconstitutional discrimination on which [Section] 
5 legislation must be based."^{48}

However, in footnote one of the Garrett decision, the Court noted 
that both of respondents' complaints in the district court alleged viola-
tions of Title I and Title II.^{49} In addition, both parties argued within 
the context of Title I and Title II in their legal briefs.^{50} Nevertheless, 
neither party briefed the issue concerning "whether Title II of the 
ADA, dealing with the 'services, programs, or activities of a public 
entity, ...' is available for claims of employment discrimination when 
Title I of the ADA expressly deals with that subject."^{51} Because the 
issue was not briefed and the Courts of Appeals were split,^{52} the 
Court dismissed writ on the Title II claim.^{53} The Court noted that 
Title II has somewhat different remedial provisions from Title I;^{54} 
namely, Title I claims must exhaust all remedial sources before filing 
suit while Title II does not require such action. Further, with Title II's 
distinct legislative history, Title II may abrogate Eleventh Amend-
ment immunity even though Title I does not.

C. An Employment Discrimination Claim Under Title II

The first of two questions left open by the Court in Garrett is 
whether Title II is available for claims of employment discrimination. 
As mentioned in the Garrett decision, the Courts of Appeals are split.^{55} 
The lower courts have established their positions by focusing 
on three arguments. The first argument concerns the legislative his-
tory of the ADA and each title, specifically examining whether Con-
gress intended to incorporate all of the employment provisions of the 
Rehabilitation Act of 1973 (the Rehabilitation Act), a disability dis-
* g r i m i n a t i o n statute that preceded the ADA, into Title II, or only the 
Rehabilitation Act's procedural safeguards. The second argument 
looks to the plain meaning and ambiguity of the text itself, which 
mainly concerns whether Title II contains a "catch-all" provision to

\(^{48}\) Id. at 369-70.
\(^{49}\) Id. at 360 n.1.
\(^{50}\) Id.
\(^{51}\) Garrett. 531 U.S. at 360 n.1.
\(^{52}\) Compare Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 
(11th Cir. 1998) (holding that claims of employment discrimination are available under Title II of 
the ADA), with Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169 (9th Cir. 1999) (holding 
claims of employment discrimination are not available under Title II of the ADA).
\(^{53}\) Garrett. 531 U.S. at 360 n.1.
\(^{54}\) Id.
\(^{55}\) Id. at 360 n.1.
implicitly include employment discrimination within its scope of coverage. The last dispute is over the deference to be afforded to the Department of Justice (DOJ) interpretation, which explicitly includes employment within the scope of Title II.

1. The Pro-Coverage Decision: Bledsoe v. Palm Beach County Soil & Water Conservation District

The leading case holding that Title II of the ADA encompasses public employment discrimination is Bledsoe v. Palm Beach County Soil & Water Conservation District. Appealed from the United States District Court for the Southern District of Florida, the court granted summary judgment in favor of the Palm Beach County Soil and Water Conservation District. Writing for the majority, Judge Dubina began by noting that in the past, the court merely assumed that Title II encompassed employment discrimination without examining the language or legislative history of that title and noted that the district courts within the circuit acknowledged this Title II right.

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56. 133 F.3d 816 (11th Cir. 1998).
57. Id. at 816. As a resource technician, Bledsoe's job included “walking, surveying, and performing manual labor in the fields.” Id. at 818. Following a knee injury and his doctor's advice that he should avoid excessive walking, he was terminated after asking for accommodation and refusing the accommodation offered. Id. For other cases where the courts determined employment discrimination is an appropriate claim within the confines of Title II of the ADA see Castellano v. City of New York, 142 F.3d 58 (2d Cir. 1998) (applying Title II to an employment benefits discrimination claim); Holmes v. Tex. A & M Univ., 145 F.3d 681 (5th Cir. 1998) (applying Title II to a claim of employment discrimination); Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995) (allowing the plaintiff to proceed against the employer/hospital under both the Rehabilitation Act and Title II); Downs v. Mass. Bay Transp. Auth., 13 F. Supp. 2d 130, 134-36 (D. Mass. 1998); Hernandez v. City of Hartford, 959 F. Supp. 125 (D. Conn. 1997); Wagner v. Tex. A & M Univ., 939 F. Supp. 1297 (S.D. Tex. 1996) (finding that Title II obtains its remedies from the Rehabilitation Act, which does not require exhaustion of administrative remedies before filing suit; noting that Title II encompasses employment actions); Graboski v. Giuliani, 937 F. Supp. 258 (S.D.N.Y. 1996); Silk v. City of Chicago, No. 95C0143, 1996 U.S. Dist. LEXIS 8334, (N.D. Ill. June 7, 1996); Dertz v. City of Chicago, 912 F. Supp. 319 (N.D. Ill. 1995); Petersen v. Univ. of Wis. Bd. of Regents, 818 F. Supp. 1276 (W.D. Wis. 1993).
58. Bledsoe, 133 F.3d at 817.
59. Id. at 820. See Holbrook v. City of Alpharetta, 112 F.3d 1522, 1529 (11th Cir. 1997) (explaining that “Title II incorporates by reference the substantive, detailed regulations prohibiting discrimination against individuals contained in Title I”); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1073 (11th Cir. 1996) (finding that while Title I of the ADA applies to the private sector, Title II of the ADA, which applies to public sector employment, contains a parallel provision).
In its three-part analysis, the Eleventh Circuit first looked to the legislative history of the ADA and found that the "legislative commentary regarding the applicability of Title II to employment discrimination . . . is so pervasive as to belie any contention that Title II does not apply to employment actions."\(^{61}\) In first examining Title II's connection to the Rehabilitation Act,\(^{62}\) the court noted a report from the United States House of Representatives Judiciary Committee that "in the area of employment, [T]itle II incorporates a duty set forth in the regulations of [s]ections 501, 503 and 504 of the Rehabilitation Act to provide a 'reasonable accommodation' that does not constitute an 'undue hardship.'"\(^{63}\) The report also noted:

The Committee intends . . . that the forms of discrimination prohibited by section 202 [codified as 42 U.S.C. § 12132] be identical to those set out in the applicable provisions of [T]itles I and III of this legislation . . . . In addition, activities which do not fit into the employment or public accommodations context, are governed by the analogous section 504 regulations.\(^{64}\)

Further, the court noted, "the purpose of [T]itle II is to continue to break down barriers to the integrated participation of people with disabilities in all aspects of community life."\(^{65}\) The Committee intends that [T]itle II work in the same manner as [s]ection 504."\(^{66}\) To further support this argument, the court stated:

It is significant that Congress intended Title II to work in the same manner as [s]ection 504 of the Rehabilitation Act, because [s]ection 504 was so focused on employment discrimination that Congress enacted subsequent legislation to clarify that [s]ection 504 applied to other forms of discrimination in addition to employment discrimina-

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\(^{61}\) Bledsoe, 133 F.3d at 821.

\(^{62}\) 29 U.S.C. §§ 701-796 (1994). Congress enacted the Rehabilitation Act upon finding that "millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing," and that this group constitutes "one of the most disadvantaged groups in society." 29 U.S.C. §§ 701(a)(1), (2).

\(^{63}\) Bledsoe, 133 F.3d at 821 (citing H.R. REP. No. 101-485(II), at 50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 473). "A reasonable accommodation test applies in employment covered by [T]itle II, and this test is intended to be the same as that applied in the regulations for sections 501, 503, and 504 of the Rehabilitation Act." Mark C. Weber, Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, 36 WM. & MARY L. REV. 1089, 1100 (1995). In addition, "[i]n the area of employment, section 504 and [T]itle II apply the same limit to the obligation to provide reasonable accommodation—the employer need not provide an accommodation that would cause undue hardship." Id. at 1102.


\(^{65}\) Id.

tion. The first Supreme Court case to consider [s]ection 504 . . . was an employment discrimination case.\textsuperscript{67}

Furthermore, the main purpose of the Rehabilitation Act was to “promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment.”\textsuperscript{68} To this end, the court concluded that based on the legislative history of the ADA coupled with the Rehabilitation Act, Title II was intended to cover employment discrimination.

Next, the Eleventh Circuit rejected the semantics used by the lower court to reach the opposite outcome.\textsuperscript{69} The district court focused on the wording “services, programs, or activities”\textsuperscript{70} to conclude that the focus of the Title was on a public entities’ “outputs” instead of “inputs.”\textsuperscript{71} Because the lower court characterized public employment as an “input” instead of an “output,”\textsuperscript{72} Title II could not cover employment discrimination. However, Judge Dubina pointed out the language in the final clause of the section, “which protects qualified individuals with a disability from being subjected to discrimination by any such entity”\textsuperscript{73} and determined that this clause was not tied directly to services, programs, or activities, but instead was a catch-all phrase to prohibit all kinds of discrimination by a public entity, thus covering employment discrimination.\textsuperscript{74}

Third, the Eleventh Circuit looked to the DOJ regulations.\textsuperscript{75} The court noted that “considerable weight should be accorded to an executive department’s construction of a statutory scheme” it is entrusted to administer.\textsuperscript{76} Because “Title II does not list all of the forms of discrimination that the title is intended to prohibit,” Congress provided that the “DOJ should write regulations implementing Title II’s prohibition against discrimination.”\textsuperscript{77} In response, the Attorney General

\begin{itemize}
\item \textsuperscript{67} \textit{Bledsoe}, 133 F.3d at 821.
\item \textsuperscript{68} \textit{Id.} (citing 29 U.S.C. § 701(8)).
\item \textsuperscript{69} \textit{Bledsoe}, 133 F.3d at 821-22.
\item \textsuperscript{70} 42 U.S.C. § 12132 (1994).
\item \textsuperscript{71} \textit{Bledsoe}, 133 F.3d at 821.

\item \textsuperscript{72} See Decker v. Univ. of Houston, 970 F. Supp. 575, 578 (S.D. Tex. 1997), \textit{aff'd}, 159 F.3d 1355 (5th Cir. 1998) (interpreting the phrase “services, programs, and activities” to be understood as a whole to focus on a public entity’s “outputs” rather than “inputs”), later holding reversed by Holmes, 145 F.3d at 684.
\item \textsuperscript{73} \textit{Bledsoe}, 133 F.3d at 821 (quoting 42 U.S.C. § 12132).
\item \textsuperscript{74} \textit{Id.} at 821-22.
\item \textsuperscript{75} \textit{Id.} at 822-23.
\item \textsuperscript{76} \textit{Id.} (quoting Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). See \textit{infra} note 98 and accompanying text.
\item \textsuperscript{77} \textit{Id.} at 822.
\end{itemize}
created the following series of subparts to the Code of Federal Regulations (CFR) addressing Title II:

(a) No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

(b)(1) For purposes of this part, the requirements of [Title I of the Act] apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of [Title I] . . .

(b)(2) For the purposes of this part, the requirements of section 504 of the Rehabilitation Act of 1973, as established by the regulations of the Department of Justice in 28 CFR part 41, as those requirements pertain to employment, apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of [Title I].

The Attorney General’s interpretation provided that Title II encompasses employment actions. Finding the adoption to be neither “arbitrary, capricious, [n]or manifestly contrary to statute,” the Bledsoe court accepted the DOJ interpretations.

In light of this three-part analysis, the Eleventh Circuit reversed the district court and held that Title II of the ADA is available for claims of public employment discrimination, even though Title I of the ADA expressly deals with employment.

Several other courts have sided with the Bledsoe decision to allow claims of employment discrimination under Title II. Additionally, the DOJ, National Employment Lawyers Association, and American Civil Liberties Union filed amicus briefs in support of the position Bledsoe adopted. Another decision in support of this position was the United States Court of Appeals for the Fourth Circuit’s in Doe v. University of Maryland Medical System Corp. Judge Wilkins, writing for the majority, found that because the language of section 504 of the

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78. Bledsoe, 133 F.3d at 822 (quoting 28 C.F.R. § 35.140).
79. Id. (citing Fla. Nat’l Guard v. Fed. Labor Relations Auth., 699 F.2d 1082, 1087 (11th Cir. 1983), which noted that “Congress is deemed to know the executive and judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning”).
80. Id. at 825 (citing Chevron, 467 U.S. at 844).
81. Bledsoe, 133 F.3d at 823.
82. Id. at 825.
83. See supra note 57.
84. Bledsoe, 133 F.3d at 820 n.3.
85. See Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261 (4th Cir. 1995) (involving a suit filed by a former resident of neurosurgery, who carried the human immunodeficiency virus (HIV), against the university for alleged violations of both the Rehabilitation Act and ADA).
Rehabilitation Act and Title II of the ADA is substantially the same, the same analysis applies to both, including all the remedies, procedures, and rights.\(^86\)

2. \textit{The Anti-Coverage Decision: Zimmerman v. State of Oregon Department of Justice}\(^87\)

On the other side of the spectrum is a United States Court of Appeals for the Ninth Circuit case holding that Title II of the ADA is not available for claims of employment discrimination, \textit{Zimmerman v. State of Oregon Department of Justice}.\(^88\) This case affirmed a Rule 12(b)(6) dismissal, where \textit{inter alia}, the United States District Court for the District of Oregon held that Title II does not apply to employment because Title II does not require similar procedures.\(^89\)

The Ninth Circuit first looked to the statute itself.\(^90\) Because Title I is traditionally considered the "employment title," it noted that at one time the plaintiff could have filed this action under Title I.\(^91\) However, due to the plaintiff's failure to first file a charge with the EEOC,\(^92\) the plaintiff was left to argue that Title II applies to employment discrimination.\(^93\)

The Ninth Circuit next looked to the Attorney General and DOJ interpretation of Title II.\(^94\) By finding "[n]o qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity" one could assume the Attorney General intended Title II to include employment.\(^95\) The court noted that in \textit{Chevron U.S.A., Inc. v. Natural Resources Defense Council},\(^96\) the Supreme

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\(^{86}\) \textit{Id.} at 1272 n.9.
\(^{87}\) 170 F.3d 1169 (9th Cir. 1999).
\(^{88}\) See \textit{Zimmerman v. Or. Dep't of Justice}, 170 F.3d 1169 (9th Cir. 1999) (involving a plaintiff with a disabling eye condition hired as a child support agent whose request for reasonable accommodations from the employer were allegedly refused and gave rise to the claim).
\(^{89}\) Zimmerman v. Or. Dep't of Justice, 983 F. Supp. 1327 (D. Or. 1997) (reasoning of the district court was premised on the assumption that allowing employment discrimination claims under Title II would make Title I almost completely redundant as applied to public employees).
\(^{90}\) Zimmerman v. Or. Dep't of Justice, 170 F.3d 1169 (9th Cir. 1999).
\(^{91}\) \textit{Id.} at 1172.
\(^{92}\) See 42 U.S.C. § 12117(a) (1994) (requiring an employee to first file a charge with the EEOC in a timely manner).
\(^{93}\) \textit{Zimmerman}, 170 F.3d at 1172-73.
\(^{94}\) 28 C.F.R. § 35.140(a) (1998).
\(^{95}\) \textit{Id.} at 1173 (quoting 28 C.F.R. § 35.140(a) (1998)).
Court devised a two-part analysis to review administrative agency interpretations of statutes. The first part entails applying "traditional tools of statutory construction to determine whether Congress has expressed its intent unambiguously" and second, if the intention of Congress is unclear, to "uphold the administrative regulation unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" The Ninth Circuit concluded its analysis by stating, "Congress unambiguously intended Title II to not apply to employment," therefore, no weight should be given to the Attorney General's interpretation.

Third, the Ninth Circuit looked to the wording of Title II to infer intent. The court interpreted the first clause that states, "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," in its plain meaning to only apply to "outputs" of a public agency, instead of "inputs," such as employment. Therefore, the court held that the wording of the first clause implies no intent for employment to be covered. The second clause of Title II states, "no qualified individual with a disability shall, by reason of such disability . . . be subjected to discrimination by any such entity." The court asserted two reasons for rejecting the rationale given by other courts that the second clause is independent from the first, thus prohibiting any form of discrimination by

97. Chevron, 467 U.S. at 842-44.
98. Zimmerman, 170 F.3d at 1173 (quoting Chevron, 467 U.S. at 842-44). Chevron addressed whether the Environmental Protection Agency's (EPA) decision "to allow States to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' is based upon a reasonable construction of the statutory term 'stationary source.'" Chevron, 467 U.S. at 840. Within this analysis, the Court articulated a two-pronged test to apply in these cases of statutory interpretation: (1) a court must apply the traditional rules of statutory construction to determine whether Congress has expressed its intent unambiguously: and (2) if the intention of Congress is not clear, a court should still uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute." Id. at 842-44.
99. Id. at 1173. See, e.g., Patterson v. Ill. Dep't of Corrs., 35 F. Supp. 2d 1103 (C.D. Ill. 1999) (refusing to defer to the Attorney General's interpretation of Title II).
100. Zimmerman, 170 F.3d at 1173-76.
102. Zimmerman, 170 F.3d at 1174.
103. Id.
105. See Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816, 822 (11th Cir. 1998) (finding the language of "any such entity" a catch-all phrase that prohibits all discrimination by a public entity, regardless of its context); Alberti v. City & County of San Francisco Sheriff's Dept., 32 F. Supp. 2d 1164 (N.D. Cal. 1998) (finding that although Congress did not insert the word "employment," the wording is evidence that the congressional intent was to keep the term broad); Downs v. Mass. Bay Transp. Auth., 13 F. Supp. 2d 130 (D. Mass. 1998) (keeping Title II broad enough to cover employment discrimination).
a public entity.\(^\text{106}\) First, the Ninth Circuit reasoned that an independent determination of the second clause would take a key phrase out of context.\(^\text{107}\) It noted that by putting both clauses in the same sentence and labeling the entire title “Public Services,” the two clauses naturally become interrelated.\(^\text{108}\) Further, Title II states that a person is not a qualified individual with a disability under the ADA unless he or she “meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”\(^\text{109}\) To this end, the court concluded that employment is not within the typical meaning of a “receipt of services.”\(^\text{110}\) In addition, the court noted that this interpretation was consistent with Ninth Circuit precedent.\(^\text{111}\)

Next, the Ninth Circuit looked to the structure of the ADA.\(^\text{112}\) The court noted five ways the structure demonstrates the intent of Congress. First, “Congress placed employment-specific provisions in Title I, which is labeled ‘Employment,’” but it did not do the same for Title II, instead labeling it as the “Public Services” provision.\(^\text{113}\) Second, “Congress defined a ‘qualified individual with a disability’ differently in Title II than in Title I.”\(^\text{114}\) Third, the court held that allowing claims for employment discrimination “under Title II would make Title I re-

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\(^\text{106}\) Zimmerman, 170 F.3d at 1175.

\(^\text{107}\) Id.

\(^\text{108}\) Id.

\(^\text{109}\) Id. (citing 42 U.S.C. § 12131(2) (1994)).

\(^\text{110}\) Id. at 1175-76 (explaining that “obtaining or retaining a job is not ‘the receipt of services,’ nor is employment a ‘program or activity provided by a public entity’”).

\(^\text{111}\) Id. at 1176. See Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996) (explaining that the word “or” in between the two clauses was “intended to prohibit two different phenomena,” disparate treatment of the disabled and intentional discrimination, and thus not permitting the inference that the second clause is a catch-all to include employment discrimination).

\(^\text{112}\) Zimmerman, 170 F.3d at 1176-79.

\(^\text{113}\) Id. at 1176. See Russello v. United States, 464 U.S. 16, 23 (1983) (stating that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion”).

\(^\text{114}\) Zimmerman, 170 F.3d at 1176 (making a person “qualified” under Title I if that person can work, whereas in Title II a person is “qualified if able to receive services or participate in publicly provided programs”). Compare 42 U.S.C. § 12111(8) (1994) (“The term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires”), with 42 U.S.C. § 12131(2):

The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id.
dundant” and “eviscerate the procedural requirements of Title I,” as Title I requires an exhaustion of administrative remedies before filing suit and Title II does not require the same exhaustion.115 Fourth, Congress gave regulatory authority over Title I and Title II to different agencies. Title I authority was given to the EEOC, and authority over Title II was given to the Attorney General.116 Fifth, “Congress expressly linked the employment-related provisions of the Rehabilitation Act to Title I of the ADA, not to Title II.”117 These five factors would further suggest that Congress intended to incorporate employment-related provisions into Title I, not Title II.

In addition, the Ninth Circuit looked to the Rehabilitation Act and rejected the argument that Title II either explicitly or implicitly incorporates the Rehabilitation Act’s prohibition on employment discrimination.118 Because one of the explicit “rights” given in the Rehabilitation Act is the “right to be free from employment discrimination,” the plaintiff argued that right is also explicitly incorporated into Title II.119 However, the Ninth Circuit found that Title II only incorporated one section of the Rehabilitation Act, 29 U.S.C. § 794a, or the Rehabilitation Act’s procedural rights, but not its substantive rights; thus no employment rights were incorporated into Title II.120 In addition, just because Congress requested the DOJ to coordinate the implementation of section 504 of the Rehabilitation Act, which prohibits employment discrimination as one of its many prohibitions,

115. Zimmerman, 170 F.3d at 1176.

The standards used to determine whether this section has been violated in a complaint allowing employment discrimination under this section shall be the standards applied under [T]itle I of the Americans with Disabilities Act of 1990 . . . and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 . . . as such sections relate to employment.

Id.
118. Zimmerman, 170 F.3d at 1179-83.
119. Id. at 1179.
120. Id. See 29 U.S.C. § 794(a), stating:

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . . The head of each such agency shall promulgate regulations as may be necessary to carry out the amendments . . . . Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation should take effect no earlier than the thirtieth day after the date on which such section is so submitted to such committees.

Id.
does not mean Congress intended it to be fully incorporated into Title II.\footnote{Zimmerman, 170 F.3d at 1179.} Title II states, “regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28 . . . .”\footnote{42 U.S.C. § 12134(b) (1994).} Instead of incorporating the Rehabilitation Act into Title II regulations, this section was only intended to ensure that the “regulations are ‘compatible’ to the extent they overlap.”\footnote{Zimmerman. 170 F.3d at 1179.}

The Ninth Circuit also rejected the contention that section 504 of the Rehabilitation Act was implicitly incorporated into Title II of the ADA.\footnote{Id. at 1180-83.} Although Title II contains wording similar to the wording of section 504 of the Rehabilitation Act,\footnote{Compare 42 U.S.C. § 12132 (1994) (stating 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”), with 29 U.S.C. § 794(a) (1994) (stating that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason or her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ”).} the court cited four reasons why incorporation cannot be implied.\footnote{Zimmerman, 170 F.3d at 1180-83.} First, Congress did not borrow the wording verbatim.\footnote{Id. (explaining that the wording under the Rehabilitation Act, “under any program or activity receiving Federal financial assistance,” is more broad than Title II’s phrase “services, programs, or activities of a public entity”).} Second, the surrounding sections of the Rehabilitation Act discuss employment explicitly, while no section of Title II does the same.\footnote{Id. at 1180-82.} Third, unlike the Rehabilitation Act, Congress explicitly addressed employment elsewhere in the ADA—through Title I—thus incorporating employment into Title II would be redundant.\footnote{See, e.g., Consol. Rail Corp. v. Darrone, 465 U.S. 624, 632 n.13 (1984) (distinguishing parts of the Civil Rights Act of 1964, because the Act was unnecessary to extend Title VI to ban employment discrimination when Title VII already comprehensively regulates such discrimination).} Fourth, “Congress has linked the Rehabilitation Act to Title I, but not Title II, of the ADA.”\footnote{Zimmerman, 170 F.3d at 1183.}

In response to this analysis of the congressional intent and structure of the ADA, the Ninth Circuit concluded that Title II is not available for claims of employment discrimination when Title I of the ADA expressly addresses employment claims.\footnote{Zimmerman, 170 F.3d at 1181-83. See 29 U.S.C. § 794(d) (1994) (incorporating employment provisions of Title I of the ADA into the Rehabilitation Act).} Although the Ninth Circuit

\begin{bibliography}{10}
\bibitem{121}Zimmerman, 170 F.3d at 1179.
\bibitem{122}42 U.S.C. § 12134(b) (1994).
\bibitem{123}Zimmerman, 170 F.3d at 1179.
\bibitem{124}Id. at 1180-83.
\bibitem{125}Compare 42 U.S.C. § 12132 (1994) (stating 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”), with 29 U.S.C. § 794(a) (1994) (stating that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason or her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ”).
\bibitem{126}Zimmerman, 170 F.3d at 1180-81.
\bibitem{127}Id. (explaining that the wording under the Rehabilitation Act, “under any program or activity receiving Federal financial assistance,” is more broad than Title II’s phrase “services, programs, or activities of a public entity”).
\bibitem{128}Id.
\bibitem{129}Id. at 1180-82. See, e.g., Consol. Rail Corp. v. Darrone, 465 U.S. 624, 632 n.13 (1984) (distinguishing parts of the Civil Rights Act of 1964, because the Act was unnecessary to extend Title VI to ban employment discrimination when Title VII already comprehensively regulates such discrimination).
\bibitem{130}Zimmerman, 170 F.3d at 1181-83. See 29 U.S.C. § 794(d) (1994) (incorporating employment provisions of Title I of the ADA into the Rehabilitation Act).
\bibitem{131}Zimmerman, 170 F.3d at 1183.
\end{bibliography}
noted this decision would cause a split among the circuits, it justified its decision by finding that the courts addressing the problem previously assumed without analysis that Title II applied to employment. Instead, the other courts relied on the Attorney General's regulations, legislative history, and the Rehabilitation Act without analyzing whether Congress intended to incorporate its prohibition against employment discrimination into Title II.

The Ninth Circuit remains firm in holding that Title II does not apply to claims of employment discrimination. However, few lower courts have adopted a similar view taken by the Zimmerman court that Title II is not available for claims of employment discrimination.

After examining the background arguments concerning whether Title II applies to employment discrimination while Title I explicitly does so, this section now turns to the history of the Eleventh Amendment to complete the background necessary to determine whether a similar Garrett-type decision would result had the case been brought under Title II of the ADA.

D. The Eleventh Amendment and Congress’s Power to Abrogate Under Section 5 of the Fourteenth Amendment

The United States Constitution grants Congress legislative power to enact statutes, such as the ADA, that would remedy constitutional violations through three specific sources. This authority comes from “Article I and III powers over the lower federal courts; the necessary and proper clause of Article I authorizing Congress to execute the judicial power; and Section 5 of the Fourteenth Amendment authorizing Congress to enforce the provisions of that amendment.”

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132. Id.
133. Id.
134. Id. Two other courts have come to the same conclusion as the Zimmerman court in holding that employment discrimination is not available under Title II. See, e.g., Decker v. Univ. of Houston, 970 F. Supp. 575 (S.D. Tex. 1997); Iskander v. Rodeo Sanitary Dist., 121 F.3d 715 (9th Cir. 1997).
135. See Denton v. Arizona, 2001 WL 700598 (9th Cir. June 11, 2001) (holding that, pursuant to Zimmerman, Title II is not available for claims of employment discrimination).
138. Id.
The power specifically used to enact the ADA comes from Section 5 of the Fourteenth Amendment stating, "Congress shall have the power to enforce, by appropriate legislation, the provisions of [Article I]." To analyze whether Congress has the power to enforce the ADA against the states, it is first necessary to understand the limits to both the Eleventh Amendment and Section 5 of the Fourteenth Amendment.

Many commentators believe that the Eleventh Amendment adopted the dissenting opinion of Justice James Iredell in *Chisholm v. Georgia*. In *Chisholm*, the plaintiff, a citizen of South Carolina, sued the State of Georgia in a federal court under diversity jurisdiction to recover debts on bonds issued by Georgia. The State of Georgia argued that as a sovereign, it could not be sued in a federal court without its consent. While the majority held that Georgia was subject to the Court's jurisdiction, Justice Iredell argued that the Constitution did not grant this power of jurisdiction over the states to the Court, and even if Article III granted such power, a new law would be necessary for the Court to exercise this power. Primarily because of this holding in *Chisholm*, Congress adopted the Eleventh Amendment in 1795 stating, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Although the language of the Eleventh Amendment and the idea of sovereign immunity, derived from English law, seem straightforward, over two hundred years later the Court is still struggling to determine the boundaries of Eleventh Amendment protection. For
example, in *Hans v. Louisiana*, the plaintiff, a citizen of Louisiana, sued the State of Louisiana in federal court under federal question jurisdiction. Although the language of the Eleventh Amendment does not say that citizens may not sue their own state, *Hans* held that a nonconsenting state could not be brought into court against its will. In contrast, however, “the Supreme Court has refused to apply the Eleventh Amendment in many instances” where the Court does not believe the Eleventh Amendment extends.

At the same time, however, Section 5 of the Fourteenth Amendment gives Congress the power to pass “appropriate legislation” to enforce the mandates of the Fourteenth Amendment, specifically affording all persons “equal protection of the laws.” In light of this, Congress passed the ADA to protect individuals with disabilities. In exercising its power to enact the ADA against the states, Congress was required to abrogate Eleventh Amendment immunity by “unequivocally express[ing] its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court” pursuant to a majority of the Supreme Court including Justices Stevens, Souter, Ginsberg, and Breyer that views the Eleventh Amendment as a restriction on the federal courts’ subject matter jurisdiction only in precluding cases brought against states founded solely on diversity jurisdiction. *Id. See also John J. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*. 83 COLUM. L. REV. 1889, 2003-04 (1983) (concluding that “[t]he history of the [E]leventh [A]mendment is in large measure an unflinchingly political one” and “[a]t the two major points in its history, the amendment’s contours were shaped not by doctrinal reasoning but by the political exigencies of the times”).

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149. 134 U.S. 1 (1890).
150. *Id.* at 4-5.
151. *Id.* at 18.
152. CHEMERINSKY, *supra* note 142, at 404-11 (discussing in detail suits the Supreme Court explicitly allows over the Eleventh Amendment). For more information on where the Supreme Court has refused to apply the Eleventh Amendment in federal court, see California v. Deep Sea Research, 523 U.S. 491 (1998) (holding that the Eleventh Amendment does not bar admiralty suits where the state does not have possession of the property); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985) (explaining that the state can waive its Eleventh Amendment immunity); Colorado v. New Mexico, 459 U.S. 176 (1982) (holding that the Eleventh Amendment does not bar suits against a state by another state); Fla. Dep’t of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) (holding that the Eleventh Amendment did not bar a federal court from issuing a warrant in an *in rem* action for a wreckage in an admiralty suit); Nevada v. Hall, 440 U.S. 410 (1979) (holding that the Eleventh Amendment does not prevent a state from being sued in its own state court or in another state's court, instead the Eleventh Amendment only applies to federal court); Mt. Health City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (holding that the Eleventh Amendment does not bar suits against municipalities or political subdivisions); United States v. Mississippi, 380 U.S. 128 (1965) (holding that the Eleventh Amendment does not bar federal court suits by the federal government against a state); United States v. Texas, 143 U.S. 621 (1892) (holding that the Eleventh Amendment does not bar federal court suits by the federal government against a state).
to a valid exercise of power, namely Section 5 of the Fourteenth Amendment.\textsuperscript{155} The challenge is to balance the policy concerns of the Eleventh Amendment, maintaining dual sovereignty between the states and federal government, with the policy concerns surrounding the Fourteenth Amendment, state accountability.

1. The Early Cases

The case law necessary to understand the modern approach to the constrictions under federalism began in 1985 with \textit{Atascadero State Hospital v. Scanlon}.

In \textit{Atascadero}, the Supreme Court announced a two-pronged test to determine when abrogation of the Eleventh Amendment is achieved: "Congress must clearly and unmistakably indicate, in the language of the statute itself, its intent to abrogate state sovereign immunity; and . . . Congress may abrogate immunity only pursuant to a valid exercise of power, namely its power under [S]ection 5 of the Fourteenth Amendment."\textsuperscript{157}

Four years later in \textit{Pennsylvania v. Union Gas Company},\textsuperscript{158} the Court articulated an expansive interpretation of congressional power. Five justices\textsuperscript{159} affirmed the holding in \textit{Hans} as a "fundamental principle of federalism."\textsuperscript{160} With only a plurality opinion, Justice William Brennan found that the language of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERLA)\textsuperscript{161} and Superfund Amendments (SARA)\textsuperscript{162} did not meet the two-pronged standard enunciated in \textit{Atascadero}.

Nevertheless, the Court

\begin{itemize}
  \item \textsuperscript{155} \textit{Atascadero}, 473 U.S. at 242.
  \item \textsuperscript{156} 473 U.S. 234. In \textit{Atascadero}, the Court held that this Act did not abrogate sovereign immunity under the Eleventh Amendment because the language of the Act did not unequivocally demonstrate Congress's intent to abrogate immunity. \textit{Id.} at 247.
  \item \textsuperscript{157} Royer, supra note 7, at 645 (citing \textit{Atascadero}, 473 U.S. at 242-43).
  \item \textsuperscript{158} 491 U.S. 1 (1989). In \textit{Union Gas}, the Court examined whether Congress in fact made a clear statement of legislative intent to abrogate the Eleventh Amendment. \textit{Id.} at 5. Initially, the district court dismissed the case, holding that the Eleventh Amendment barred it. \textit{Id.} at 6. The Court of Appeals affirmed. \textit{Id.} On the case's first appearance before the Supreme Court, the case was remanded for reconsideration in light of the Superfund Amendments to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERLA). 42 U.S.C. §§ 9601-9675 (1994). \textit{Id.} On remand, the Third Circuit found a clear statement of legislative intent and held that CERLA was a valid exercise of congressional power. \textit{Id.}
  \item \textsuperscript{159} On this view, Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Byron White joined Justice Scalia in his opinion. \textit{Union Gas}, 491 U.S. at 3-4.
  \item \textsuperscript{160} \textit{Id.} at 37 (Scalia, J., concurring in part and dissenting in part).
  \item \textsuperscript{161} 42 U.S.C. §§ 9601-9675. Known as CERLA or the "Superfund," this Act was passed to combat hazardous waste contamination and protect public health. For a full summary on the history of the Act, see John Quarles & Michael W. Steinberg, \textit{The Superfund Program and its 20th Anniversary}, 31 ENVTL. L. REP., 10706 (2001).
  \item \textsuperscript{162} These amendments were added to CERLA to create more stringent standards.
  \item \textsuperscript{163} \textit{Union Gas}, 491 U.S. at 13.
\end{itemize}
held that even though Congress did not abrogate immunity through Section 5 of the Fourteenth Amendment, the legislation was valid pursuant to its powers under the Interstate Commerce Clause.¹⁶⁴

2. Seminole Tribe of Florida v. Florida¹⁶⁵

The shift from this expansive view of congressional power began in Seminole Tribe of Florida v. Florida. This case involved an Indian tribe suing the State of Florida to compel negotiations under the Indian Gaming Regulatory Act (IGRA).¹⁶⁶ Sovereign immunity was raised on a motion to dismiss in the district court.¹⁶⁷ The motion was denied¹⁶⁸ and then reversed on appeal by the Eleventh Circuit¹⁶⁹ as an invalid exercise of power. The Supreme Court granted certiorari to address the sovereign immunity issue and affirmed the court of appeals in a five to four decision.¹⁷⁰

With Justice Clarence Thomas's addition to the Court, there was a clear majority in favor of the current interpretation that the Eleventh Amendment requires strict subject matter jurisdiction in federal court that bars all suits against state governments.¹⁷¹ Chief Justice Rehnquist, writing for the majority, overruled Union Gas's holding that Congress could act pursuant to its power under the Interstate Commerce Clause¹⁷² and focused on whether Congress validly abrogated immunity through Section 5 of the Fourteenth Amendment. The Court also found that "Congress intended through the Act to abrogate the States' sovereign immunity from suit."¹⁷³ However, the Court found that Congress did not act pursuant to a constitutional provision granting it power to abrogate since "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I can-

¹⁶⁴. Id. at 13-14, 57.
¹⁶⁶. Id. at 47. See 25 U.S.C. §§ 2710(d)(3), (7) (1994) (articulating the Indian Gaming Regulatory Act (IGRA)). The IGRA "imposes upon the [s]tates a duty to negotiate in good faith with an Indian tribe toward the formation of a compact and authorizes a tribe to bring suit in federal court against a State in order to compel performance of that duty." Seminole Tribe, 517 U.S. at 47.
¹⁶⁷. Seminole Tribe, 517 U.S. at 52.
¹⁶⁸. Seminole Tribe, 801 F. Supp. at 657-63 (analyzing the language of the IGRA and finding a clear intent to abrogate immunity).
¹⁶⁹. Seminole Tribe, 11 F.3d at 1019 (finding that the IGRA did not pass the second prong of the Atascadero test for a valid exercise of abrogation).
¹⁷⁰. Seminole Tribe, 517 U.S. at 76.
¹⁷¹. See CHEMERSKINSKY, supra note 142, at 402 (explaining that the four Justices with this interpretation, Rehnquist, O'Connor, Scalia, and Kennedy, were joined by the appointment of Justice Thomas, thus creating a clear majority).
¹⁷². Seminole Tribe, 517 U.S. at 47, 72.
¹⁷³. Id. at 57.
not be used to circumvent the constitutional limitations placed upon federal jurisdiction.” Therefore, the court dismissed the complaint against the State of Florida for lack of jurisdiction, and ultimately, the majority opinion emphasized “the important policy of recognizing the states as sovereign entities and conferring upon them the benefits of such status, including immunity from certain suits to which they do not consent.”

3. City of Boerne v. Flores

Although Seminole Tribe was viewed as an expansion of Eleventh Amendment power, the full impact of this shift was not appreciated until City of Boerne v. Flores. City of Boerne involved a dispute over the denial of a building permit to expand the size of a church in Boerne, Texas. The local zoning authorities denied the request under an ordinance governing historic preservation. Suit was brought to challenge the denial under the Religious Freedom Restoration Act of 1993 (RFRA).

The Court’s analysis began with a detailed history of Section 5 of the Fourteenth Amendment and its evolving interpretations. In the past, the Court held that “[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into ‘legislative spheres of autonomy previously reserved to the States.’" However, “as broad as the congressional enforcement power is, it is not unlimited,” and “Congress’ power under [Section] 5 . . . extend[s] only to ‘enforce[ing]’ the provisions of the Fourteenth Amendment.” This power to “enforce” the Amendment includes the authority both to remedy and de-

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174. Id. at 72-73.
175. Id. at 73.
178. Id. (granting certiorari after the district court concluded the RFRA exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment and the Fifth Circuit reversed, holding the Act to be constitutional).
179. Id. at 511.
180. Id. at 512.
181. Id. See 107 Stat. 1488, 42 U.S.C. § 2000bb et seq. (1994). RFRA prohibits government from substantially burdening a person’s exercise of religion even if the burden results from a rule of general applicability unless government can demonstrate the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.
183. Id. at 518 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).
184. Id.
185. Id. at 519.
ter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment’s text.\textsuperscript{186} Additionally, “[t]here must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”\textsuperscript{187} According to the Court, “history confirms the remedial, rather than the substantive, nature of the Enforcement Clause.”\textsuperscript{188}

Applying these standards, the Court held that Congress did not have the power under Section 5 of the Fourteenth Amendment to enact the RFRA.\textsuperscript{189} After examining the legislative history of the RFRA, the Court determined that “the stringent test [the Act] demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved”\textsuperscript{190} by contradicting the “vital principles necessary to maintain separation of powers and the federal balance.”\textsuperscript{191} While this holding does not explicitly address the concerns under the Eleventh Amendment, the decision starts to emphasize the “appropriate balance of power between the federal and state governments.”\textsuperscript{192} To this end, “when read[ing Seminole Tribe and City of Boerne] together, these cases clearly demonstrate a . . . ‘new federalism’ in which the Supreme Court focuses on maintaining state sovereignty and thus according to what the Court views as their appropriate status in our system of government.”\textsuperscript{193}

4. Kimel v. Florida Board of Regents\textsuperscript{194}

The next case that helped define this area of jurisprudence is Kimel v. Florida Board of Regents.\textsuperscript{195} Kimel involved three different cases consolidated for appeal\textsuperscript{196} concerning whether the Age Discrimina-

\begin{itemize}
  \item \textsuperscript{187} City of Boerne, 521 U.S. at 520.
  \item \textsuperscript{188} Id. at 518.
  \item \textsuperscript{189} Id. at 536.
  \item \textsuperscript{190} Id. at 533.
  \item \textsuperscript{191} Id. at 536.
  \item \textsuperscript{192} Royer, supra note 7, at 671.
  \item \textsuperscript{193} Id.
  \item \textsuperscript{194} 528 U.S. 62 (2000).
  \item \textsuperscript{195} Id.
  \item \textsuperscript{196} Kimel, 525 U.S. at 1121 (granting certiorari to resolve the conflict among districts after the Eleventh Circuit held that the ADEA does not validly abrogate the states’ Eleventh Amendment immunity).
\end{itemize}
tion in Employment Act of 1967 (ADEA)\textsuperscript{197} is a valid abrogation of the Eleventh Amendment. The ADEA makes it unlawful for an employer to fail or refuse to hire, discharge, or otherwise discriminate against any individual because of that individual's age.\textsuperscript{198} The Court held that although the ADEA contains a clear statement of Congress's intent to abrogate the states' immunity, the abrogation exceeded Congress's authority under Section 5 of the Fourteenth Amendment.\textsuperscript{199}

The Court applied the same congruence and proportionality test as used to invalidate the RFRA in \textit{City of Boerne}.\textsuperscript{200} First, the Court found that old age does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it.\textsuperscript{201} Therefore, the Court applied the rational basis standard, allowing states to discriminate based on age without offending the Fourteenth Amendment if the age classification is "rationally related to a legitimate interest."\textsuperscript{202} Based on this standard, the Court found that the legislative history provided to establish a pattern of age discrimination merely constituted "isolated sentences clipped from floor debates and legislative reports," thus falling short of the mark to create a pattern.\textsuperscript{203} Due to the lack of evidence, the ADEA failed the "congruence and proportionality test," and thus was an invalid abrogation of the state's sovereign immunity.\textsuperscript{204}

5. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank\textsuperscript{205}

The Court clarified the congruence and proportionality test in \textit{Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank}.\textsuperscript{206} To invoke its Section 5 congressional power, the Court held that Congress must both "identify conduct transgressing the Fourteenth Amendment's substantive provisions" and "tailor its legis-

\textsuperscript{197} 29 U.S.C. § 621 \textit{et seq}. (1994) (making it unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual because of the individual's age).
\textsuperscript{199} \textit{Kimel}. 528 U.S. at 92.
\textsuperscript{200} \textit{Id}. at 81-83.
\textsuperscript{201} \textit{Id}. at 83.
\textsuperscript{202} \textit{Id}.
\textsuperscript{203} \textit{Id}. at 89.
\textsuperscript{204} \textit{Id}. at 91.
\textsuperscript{205} 527 U.S. 627 (1999).
\textsuperscript{206} \textit{Id}. In this case, a patentee brought an suit against a state agency alleging infringement of a patented apparatus and method for administering college investment programs under the Trademark Remedy Clarification Act. \textit{Id}. at 630.
lative scheme to remedying or preventing such conduct.” The Court then looked to the legislative record to identify a pattern of constitutional violations by the states to justify such an act. The Court stated that although the legislative record is not determinative, identifying the wrong is still a critical part of the Section 5 analysis.

6. Board of Trustees of the University of Alabama v. Garrett

The next case decided by the Court pertaining to sovereign immunity was *Board of Trustees of the University of Alabama v. Garrett*. Garrett reaffirmed this same line of reasoning that Congress did not validly abrogate the states’ Eleventh Amendment sovereign immunity when enacting legislation, even though Congress unequivocally intended to do so, under its powers pursuant to Section 5 of the Fourteenth Amendment. Additionally, the Court built upon its previous reasoning by emphasizing the importance of a legislative record and based the ruling on the record’s perceived weakness.

7. The Lower Courts’ View on Title II and Sovereign Immunity

Before Garrett, the lower courts were split on whether Title II of the ADA validly abrogates state sovereign immunity pursuant to its Fourteenth Amendment powers. The Garrett Court, in refusing to answer that question, has caused an even deeper divide among the circuits.

One lower court that discussed whether Title II of the ADA exceeds congressional authority under Section 5 of the Fourteenth Amendment prior to Garrett was the United States Court of Appeals for the Eighth Circuit in *Alsbrook v. City of Maumelle*. The Eighth

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207. *Id.* at 639.
208. *Id.* at 639-41.
209. *Id.* at 646.
211. *Id.* See *supra* notes 31-54 and accompanying text for a detailed background, summary, and explanation of the Garrett holding.
213. *Id.* at 370-71 (explaining that the legislative findings presented to establish a pattern of discrimination were merely “unexamined, anecdotal accounts of adverse, disparate treatment by state officials”). For a detailed discussion of the significance of the reliance on a legislative record, see William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 Stan. L. Rev. 87 (2001).
214. Compare Dare v. California, 191 F.3d 1167 (9th Cir. 1999) (holding that Congress did not abrogate the Eleventh Amendment in enacting Title II of the ADA), *with* Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (holding that Congress abrogated the Eleventh Amendment in enacting Title II of the ADA).
215. See Alsbrook, 184 F.3d at 999 (8th Cir. 1999). Alsbrook involved Christopher Alsbrook, who was denied certification as a law enforcement officer due to a congenital condition called...
Circuit held that Title II of the ADA was not a valid abrogation of congressional power and reversed the district court's denial of summary judgment based upon that issue. In doing so, the Eighth Circuit used the same two-pronged test articulated in *Seminole Tribe*. Although Title II of the ADA passed the first prong, whether Congress intended to abrogate state sovereign immunity, it did not satisfy the second, whether Congress acted pursuant to its congressional power. The court followed the reasoning used in *City of Boerne* to find that Title II of the ADA does more than act as remedial legislation. It also noted that even though Congress relied on extensive findings regarding the discrimination faced by disabled citizens, the legislative record alone could not suffice to bring Title II within the powers granted to Congress. Further, the Court held that Title II does not comport with the rational basis test for disabled persons.

Another lower court that examined this issue before *Garrett* was the Ninth Circuit in *Dare v. California*. Similar to the Eighth Circuit, the Ninth Circuit used the two-pronged test articulated in *City of Boerne* to determine that Title II is not a valid congressional abrogation of state sovereign immunity.

Amblyopia, which impaired his eyesight. *Id.* Alsbrook sought both injunctive relief and compensatory and punitive damages under both Title II of the ADA and 42 U.S.C. § 1983 (1998).

216. See *Popovich v. Cuyoga County Ct. of Common Pleas*, 227 F.3d 627 (6th Cir. 2000), *reh'g en banc granted, op. vacated* (holding that Congress exceeded its authority under Section 5 of the Fourteenth Amendment when it attempted to abrogate Eleventh Amendment immunity by applying the ADA's Title II disability discrimination provisions to the States).

217. See *supra* notes 156-157 and accompanying text.

218. *Alsbrook*, 184 F.3d at 1005-06. The court found that "Congress has unequivocally expressed its intent to abrogate [E]leventh [A]mendment immunity" through 42 U.S.C. § 12202, which provides that "[a] State shall be immune under the [E]leventh [A]mendment ... from an action in Federal or State court of competent jurisdiction for a violation of this chapter." *Id.* at 1005.

219. *Id.* at 1007-09.


221. *Alsbrook*, 184 F.3d at 1007.

222. *Id.* at 1008.

223. *Id.* at 1009. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (articulating that under the Equal Protection Clause of the Fourteenth Amendment, state classifications on the basis of mental retardation, a disability, need only satisfy rational basis review).

224. See *Wessel v. Glendening*, 306 F.3d 203 (4th Cir. 2002) (holding that Title II is not a valid abrogation of sovereign immunity); *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001) (holding that Title II is not a valid abrogation of sovereign immunity); *Thompson v. Colorado*, 258 F.3d 1241 (10th Cir. 2001) (holding that Title II is not a valid abrogation of sovereign immunity).

225. 191 F.3d 1167 (9th Cir. 1999) (involving an class action lawsuit challenging a six dollar fee charged to disabled individuals to obtain a placard necessary for handicapp'd parking zones under the Title II of the ADA).
Boerne to resolve this issue. However, in determining whether Title II constituted a valid exercise of constitutional powers, the Ninth Circuit found the legislation to be both congruent and proportional to its remedial and preventative goal. The Ninth Circuit examined the legislative record and found that “the ADA was a necessary legislative response to a long history of arbitrary and irrational discrimination.” Additionally, the Ninth Circuit acknowledged the importance of congressional deference in finding that the ADA was a proportional response to the discrimination. The Ninth Circuit affirmed the Dare holding in Hason v. Medical Board of California, which has been appealed and certiorari has been granted by the United States Supreme Court.

An alternative way of approaching Title II of the ADA was utilized by the United States Court of Appeals for the Second Circuit in Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn. In that case, a dismissed medical student alleged violations under Title II of the ADA. The Second Circuit found that although Title II as a whole exceeded congressional authority, the court looked to “how Title II monetary claims against the states can be limited so as to comport with Congress’s [Section] 5 authority.” To this court, congressional authority would be limited to a factual inquiry into whether the “violation was motivated by discriminatory animus or ill will based on the plaintiff’s disability.” Without this, a claim cannot stand under Title II.

The United States Court of Appeals for the Sixth Circuit also introduced a new approach to reviewing Title II in the sovereign immunity context in Popovich v. Cuyahoga County Court of Common Pleas. In Popovich, the plaintiff brought a Title II suit against a state court for failing to provide him with an adequate hearing device during a

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226. Id. at 1174-75.
227. Id. (explaining that, based on the legislative findings offered to prove a history of discrimination, the congruence requirement was satisfied, and relying mainly on the importance of deference to Congress along with the record to satisfy the proportionality requirement).
228. Id. at 1174.
229. Id. at 1175.
230. 279 F.3d 1167 (9th Cir. 2002).
232. 280 F.3d 98 (2d Cir. 2001).
233. Id. at 105.
234. Id. at 111.
235. Id.
236. 276 F.3d 808 (6th Cir. 2002). The Sixth Circuit affirmed its holding in Carten v. Kent State Univ., 282 F.3d 391 (6th Cir. 2002), however, it still dismissed the plaintiff's complaint because “no allegations sounded in due process” but rather sounded in equal protection. Carten, 282 F.3d at 395.
child-custody hearing.\textsuperscript{237} The state argued that under the Eleventh Amendment it was immune from suit.\textsuperscript{238} Instead of dismissing the claim, the court barred the plaintiff's action in as much as it relied "on congressional enforcement of the Equal Protection Clause,"\textsuperscript{239} but the court did not dismiss the claim as much as it relied "on congressional enforcement of the Due Process Clause."\textsuperscript{240} Further, this due process right to participate in a child-custody hearing is within Congress's power to legislate under Section 5 of the Fourteenth Amendment, thus abrogating a state's sovereign immunity.\textsuperscript{241}

A similar type of middle-ground methodology was adopted by the United States Court of Appeals for the First Circuit in Kiman v. New Hampshire Department of Corrections.\textsuperscript{242} This court looked only to the ADA as it applied to the particular facts of the case, instead of examining it on a broader scope.\textsuperscript{243} In doing so, the court 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."\textsuperscript{244} In this case, the constitutional violation was cruel and unusual punishment.\textsuperscript{245}

In sum, over the past decade the Court has expanded the scope of Eleventh Amendment immunity to federal statutes enacted by Congress to protect basic civil rights. Exactly how far the Court is willing to expand this reasoning and what we as citizens can do to protect our rights is addressed in the rest of this Comment.

III. WHETHER UNDER A TITLE II ANALYSIS, THE COURT WOULD HAVE THE SAME OUTCOME AS GARRETT

To determine whether Garrett would have the same outcome under Title II, a two-part analysis is necessary.\textsuperscript{246} The first inquiry is whether a claim for employment discrimination is available under Title II even though Title I explicitly addresses employment. This section will analyze the legislative history, intent, interpretations, and structure of Title II and show why, although a minority view, the

\begin{footnotesize}
\textsuperscript{237} Popovich, 276 F.3d. at 811.
\textsuperscript{238} Id.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Id. at 815-16.
\textsuperscript{242} 301 F.3d 13 (1st Cir. 2002).
\textsuperscript{243} Id.
\textsuperscript{244} Id. at 24.
\textsuperscript{245} Id.
\textsuperscript{246} Garrett, 531 U.S. at 356.
\end{footnotesize}
Ninth Circuit's analysis\textsuperscript{247} is the better approach. Title II should not extend to claims of employment discrimination when Title I does so explicitly.\textsuperscript{248} The second question still must be addressed even though this Comment asserts that employment discrimination is not covered under Title II because a majority of courts\textsuperscript{249} and authorities support the view that employment discrimination claims are in fact incorporated into Title II, and the Supreme Court has yet to decide the fate of Title II against the states in general.\textsuperscript{250} Therefore, whether Title II of the ADA is a valid exercise of congressional power against a state government will also be addressed. Although Congress intended the ADA to be a valid abrogation of federal power over the states,\textsuperscript{251} under the Supreme Court's current Eleventh Amendment jurisprudence,\textsuperscript{252} Title II does not validly abrogate the Eleventh Amendment due to its seeming lack of a legislative record to establish a pattern of state-sponsored discrimination.

\section{Title II is Not Available for Claims of Employment Discrimination}

The federal appellate courts are split on whether the legislative intent, actual language of the Act, and the DOJ regulations interpreting Title II show that Title II encompasses claims for employment discrimination.\textsuperscript{253} However, only the Ninth Circuit has held that employment discrimination is not a valid claim under Title II of the ADA.\textsuperscript{254} Regardless of the ultimate holdings, the courts have all examined these common factors.

\textsuperscript{247} Zimmerman, 170 F.3d at 1169. See supra notes 87-134 and accompanying text.

\textsuperscript{248} Zimmerman, 170 F.3d at 1184.


\textsuperscript{250} See Garrett, 531 U.S. at 356 n.1 (explaining the divide among lower courts).

\textsuperscript{251} See 42 U.S.C. § 12101(b)(4) (1994) (explaining that the ADA intended to "invoke a sweep of congressional authority, including the power to enforce the [F]ourteenth [A]mendment 

\textsuperscript{252} See supra note 6 and accompanying text.

\textsuperscript{253} Compare Bledsoe, 133 F.3d at 816 (holding that employment discrimination falls within the scope of Title II coverage), with Zimmerman, 170 F.3d at 1169 (holding that employment discrimination does not fall within the scope of Title II coverage).

\textsuperscript{254} Zimmerman, 170 F.3d at 1169.
I. Legislative Intent

The ADA does not explicitly state that claims for employment discrimination are included under Title II. However, courts have argued that this intent to make claims of employment discrimination available under Title II can be implied from extensive legislative commentary regarding the Act’s application.255

a. Similarities to the Rehabilitation Act

One report of the United States House of Representatives Judiciary Committee stated, “in the area of employment, [T]itle II incorporates the duty set forth in the regulations for [s]ections 501, 503 and 504 of the Rehabilitation Act to provide a ‘reasonable accommodation’ that does not constitute an ‘undue hardship.’”256 This would imply that all of the substantive rights of the Rehabilitation Act were intended to extend to Title II. Further, an earlier report noted that the committee intended the forms of discrimination prohibited by Title II to be identical to those set out in the applicable provisions of Titles I and III.257 This would imply that Title II covers the same forms of discrimination as Titles I and III, except Title II applies only to the public sector, instead of the private sector. The same committee report noted that Title II was intended to work in the same manner as section 504 of the Rehabilitation Act, for example, by not requiring an exhaustion of remedies before filing suit.258 Thus, since section 504 of the Rehabilitation Act was so focused on employment discrimination, Title II must also be focused on employment discrimination.259

On the face of these cursory statements, it would seem Congress intended to incorporate all of the Rehabilitation Act into Title II of the ADA.260 However, a closer look shows that is not what Congress

255. Bledsoe, 133 F.3d at 821.
256. Id. (citing H.R. REP. NO. 101-485(III), at 50 (1990)).
257. Id. (citing H.R. REP. NO. 101-485(II), at 84 (1990)).
258. Id. See Weber, supra note 63, at 1095 (explaining that “[s]ection 504 already covered most governmental units, and [T]itle II was perceived as merely extending that coverage a small degree”). In addition: section 504 does not require exhaustion of administrative remedies as a prerequisite to a suit, although . . . Title I of the ADA require[s] some form of exhaustion for employment discrimination matters. Title II’s legislative history makes clear that its drafters meant to exclude private actions brought under it from a requirement of administrative exhaustion, in harmony with section 504.
259. Id. at 1104-05.
260. One commentator argues that four factors contribute to similarities in interpretation of the laws. These factors are:
actually incorporated into the wording of the Act. Title II states, “[t]he remedies, procedures, and rights set forth in section 794a [of the Rehabilitation Act] shall be the remedies, procedures, and rights [of Title II].”261 This meant that Congress explicitly incorporated only section 794(a) rights into Title II, not any other right. However, Section 794(a) only addresses procedural rights.262 One cannot conclude from incorporating one right that Congress intended to incorporate the entire Act. In fact, because Congress explicitly incorporated this one section, it would seem logical that if it meant to incorporate others, it would have explicitly done just that.

In addition, one cannot argue that the rest of the Rehabilitation Act was incorporated into Title II, which states, “regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations, applicable to recipients of Federal financial assistance under [the Rehabilitation Act].”263 Instead of full incorporation, Congress was asserting that only overlapping regulations should be consistent with one another.264

Other courts have looked to the wording of both acts to determine that Congress meant each act to be treated similarly.265 However, based on the wording, the scope and coverage are quite different.266 Further, although the wording might be similar, several factors make a difference as to whether courts should take a cursory approach and find the two acts to be substantially similar. First, the wording specifying coverage is not verbatim.267 The Rehabilitation Act applies to a

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264. Zimmerman, 170 F.3d at 1179-80.
265. See Doe v. Univ. of Md. Med. Sys. Corp., 50 F.3d 1261, 1264 nn.7-9 (4th Cir. 1995) (applying the same analysis to both statutes because the language of both was substantially similar).
266. See Weber, supra note 63, at 1089 (explaining that when enacting the ADA Congress “imposed obligations that are subtly different from those imposed by section 504” and also “built upon section 504 when it imposed obligations on private employers and businesses in the other titles of the ADA but did not place exactly the same obligations on private companies that it placed on public entities with [T]itle II”).
267. See Weber, supra note 63, at 1110-11. Professor Weber explains that another facial difference is in the wording “solely by reason of” a disability that is not included in Title II. Profes-
“qualified individual with a disability . . . subjected to discrimination under any program or activity receiving Federal financial assistance.” Title II of the ADA applies to a “qualified individual with a disability . . . excluded from participation in or denied the benefits of the services, programs, or activities of a public entity.” Second, the Rehabilitation Act includes sections explicitly addressing employment discrimination and Title II does not. Third, employment discrimination in the Rehabilitation Act is solely covered by section 504, whereas the ADA explicitly covers employment discrimination in Title I for entities with fifteen or more employees. Fourth, Congress has linked the Rehabilitation Act to Title I and not Title II. Therefore, Title II was not intended to wholly incorporate the Rehabilitation Act, thus Title II is not available for claims of employment discrimination.

b. Title II Word Structure

Another debate concerning whether a claim for employment discrimination is available under Title II involves the wording of the Act itself. Title II states in part, “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.” One interpretation treats this statement as two separate clauses. Under this interpretation, the first clause prohibits discrimination for a disability in “services, programs, or activities of a public entity,” while the second is a catch-all phrase, covering “discrimination by any

270. But see Weber, supra note 63, at 1103 (explaining that the reason Title II was not more specific was to prevent conflict between section 504 and Title II).
274. See Innovative Health Sys., Inc. v. City of White Plains, 117 F.3d 37, 44-45 (2d Cir. 1997) (explaining that Title II is broken into two clauses, one covering “services, programs, and activities” and the other is a catch-all, to include whatever other claims are not explicitly mentioned).
such entity." Due to this catch-all phrase, coverage for employment discrimination is possible.

A more sound construction of the words can be found by looking to the plain meaning of the words. The first clause covering, "services, programs, or activities" all commonly refer to types of "outputs," not "inputs." This is because "employment by a public entity is not commonly thought of as a service, program, or activity of a public entity" and "the 'action' words in the sentence presuppose that the public entity provides an output that is generally available, and that an individual seeks to participate in or receive the benefit of such an output." For example, when asked, "What services, programs, or activities does the public library supply?" a common answer is, "We hold children's story hour," or "We sponsor a book of the month club." One would not answer, "We hire librarians." Using employment as an example, employment is "a means to deliver the services, but it is not itself a service, program, or activity."

The second clause states, "no qualified individual with a disability shall, by reason of that disability . . . be subjected to discrimination by any such entity." While some courts have held that this phrase should be interpreted broadly to include employment discrimination, such an interpretation would "take a key phrase out of context." Placing a second clause in a single sentence would imply that the two clauses are connected. Such a broad interpretation would expand the meaning of the words beyond the title, "Public Services."

275. See id.
276. See Pa. Dep't of Corrs. v. Yeskey, 524 U.S. 206 (1998) (holding that state prisons fall within Title II's statutory definition of a "public entity" by interpreting the phrase "benefits of the services, programs, or activities of a public entity" broadly).
278. Zimmerman, 170 F.3d at 1174.
279. See, e.g., id. (giving a similar input/output example using the Parks Department).
280. Id.
283. Zimmerman, 170 F.3d at 1175.
284. Id. See Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 115 (2001) (explaining that "[w]here general words follow specific statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words").
Further, within Title II a qualified individual is defined as, "an individual with a disability who . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." The Ninth Circuit would argue, "obtaining or retaining a job is not, [within the plain meaning of], 'receipt of services' nor is employment a 'program or activity provided by a public entity,'" because the former provides an "output" the latter participates in or receives. Therefore, a "Public Services" clause would not include employment.

The Ninth Circuit, in an earlier case, suggested that the only difference between the first and second clause was the method of prohibiting discrimination. This court suggested Congress intended the first clause to prohibit intentional discrimination and the second clause to prohibit disparate treatment of the disabled.

c. Structure of the ADA

When viewing the ADA as a whole, why would Title II implicitly cover claims of employment discrimination when Title I is explicitly available for such claims? In addition, why would Congress require exhaustion of remedies before filing a claim under Title I, when such exhaustion is not necessary under Title II? The Eleventh Circuit, for example, has justified this anomaly by distinguishing the fact that Title I applies to the private sector while Title II applies to the public sector, creating a parallel provision. Other justifications include that while Title I requires exhaustion of administrative remedies, Title II does not because it incorporates the enforcement

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287. Zimmerman, 170 F.3d at 1176.

288. See Crowder v. Kitagawa, 81 F.3d 1480, 1483 (9th Cir. 1996), explaining that:

289. Id.


291. See, e.g., Wagner v. Tex. A & M Univ., 939 F. Supp. 1297 (S.D. Tex. 1996) (holding that exhaustion of administrative remedies is not necessary under Title II); Dertz v. City of Chicago, 912 F. Supp. 319 (N.D. Ill. 1995) (holding that exhaustion of administrative remedies is not necessary under Title II); Ethridge v. Alabama, 847 F. Supp. 903 (M.D. Ala. 1993) (holding that exhaustion of administrative remedies is not necessary under Title II).

procedures of the Rehabilitation Act; thus a Title II claim does not require exhaustion.\textsuperscript{293} Courts have also looked to the DOJ interpretations for determining that both Title I and Title II can co-exist with different requirements.\textsuperscript{294} Although "undesirable from a policy standpoint," courts have refused to "fill the gaps in the ADA in an attempt to effectuate a purported congressional intent that is not entirely evident."\textsuperscript{295}

However, by providing for two different titles in one act to cover the same type of discrimination, requiring different procedures, and placing enforcement into the hands of two different agencies,\textsuperscript{296} some argue that "the ADA surely must rank as one of the great drafting debacles of recent times."\textsuperscript{297} By allowing employment claims under these interpretations to be covered by both Title I and Title II, Title I would be redundant to public employment and thus have no meaning in that area.\textsuperscript{298} Further, if either title could apply to public employment, any reasonable person would simply avoid the procedural requirements of Title I by filing a claim under Title II.

2. Department of Justice Regulations

When looking to the DOJ regulations to clarify the ambiguity found within the law,\textsuperscript{299} the Supreme Court has developed a two-pronged test to determine how much weight to give such an interpretation.\textsuperscript{300} First, a court should apply the traditional rules of statutory construction to determine whether Congress has expressed its intent unambiguously on the question before the court.\textsuperscript{301} Second, if the intent is not clear, the court should still uphold the administrative regulation unless it is "arbitrary, capricious, or manifestly contrary to the statute."\textsuperscript{302}

The DOJ explicitly found "the requirements of [T]itle I of the Act . . . apply to employment in any service, program, or activity con-

\textsuperscript{293} See, e.g., Ethridge, 847 F. Supp. at 907; Bledsoe, 133 F.3d at 823-24.
\textsuperscript{295} Wagner, 939 F. Supp. at 1310.
\textsuperscript{296} Compare 42 U.S.C. § 12117(a) (Title I), with 42 U.S.C. § 12133 (Title II).
\textsuperscript{298} Zimmerman, 170 F.3d at 1176-78.
\textsuperscript{299} See 42 U.S.C. § 12134(a) (Congress explicitly provided that the DOJ should write regulations implementing Title II's prohibition against discrimination).
\textsuperscript{301} Chevron, 467 U.S. 842-44.
\textsuperscript{302} Id.
ducted by a public entity," 303 and "the requirements of section 504 of the Rehabilitation Act of 1973 . . . apply to employment in any service, program, or activity conducted by a public entity if that public entity is not also subject to the jurisdiction of [T]itle I." 304 Thus, by "[b]orrowing language and concepts from Title I and Title III, DOJ Title II regulations . . . [p]rotect . . . by establishing a general prohibition against discriminatory conduct by public entities." 305

The Bledsoe court concluded that although the intention of Congress might be ambiguous, the regulations given by the DOJ were neither "arbitrary, capricious, [n]or manifestly contrary to the statute," thus giving great deference to the DOJ. 306 However, other courts have found that Congress unambiguously expressed its intent that employment discrimination is not an available claim under Title II when Title I explicitly governs that claim, thus ending their inquiry after the first step of the Chevron analysis. 307 It would seem that if Congress intended to incorporate employment discrimination into Title II, Title I would not explicitly govern employment, and Congress would provide both titles to be enforced by the same government agency to ensure consistency.

Based on the foregoing analysis, it would seem contrary to the expressed intent of Congress to find employment discrimination to be an available claim under Title II of the ADA. Title I already explicitly covers employment discrimination with detailed guidelines that apply to employers with fifteen or more employees. The legislative history only shows that certain portions of the Rehabilitation Act were incorporated into Title II, such as remedial and procedural aspects. The structure of the two clauses leads to the conclusion that they were intended to be related, instead of two distinctly different clauses, and intended to relate solely to "outputs" within public services. Finally, the DOJ regulations deserve no weight, because the intent of Congress seems to clearly distinguish employment claims from claims under Title II.

B. Whether Title II of the ADA Abrogates the Eleventh Amendment

Even though the foregoing analysis argues that claims of employment discrimination are not available under Title II of the ADA, the

304. 28 C.F.R. § 35.140(2) (2002).
305. Coleman & Debruge, supra note 28, at 68.
306. Bledsoe, 133 F.3d at 823.
307. Zimmerman, 170 F.3d at 1173.
sovereign immunity question is still relevant on a broader level. The Supreme Court has so far applied its Eleventh Amendment immunity analysis only to Title I. The future of Title II has yet to be determined. Even though Title I was not a valid abrogation of state immunity, the lower courts are still split on whether Title II, incorporating different provisions, procedures, and remedies, is a valid abrogation of state immunity. However, it seems obvious that the trend in Eleventh Amendment jurisprudence over the past decade has been to expand the power of the states and limit the control Congress has over the states. This has been seen most vigorously in a line of discrimination cases invalidating any claim for money damages that a state employee may have against its employer under a series of acts passed by Congress to protect such individuals.

1. Standard of Review

The first step to any constitutional analysis is to determine the proper standard of review. The Court has developed three levels of review for state classifications based on the probability that certain types of actions are prejudicial and unrelated to proper government interests. In Cleburne v. Cleburne Living Center, Inc., the Supreme Court has applied its Eleventh Amendment immunity analysis only to Title I of the ADA are barred by the Eleventh Amendment”).

309. See Med. Bd. of Cal. v. Hason, 123 S. Ct. 561 (2002) (granting certiorari to decide whether Title II is a valid abrogation of state sovereign immunity). See Hartley, supra note 24, at 82 (explaining the basis of this article that the “most immediate unanswered question following Garrett is its effect on ADA Title II . . . first, may public employees use Title II to litigate employment discrimination claims . . . [and] . . . is the Title I holding in Garrett applicable to such Title II suits”).

310. Compare Dare v. California, 191 F.3d 1167 (9th Cir. 1999) (holding that in enacting Title II of the ADA, Congress validly abrogated state sovereign immunity pursuant to its power under the Fourteenth Amendment), with Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (holding that in enacting Title II of the ADA, Congress did not act pursuant to its powers under the Fourteenth Amendment). See supra notes 214-245 and accompanying text.

311. See Thomas, supra note 137, at 674; see also supra note 6.


313. See Leonard, supra note 23, at 100-01 (explaining the three levels of scrutiny). For classifications involving a suspect class or a fundamental right, courts use strict scrutiny, meaning the defendant must show that the classification in question is for a compelling state interest and is narrowly tailored to meet that end. Id. at 100. Intermediate scrutiny is used when important rights or quasi-suspect classes, such as gender or illegitimacy classifications, are being examined. Id. at 100-01. This standard “requires a defendant to establish that the classification is substantially related to an important state interest.” Id. at 101. Rational basis scrutiny is used for classifications involving non-suspect groups or something less than a fundamental right. Id. For this standard, “the burden is on the plaintiff to show that the challenged measure bears no rational
The Supreme Court reversed a lower court's determination that mental retardation qualified as a "quasi-suspect" classification under our equal protection jurisprudence and instead applied rational basis review. The Court held this review standard to be applicable to general "social and economic legislation." However, even with such a low standard of review, the Court struck down the city ordinance as irrational in light of evidence pertaining to how other groups similarly situated to this particular group are treated. Similarly, when determining the standard of review for disabled individuals, the Court held that rational basis review was appropriate. By striking down the ordinance, even though it explicitly stated it was applying rational basis review, one could imply the Court is doing one thing and saying another. The analysis appeared to be more like an intermediate standard of review.

However, any hope that one might have had that the Court was actually applying intermediate scrutiny was lost by the Garrett decision. Similar to Cleburne, the Court in Garrett held "that States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions are rational." Unlike Cleburne, however, the Court struck down the statute, thus appearing as if it used a more traditional rational basis standard. Based on the small amount of time that has passed since this decision and in accordance with stare decisis, the Court would likely apply the same rational basis standard to a case under Title II as it did under Title I.

2. The Two-Pronged Test

Along with establishing a standard of review specifically for disabled individuals, the Court has also consistently followed the two-pronged test first articulated in Seminole Tribe to determine whether relationship to a legitimate state goal. The court does not require a close fit between the ends and the means. See Leonard, supra note 23, at 101.

314. 473 U.S. 432 (1985) (involving a dispute over the denial of a special permit to operate a group home for the mentally retarded).
316. Cleburne, 473 U.S. at 440-42.
317. Id. at 442.
318. Id. at 447-50. See Jaclyn A. Okin, Has the Supreme Court Gone Too Far?: An Analysis of University of Alabama v. Garrett and its Impact on People with Disabilities, 9 AM. U. J. GENDER SOC. POLY & L. 663, 676 (2001) (explaining that although rational basis was the proper standard of review, in application the Court actually used a higher standard to invalidate the statute since there were legitimate reasons for such a statute).
320. Id. at 367.
Congress has abrogated the Eleventh Amendment. First, Congress must "unequivocally express its intent to abrogate . . . immunity." Congress has done this for the ADA in general by explicitly incorporating into the text that the purpose of the ADA was "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." Additionally, Congress must act "pursuant to a valid exercise of power." To determine whether Congress acted within its power under the Fourteenth Amendment, the Court has consistently determined that the legislation must be both congruent and proportional to the injury inflicted and the remedy to prevent such discrimination.

3. Congruence and Proportionality

Throughout this line of cases, the Court has developed the idea that legislation to remedy or deter constitutional violations must be both congruent and proportional to the injury to be prevented or remedied and the means adopted to do so. To determine whether Title II of the ADA is congruent and proportional to the discrimination it seeks to eradicate, we must first determine where the evolution of the congruence and proportionality standard has defined its scope and limits.

To attain proportionality between the injury and remedy, the requirements of the statute cannot extend beyond the requirements that the Constitution imposes on the states. For example, by placing affirmative obligations on employers to have "reasonable accommodations" for disabled individuals, it could be argued that this is too much of a burden, particularly financially, to satisfy the proportionality requirement. This affirmative nationwide duty could be seen as too

322. Id.
324. Seminole Tribe, 517 U.S. at 55.
326. See City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (articulating for the first time that for Congress to enact remedial and preventive rules, the rules must be both congruent with and proportional to the discrimination being prevented or remedied).
327. Okin, supra note 318, at 668-69 (stating that "legislation is considered legitimate under this test and is considered proportional if the statute's requirements upon the states do not reach beyond the requirements that the Constitution imposes upon states").
328. See Sarah E. Sutor & Susan Elizabeth Grant Hamilton. The Constitutional Status of the ADA: An Examination of Alsbrook v. City of Maumelle in Light of Recent Supreme Court Decisions Concerning the 11th Amendment, 19 REV. LITIG. 485, 487 (Summer 2000) (arguing that the ADA does not meet the congruence and proportionality standard). But see Katzenbach v. Mor-
stringent by not allowing for modifications based on local needs. Additionally, even though there is an escape provision for providing reasonable accommodations if such modifications cause an "undue hardship," some modifications simply are still too expensive even though they do not fall within the "undue hardship" category. This could be especially harmful to a state facing budget constraints.

Second, the legislation must have congruence between the injury inflicted and the remedy. To meet this requirement there must be clear legislative evidence of the need for the law within the legislative record, specifically evidence of widespread unconstitutional discrimination. This inquiry presents problems on many levels: What constitutes a sufficient legislative record to pass such a requirement, and what specific findings are necessary? For example, in Garrett, the Court found that Congress was presented with hundreds of instances of discrimination based upon disabilities by different state governments before enacting this legislation. However, the Court found that Congress failed to establish a pattern of specific state employment discrimination and cited the record Justice Stephen Breyer attached as "unexamined, anecdotal accounts of 'adverse, disparate treatment by state officials.'" Some would argue that this reliance on the details of the legislative record demonstrates judicial distrust of Congress and creates an "unworkable and illegitimate standard" for Congress to legislate within. At any rate, this new standard of reviewing the judicial record presents a problem for a potential and in-

329. See Sutor & Hamilton, supra note 328, at 502 (explaining the proportionality requirement that is necessary to surpass in a Section 5 analysis).

330. 42 U.S.C. § 12111(10) (defining an undue hardship as a "an action requiring significant difficulty or expense").

331. See Okin, supra note 318, at 668-69 (explaining the old and new standards to satisfy congruence in a Section 5 analysis).

332. Garrett, 531 U.S. at 389-424 (Breyer, J., dissenting). Attached to Justice Breyer's dissenting opinion was a record of hundreds of documented instances of discrimination by various state governments against individuals with disabilities. Id. Materials were put into the legislative record to establish invidious, widespread discrimination of individuals with disabilities to justify the enactment of the ADA. Id. See also Arlene Mayerson, The History of the ADA: A Movement Perspective (1992). During the first Senate hearing before enacting the ADA "witnesses spoke of their own experiences with discrimination" and "the committee also received boxes loaded with thousands of letters and pieces of testimony that had been gathered in hearings across the country the summer before from people whose lives had been damaged or destroyed by discrimination." Id.


334. Id. at 370.

335. Buzbee & Schapiro, supra note 213, at 87.
evitable challenge to Title II under the Eleventh Amendment. If these hundreds of accounts were not enough, how many more hundreds of records are sufficient to establish a pattern of state governmental discrimination? If this is the case, the scope of the number of documented instances to establish a pattern has been substantially narrowed making any findings that Congress did make to establish a pattern of discrimination in public services insufficient.

4. The Outcome Under Current Jurisprudence

The current standards set forth by the Supreme Court invariably present a problem for legislation already enacted. First, the standard of review applied to discrimination cases based on a disability is low, rational basis review. This presents a problem. As long as the defendant has a rational basis for discrimination, the standard is satisfied.

Second, the necessity for congruence and proportionality heighten the difficulty for Congress to pass remedial and preventative legislation. Title II, similar to Title I, calls for “reasonable accommodations” in public services, which places an affirmative financial burden on state governments that the Court will most likely find beyond the scope of proportionality.

However, the largest problem falls within the heightened legislative record requirement. How was Congress to know when enacting Title II of the ADA, or any other statute for that matter, that the Supreme Court would require such stringent standards for legislative documentation? This is not the same standard Congress has used in the past to legislate. Therefore, a challenge to Title II suffers from a lack of a documented pattern of state discrimination in the area of employment within public services, making Title II an invalid abrogation of the powers delegated to Congress under Section 5 of the Fourteenth Amendment.

336. See 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, 1099 (2001) (explaining that the Supreme Court's approach to reviewing the basis of legislation "leaves no room for legislative recognition that some apparently 'rational' explanations in fact mask unexplored, arbitrary prejudices and assumptions whose indulgence ultimately denies their victims of the law's equal protection").

337. Buzbee & Shapiro, supra note 213, at 92. Buzbee and Shapiro also explain that "enhanced scrutiny of the legislative record could not have been anticipated by Congress." Id. at 153. Instead, Congress has been legislating on the assumption from "long-standing precedent . . . that no particular legislative record was necessary to validate legislation." Id. at 153-54.

338. See Sutor & Hamilton, supra note 328, at 487 (arguing that Title II is not a valid abrogation of congressional powers under Section 5 of the Fourteenth Amendment).
Although the path of Title II once it reaches the Supreme Court seems clear, it will be interesting to see what the Court does with this new idea generated in the lower courts finding at least a valid abrogation of Title II under certain circumstances, such as when there is a finding of ill will or a due process violation.\(^{339}\)

In summary, under current jurisprudence, which seems to be at a five to four standstill,\(^{340}\) the same ultimate outcome would result under Title II as in Garrett under Title I.\(^{341}\) First, based on the legislative history and structure of Title II and the ADA as a whole, Title II should not be available for claims of employment discrimination when Title I is explicitly available for these types of claims.\(^{342}\) Second, even if Title II did cover claims of employment discrimination, suits by private individuals against the state governments for discrimination based upon a disability are barred by the Eleventh Amendment’s protection of sovereign immunity.\(^{343}\)

IV. Future Coverage Under the ADA, Congressional Solutions, and Its Impact on the Future of Civil Rights Laws

The impact of these decisions spans over several areas, and not only threatens current legislation, but it also threatens congressional power in the future to enact laws to protect the basic civil rights all Americans assume to be at the fundamental core of our society.

A. Remaining Protections and Alternatives

The Garrett decision does not make Title II null and void. Although Title II will not be available for claims of employment discrimination, Title I is available for certain remedies\(^ {344}\) and Title II will still afford protection to individuals with disabilities in the realm of public services. Specifically, private individuals will still have the power to sue a state government for injunctive relief, request that the federal government sue a state, hope for a waiver by a state, or turn to state

\(^{339}\) See supra notes 232-244.

\(^{340}\) The divide in the Court has Chief Justice Rehnquist on the side for heightened sovereign immunity protections with Justices Kennedy, Scalia, Thomas, and Ginsburg. On the other side of the debate are Justices Breyer, O’Connor, Souter, and Stevens.

\(^{341}\) See Hartley, supra note 24, at 83 (affirming the unlikelihood that the Court would find that Congress abrogated sovereign immunity when it enacted Title II even though the Court found no such valid abrogation under Title I).

\(^{342}\) See Garrett, supra note 24, at 83 (explaining that Congress still have the power to sue a state government for injunctive relief, request that the federal government sue a state, hope for a waiver by a state, or turn to state

\(^{343}\) See supra note 246-307 and accompanying text.

\(^{344}\) See supra notes 308-339 and accompanying text.

\(^{344}\) See Garrett, 531 U.S. at 374 n.9 (explaining that there still are options available for persons with disabilities after this holding).
law for protection. In addition, at least one scholar argues that while
the Supreme Court may have shut the door to several statutes based
on sovereign immunity claims, it has opened the door for similar fac-
tual claims under 42 U.S.C. § 1983.345

1. Injunctions

The holding in Garrett under Title I of the ADA was limited to suits
against the state governments for money damages.346 Chief Justice
Rehnquist explicitly found that suits for injunctions were not affected
by the holding.347 Even if Title II does not apply to employment dis-
crimination, employees discriminated against by their employer, a
state government, could sue under Title I for an injunction to stop
such abuse. Additionally, if claims for money damages under Title II
are barred by the Eleventh Amendment, individuals who are discrimi-
nated against in the receipt of services may still sue for an injunction.
In some cases, this can be a better remedy for a discriminated individ-
ual than money damages. For example, if an elderly person is mistak-
enly treated as a disabled individual and put into a state-run nursing
home without her consent, she could sue under Title II of the ADA
for discrimination and receive an injunction allowing her to move out
of the nursing home.348 Additionally, the Supreme Court has made
no indication that it would not follow Ex parte Young, holding that an
individual may sue a state official for injunctive relief.349 However,
similar to the Eleventh Amendment doctrine, the scope of this protec-
tion also seems to be narrowing.350

2. Suits by the Federal Government

Alternatively, an individual discriminated against could rely on the
federal government as an advocate against a state. However, this
might not be a practical solution. The federal government obviously
lacks resources and funds to represent every individual discriminated
against based upon a disability.351 One could also reasonably assume

347. Id. at 374 n.9. See Gibson v. Ark. Dep't of Corrs., 265 F.3d 718 (8th Cir. 2001) (holding
that a state employee could still sue under Title I of the ADA for an injunction against her
employer, the State of Arkansas, based on employment discrimination).
348. Janet L. Holt, Garrett Footnote Allows ADA Injunctive Relief for State Workers, Eighth
349. Ex parte Young, 209 U.S. 123 (1908). See Garrett, 531 U.S. at 374 n.9 (stating that indi-
viduals could still rely on Ex parte Young to sue state officials for injunctive relief).
351. See Okin, supra note 318, at 687 (explaining that although the federal government could
represent individuals discriminated against under the ADA, “due to insufficient resources, it is
that the federal government lacks the resources to represent class actions for disability discrimination.

3. Suits by Waiver

Another alternative is a suit by waiver. An individual citizen pursuant to a valid waiver of the state’s Eleventh Amendment immunity can sue a state government. This waiver must be both expressed and explicit to be valid. Two states, Missouri and North Carolina, have already amended their laws to allow for a waiver of sovereign immunity in limited circumstances.

4. State Statutes

The Garrett Court explicitly noted that “state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.” The best solution on its face appears to be that an individual should turn to its own state legislature for protection against disability discrimination. However, while all states seem to have some type of disability discrimination statute or regulation, many are not as comprehensive as the ADA, thus leaving their citizens with less protection than is afforded under the ADA.

There are several factors to consider when examining the sufficiency of state statutes and regulations as viable alternatives to the ADA. One study found that in the area of “facility access,” while all states provide provisions to allow disabled individuals access to buildings, “it is unclear in some states whether this rule applies to all government-owned entities . . . and fifteen states do not have clear, effective, private enforcement mechanisms” to enforce such pol-

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352. See Hans v. Louisiana, 134 U.S. 1 (1890) (holding that a state government may be sued pursuant to a valid waiver of Eleventh Amendment sovereign immunity).

353. Coll. Sav. Bank II, 527 U.S. at 666. Justice Scalia explained, “there is no doctrine of implied or constructive waiver of the Eleventh Amendment.” Id. at 682. See, e.g., Vinson v. Thomas, 288 F.3d 1145 (9th Cir. 2002) (finding that Hawaii waived its Eleventh Amendment immunity to the Rehabilitation Act by accepting Rehabilitation Act funds from the federal government).

354. See S.B. 550, 91st Gen. Assemb. (Mo. 2001) (amending the Missouri Code to allow the state to be sued under the ADA in state court but not in federal court); H.B. 898, 2001 Gen. Assemb. (N.C. 2001) (amending North Carolina’s statutory law to allow for state employee lawsuits in state or federal court under the ADA as well as a few other statutes).

In the area of "services," this same study found that "only twenty-four of fifty-one statutes clearly cover services discrimination by the states." However, even among the states that do explicitly cover services, it is unclear in three of those states whether the statutes apply to the states. In the "relief" realm, this study found that: "(1) nine states have no enforcement mechanism at all against the state; and (2) seven other states provide for enforcement against the state but limit remedies that would be available under the ADA Title II." Lastly, the authors of this study noted that while the payment of attorney's fees provide a determining factor for some individuals concerning whether to file a suit, "attorney's fees are expressly provided for by only thirty-four of fifty-one" statutes. In summary, when looking specifically to Title II protections versus protections found within state law, this study found that "only twenty-four . . . states have disability discrimination statutes that appear comparable to the ADA Title II." At any rate, the hope is that once state legislatures notice this expansion of federalism and its threat to federal civil rights legislation, a state government will take it upon itself to enact more meaningful, comprehensive state civil rights acts. This could also allow for states to specifically tailor the laws to the needs of their citizens. For example, a state with a relatively large elderly population could focus its disabilities statute to provide greater protections for elderly care, more so than other states that have a small population of elderly individuals but a large population of children with disabilities, which would focus their law more toward education. That type of state could focus more on educational programs for these children than on accommodations for the elderly.

357. Id. at 1092 (citing states that have specific provisions for discrimination in the services as: Alaska, Colorado, Connecticut, District of Columbia, Illinois, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, and West Virginia).
358. Id. (citing ambiguity in California, Oregon, and Vermont).
359. Id. at 1102 (citing the states without enforcement mechanisms against the states as: Alabama, Arkansas, Georgia, Idaho, Mississippi, Nebraska, Tennessee, Utah, and Wyoming, while the states that limit remedies include the following: Colorado, Florida, Kansas, Maryland, Nevada, North Carolina, and South Carolina).
360. Id. at 1109.
Additionally, the Court seems to have excluded cities and county governments from the Eleventh Amendment bar.\footnote{Garrett, 531 U.S. at 369.} This means that individuals discriminated against based on public services can still sue their municipal and county governments for money damages resulting from such discrimination. Another localized solution would be for state employees to turn to their unions, or elect a union to begin representing them, to create an outlet for disability discrimination claims.\footnote{Id.}

## 5. A § 1983 Claim

One scholar argues that claims seemingly precluded by sovereign immunity can still be brought in federal court for monetary relief under 42 U.S.C. § 1983.\footnote{Daum, supra note 345, at 354.} Even though sovereign immunity bars certain claims for monetary relief, according to the Commerce Clause, the states are still under an obligation to follow the law.\footnote{Id.} He explains that § 1983 has provided over a number of years a way to sue state officials, in their individual capacity, for federal law violations that have occurred.\footnote{Maine v. Thiboutot, 448 U.S. 1 (1980).} Since \textit{Maine v. Thiboutot} provided an extension of § 1983 claims, now “[o]ne can sue a state official for violating a federal statute, just as one can sue the official for violating a duty under the Constitution.”\footnote{Daum, supra note 345, at 354.} Therefore, because § 1983 claims are against state individual officers, the Eleventh Amendment does not become an issue.\footnote{Id.}

### B. The Threat to Current Federal Civil Rights Laws

This developing line of case law has substantial effects on the future of current civil rights laws that Congress has enacted over the years pursuant to the same legislative finding scheme for which the ADA

\footnotesize{\begin{itemize}
  \item[362.] Garrett, 531 U.S. at 369.
  \item[363.] See Hartley, supra note 24, at 95 (describing how Garrett and the new standard for enacting legislation might reverse the “trend away from unionization that has been caused in part by the plethora of category-based legislation enacted over the past thirty years”).
  \item[364.] Daum, supra note 345, at 354. \textit{But see} Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999) (rejecting the notion that the ADA may be pled under § 1983 due to the fact that Congress already developed a remedial scheme under the ADA, and such a suit would expand substantive rights given under the ADA).
  \item[365.] Daum, supra note 345, at 354.
  \item[366.] Id.
  \item[367.] Maine v. Thiboutot, 448 U.S. 1 (1980).
  \item[368.] Daum, supra note 345, at 354.
  \item[369.] Id.}

and other statutes alike have been criticized. The threat is due to the Court's emphasis on the detail of a legislative record to establish a pattern of discrimination. One commentator has argued that the emphasis on the legislative record might lead to the invalidation or limitation of other crucial civil rights acts, such as the Family Medical Leave Act (FMLA). Yet another commentator suggests threats to parts of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963 (EPA). Other acts that might also suffer due to this new standard for validly abrogating Section 5 powers include the Pregnancy Discrimination Act (PDA), Title VI of the Civil Rights Act, the Rehabilitation Act, Title IX of the Education Amendments of 1972, and the Individuals with Disabilities Education Act (IDEA).

C. The Threat to Future Federal Civil Rights Laws and What Congress Must Do to Protect That Future

This new standard begs the question: What must Congress actually do to abrogate Eleventh Amendment immunity and pass legislation that is both appropriate within its powers and meaningful to soci-

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370. See supra note 6 (listing cases which have invalidated federal statutes under the rationale that the statutes were enacted outside the scope of congressional power granted to Congress by the Fourteenth Amendment).
371. See Buzbee & Schapiro, supra note 213, at 87 (explaining that “the Court for the first time based its ruling solely on the perceived weakness of the supporting legislative materials” arguing that this change represented a “decisive break with a seventy-year practice of deferring to congressional factual judgments underlying legislation”).
372. 29 U.S.C. §§ 2601-2654 (1994). See Hartley, supra note 24, at 85 (explaining that the FMLA damage remedies were under attack from lower courts even before the Supreme Court took on the Garrett case for an invalid abrogation of congressional Section 5 powers).
374. 29 U.S.C. § 206(d) (1994). See Vikram David Amar & Samuel Estreicher, Conduct Unbecoming a Coordinate Branch: The Supreme Court in Garrett, 4 Green Bag 2d 351, 352 (2001) (explaining that the outcome in Garrett will lead to problems for other civil rights statutes.) See also Hartley, supra note 24, at 87 (explaining that while the protections under Title VII for overt racial, national origin, and religious, and gender discrimination cases will remain intact due to the heightened level of scrutiny afforded these types of actions, “Title VII’s prohibitions of employment policies causing a disparate impact” will suffer under these newly articulated strict standards for valid abrogation of Section 5 power).
An immediate solution to the ADA itself would be to amend the statute to clarify Congress's intent that the ADA allows a private cause of action for damages against state officers sued in their individual capacity and amend the standards for qualified immunity in individual capacity suits. One commentator suggests that Congress could change the way it documents evidence of civil rights violations before enacting a law to ensure the law satisfies a challenge to the abrogation of sovereign immunity. These changes include “amassing huge amounts of supporting evidence, delegating fact finding to an administrative agency, and placing findings or other supporting information into the enacted text of the legislation.” The problem with this solution, of course, is that the Court has failed to articulate exactly how much documentation is enough to satisfy a challenge. Congress could also amend current statutes and add to future statutes to strongly encourage states to waive sovereign immunity in order to receive federal assistance; however, this type of forced waiver could raise different constitutional violations.

V. Conclusion

The ultimate outcome of a Garrett-type case under Title II of the ADA would be the same as Garrett under Title I. First, although it could be argued that employment falls within the coverage of Title II, a closer analysis reveals that is does not. Congress never intended Title II to cover claims of employment discrimination while Title I explicitly does so and requires an exhausting of administrative remedies before filing suit. However, even if the Court determined that employment discrimination is covered under Title II, claims against state governments for employment discrimination will be barred by the Eleventh Amendment.

Under the Court’s current jurisprudence, Title II of the ADA, similar to Title I, is not within Congress’s power under Section 5 of the Fourteenth Amendment. For remedial and preventative legislation

380. See Hart, supra note 336, at 1108 (arguing that a “democratically-elected legislature is in a significantly better position than are the nine Justices of the Supreme Court to respond to the changing social understanding of what might constitute arbitrary or invidious classification and limitation of individuals”).
381. Hartley, supra note 24, at 92-93.
382. Buzbee & Shapiro, supra note 213, at 154.
383. Id.
385. See supra notes 246-307 and accompanying text.
386. See supra notes 246-307 and accompanying text.
387. See supra notes 308-338 and accompanying text.
388. See supra notes 308-338 and accompanying text.
to be within the powers delegated to Congress the legislation must exhibit both congruence and proportionality between the injury and the means to achieve a desired result.\(^{389}\) Title II of the ADA goes beyond both of these limits. First, Title II requirements are not congruent with the level of discrimination because of the affirmative financial duty it places upon a state.\(^{390}\) Second, it is not proportional due to the heightened standard of legislative findings necessary to establish a pattern of invidious discrimination.\(^{391}\) It has yet to be determined how high this standard is for Congress to meet, but because Congress relied on the same findings for Title II as Title I, and Title I was found deficient, Title II, it can be assumed, also does not sufficiently establish a pattern of employment discrimination by the states within public services to abrogate the Eleventh Amendment.

This leaves the future of civil rights laws uncertain.\(^{392}\) Now Congress will have to provide for a more complete record to withstand scrutiny. Congress also now has the task of re-evaluating already enacted legislation to determine whether it can survive a Garrett-type analysis. In the meantime, state employees discriminated against will have to look to other means to collect money damages.\(^{393}\) Ultimately, to have successful legislation, Congress and the Supreme Court need to cooperate and come to a middle ground where Congress can enact meaningful laws while still respecting the autonomy of the states.

_Heather R. McDonald*

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\(^{390}\) See supra notes 326-330 and accompanying text.

\(^{391}\) See supra notes 331-334 and accompanying text.

\(^{392}\) See supra notes 334-343 and accompanying text.

\(^{393}\) See supra notes 346-369 and accompanying text.

* The author would like to thank her family and friends for their unwavering support.