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Comments: A Return to State Sovereignty: How Individuals with Disabilities in Maryland May Still Seek Relief against State Employers after Board of Trustees of the University of Alabama v. Garrett

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A RETURN TO STATE SOVEREIGNTY: HOW INDIVIDUALS WITH DISABILITIES IN MARYLAND MAY STILL SEEK RELIEF AGAINST STATE EMPLOYERS AFTER *BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA v. GARRETT*

I. INTRODUCTION

At the foundation of the American political system lies a government of dual sovereigns: federal and state.[1] Two of the Founding Fathers, Alexander Hamilton and James Madison, understood when writing the Constitution that the nation would sometimes require federal supremacy, but they never believed that the states relinquished all of their sovereignty upon joining the Union.[2] This concept of federalism survived the American Revolution, and in 1793, the government adopted the Eleventh Amendment,[3] which purported to offer the states some protection from a domineering federal government.[4] However, these safeguards did not stop the courts and Congress from abandoning a system of duel sovereignty in favor of a federally dominated nation.[5]

Today, federalism enjoys a rebirth.[6] Recent United States Supreme Court decisions demonstrate a trend towards taking power away from Congress and giving it back to the states.[7] In doing so, the Court has

1. *See* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("As every schoolchild learns, our Constitution established a system of duel sovereignty between the States and the Federal government.").
2. *See* THE FEDERALIST No. 32, at 198 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they had before, and which by the act, exclusively delegated to the United States."); THE FEDERALIST No. 44 (James Madison) ("[T]he State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered.").
3. U.S. CONST. amend. XI ("The Judicial Power of the United States shall not be constructed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").
4. *Id.*
5. *See infra* notes 31-32, 39-40 and accompanying text.
6. See *infra* Part II.A-B for a discussion of how the Supreme Court has reasserted federalism by limiting Congress' power under the Commerce Clause and Section 5 of the Fourteenth Amendment.
7. *See generally* Richard E. Levy, *Federalism: The Next Generation*, 33 LOY. L.A. L. REV. 1629 (2000); James Leonard, *The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91 (2000) (noting that the Supreme Court reinforced the states' constitutional position in the 1990s).

reinforced the Eleventh Amendment and has begun striking down as unconstitutional provisions in statutes that disregard a state's sovereignty and allow private individuals to sue a state.[8]

In *Board of Trustees of the University of Alabama v. Garrett*,[9] the latest in this line of cases, the Supreme Court examined the constitutionality[10] of the Americans with Disabilities Act (ADA),[11] in which Congress specifically abrogated the states' Eleventh Amendment immunity.[12] Until recently, the issue of whether a state employee could sue the state as its employer under the ADA remained divided among the circuits.[13] On February 21, 2001, the Supreme Court's opinion settled this division and strengthened state sovereign immunity under the Eleventh Amendment.[14] In *Garrett*, the Supreme Court found that Congress improperly abrogated the states' Eleventh Amendment immunity with the ADA and thus, held that a private citizen cannot sue the state under the ADA.[15]

Some scholars fear that this decision may "leave [disabled] employees of states without a means of enforcing their rights under federal laws."[16] However, this decision does not eliminate an individual's protection under state law, especially in Maryland.[17] While limiting the reach of the ADA is a matter of constitutional interpretation, the goal of the ADA in eliminating discrimination against disabled individuals is a goal worth reaching.[18] In the ADA's original form, Congress unconstitutionally usurped power from the

8. *See* Leonard, *supra* note 7, at 92.
9. 531 U.S. 356 (2001).
10. *See id.* at 360 (noting that the Court took certiorari on the question of whether a private citizen can sue the state under the ADA for monetary damages).
11. *See* 42 U.S.C. §§ 12101-12213 (2000).
12. *See* 42 U.S.C. § 12202 (noting that Congress instituted a federal program that allows a state employee to sue a state employer).
13. *See infra* Part III.A (noting that before the Supreme Court decided *Garrett*, the Seventh Circuit held that Congress unconstitutionally abrogated the states' Eleventh Amendment immunity, the Eleventh Circuit held that Congress did not abuse its power under Section 5 of the Fourteenth Amendment in enacting the ADA, and the Fourth Circuit stood internally divided over the issue).
14. *See infra* Part III.B.2.
15. *Garrett*, 531 U.S. at 374.
16. Matthew S. Cunningham, *A Shift in the Balance of Power*, Alden v. Maine *and the Expansion of State Sovereign Immunity at Congress' Expense*, 35 WAKE FOREST L. REV. 425, 440 (2000).
17. *See infra* Part IV.A-B.
18. *See Garrett*, 531 U.S. at 375 (Kennedy, J., concurring) (noting that while Justice Kennedy has no "doubt that the American with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society," the states have not violated the Equal Protection Clause to justify an abrogation of their Eleventh Amendment immunity); *see also infra* notes 139-42 and accompanying text (discussing the bipartisan effort that took place in passing the ADA, what many consider a high point of modern civil rights litigation).

states by ignoring both the concept of federalism and the words of the Eleventh Amendment.[19] While the ADA serves a necessary purpose, it should not come at the expense of state sovereignty. Nowhere in the Constitution's text does the federal government possess an enumerated power that justifies its assertion of the ADA over the states.[20] Deferring to the states as independent sovereigns will not leave individuals without a forum for redress against disability discrimination by state employers.[21] Specifically, Maryland has established a set of laws for unlawful employment practices that provide protections similar to the ADA.[22] However, the inability to receive certain damages under Maryland law[23] calls for the state legislature to amend the state disability laws to include these remedies and make the state laws as appealing of an option as the ADA.[24]

This Comment begins broadly with a discussion of the Eleventh Amendment revolution on the federal level and concludes narrowly with its impact on Maryland. Part II examines the history of the judicial return to federalism.[25] Part III examines how the Supreme Court settled the split in the circuits over the ADA's legitimacy by allowing employees to sue a state employer with its decision in *Garrett*.[26] Part IV explores a disabled employee's alternatives to protection under the ADA, such as Maryland's disability discrimination laws, and how these alternatives offer the same rights and similar protections as the ADA.[27] Part V concludes that Congress should not pass laws abrogating the states' Eleventh Amendment immunity, and that in Maryland, individuals with disabilities can still sue the state under state law for disability discrimination and receive monetary remedies.[28]

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19. *See infra* notes 193-208 and accompanying text.
20. *See infra* Part II.A-B (noting that Congress no longer has expansive powers to regulate the states and hold them captive under federal legislation by using its powers under the Commerce Clause or the Fourteenth Amendment).
21. *See infra* Part IV.A.
22. *See infra* Part IV.B.2.
23. See *infra* notes 287-88 and accompanying text noting that under Maryland disability law, a plaintiff's monetary damages are limited to the equitable relief of back pay and do not include punitive or compensatory damages.
24. See *infra* Part IV.B.2.a for a discussion of the remedies available to an aggrieved party under Maryland law, including cease and desist orders, reinstatement, back pay, and equitable relief. However, unlike the ADA, Maryland law does not allow compensatory or punitive damages. *See infra* Part IV.B.2.b.
25. *See infra* notes 29-138 and accompanying text.
26. *See infra* notes 144-76, 192-216 and accompanying text.
27. *See infra* notes 221-98 and accompanying text.
28. *See infra* notes 324-50 and accompanying text.

II. THE ELEVENTH AMENDMENT REVOLUTION

In 1793, the United States Supreme Court decided to hear a case brought by two citizens of South Carolina against the State of Georgia to collect a debt.[29] In response to this case, an early American Congress, which did not want a federal constitution that ignored state sovereignty within the Union, enacted the first amendment after the Bill of Rights: the Eleventh Amendment.[30] However, the Supreme Court did not give great deference to the new amendment and continually sought to limit its application.[31] The Supreme Court allowed Congress to create a growing list of exceptions to the constitutional protection of state sovereignty, hinting that the Eleventh Amendment was, in reality, only a formality lacking any real substance.[32] Yet, in recent years the Supreme Court is moving away from this pragmatic approach and moving toward a more formalistic one.[33] Recently, the Supreme Court has begun to resurrect state sovereignty and reconstruct the meaning of the Eleventh Amendment.[34] It has reasserted a modern form of federalism by limiting the two most frequent means that Congress uses to abrogate a state's Eleventh Amendment immunity: the Commerce Clause and the Fourteenth Amendment.[35]

A. Limiting Congress' Commerce Clause Power

Over the past few years, the Supreme Court has initiated a judicial movement that places limits on Congress' use of its Commerce

29. Chisholm v. Georgia, 2 U.S. 419, 420 (1793) (noting that the Court had jurisdiction under the Article III power to hear controversies between "a State and citizens of another State").

30. William Funk, *States Rights with a Vengeance*, 25-SPG ADMIN. & REG. L. NEWS 6, *6 (2000) (noting that one purpose in passing the Eleventh Amendment was to overturn *Chisholm*). See also *supra* note 3 for the text of the Eleventh Amendment.

31. *See, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-20 (1989) (holding that the Eleventh Amendment made Congress' power to regulate interstate commerce "incomplete without the authority to render States liable in damages"); Hans v. Louisiana, 134 U.S. 1, 11 (1890) (holding that Congress could abrogate Eleventh Amendment immunity for suits by individuals); Cohens v. Virginia, 19 U.S. 264 (1821) (holding that the Court could exercise its jurisdiction over a federal question brought on appeal by the state's citizens).

32. *See, e.g.*, Funk, *supra* note 30, at *6 ("For a period it appeared that Congress under its Article I Powers could override a state's Eleventh Amendment immunity, so long as Congress expressed that intent sufficiently explicitly.").

33. *See infra* Part II.A-B (noting the formalistic interpretations of both the Commerce Clause and Section 5 of the Fourteenth Amendment).

34. *See generally* Levy, *supra* note 7. *See also supra* notes 6-8 and accompanying text.

35. *See* Levy, *supra* note 7, at 1638-39, 1646-53.

Clause[36] power to pass legislation that regulates the states.[37] This movement extends to the use of the Commerce Clause to abrogate the Eleventh Amendment.[38] Before 1995, the Court stretched the boundaries of the Commerce Clause to justify a broad array of federally supervised laws.[39] This expansive congressional power is most evident in "the Civil Rights Cases" of the 1960s, where Congress used the regulation of interstate commerce as the legal justification to enforce its social policy of eliminating discrimination in the South.[40] These cases are in sharp contrast to the Supreme Court's recent decisions that are reeling in the federal government's power and that are returning the nation to one of truly duel sovereigns.[41]

1. *United States v. Lopez*

United States v. Lopez[42] marked the beginning of the Supreme Court's return to federalism.[43] In *Lopez*, the Court struck down the Federal Gun-Free School Zone Act of 1990,[44] because the Act lacked a substantial relationship to interstate commerce, which is required

36. U.S. CONST. art. I, § 8, cl. 3 ("To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes.").
37. *See* Levy, *supra* note 7, at 1638-39; *see also* United States v. Lopez, 514 U.S. 549, 561 (1995) (holding that gun possession does not "substantially affect[ ]" interstate commerce, and that Congress does not have the power to regulate firearm possession in a school zone, leaving this activity to the states to police).
38. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72-73 (1996) (concluding that Congress could not use its Commerce Clause power to abrogate a state's Eleventh Amendment immunity).
39. Levy, *supra* note 7, at 1638 (stating that "it was generally easier for Congress and the Court to rely on the commerce power for most federal legislation"); Anna J. Cramer, Note, *The Right Results for the Wrong Reasons: An Historical and Functional Analysis of the Commerce Clause*, 53 VAND. L. REV. 271, 283 (2000) (noting that Congress used its expansive Commerce Clause power "to enact thousands of laws"); Melinda M. Renshaw, Comment, *Choosing Between Principles of Federal Power: The Civil Rights Remedy of the Violence Against Women Act*, 47 EMORY L.J. 819, 824 (1998) (stating that during the expansive era of the Commerce Clause, the Supreme Court "effectively gave Congress the ability to regulate intrastate activities that Congress previously was prohibited from regulating because they had been defined as local in nature").
40. Katzenbach v. McClung, 379 U.S. 294, 299-304 (1964) (holding that a restaurant's refusal to serve African-Americans places a burden on interstate commerce and justifies Congress' regulation); Heart of Atlanta Motel v. United States, 379 U.S. 241, 249-58 (1964) (noting that racial discrimination has a negative impact on interstate commerce, which justified Congress regulating hotels).
41. *See* Levy, *supra* note 7, at 1638-39 ("These new federalism decisions establish limits on both the substantive scope of federal authority under the commerce power and the means that can be used to implement regulatory decisions within the scope of that authority.").
42. 514 U.S. 549 (1995).
43. *See* Levy, *supra* note 7, at 1639.
44. 18 U.S.C. § 922(q) (1994).

under the Commerce Clause.[45] After the Court returned the "police power" to the states, it also began to focus on restoring the Eleventh Amendment, another aspect of federalism.[46]

2. *Seminole Tribe of Florida v. Florida*

In the year after *Lopez*, the Court ruled on *Seminole Tribe of Florida v. Florida*[47] and took the first step toward reasserting Eleventh Amendment immunity. In *Seminole Tribe*, the Court noted that Congress, through its power under the Indian Commerce Clause,[48] passed the Indian Gaming Regulatory Act.[49] Before this case, Congress had relied on the precedent set forth in *Pennsylvania v. Union Gas Co.*[50] when using the Commerce Clause to abrogate a state's Eleventh Amendment protection.[51] However, the Court used *Seminole Tribe* to overrule *Union Gas* and to serve as the catalyst for the growing federalism revolution.[52] *Seminole Tribe* prevented Congress from using the Commerce Clause to supercede the Eleventh Amendment and checked Congress' most effective tool in regulating the fifty states as a whole.[53] Noting the importance of enforcing the Eleventh Amendment, the Supreme Court held that "[e]ven when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[54] This decision aided the new federalism movement by signifying that

45. *Lopez*, 514 U.S. at 561.

46. *See* Levy, *supra* note 7, at 1641-42 (noting that while the limitation of Congress' Commerce Clause power is the more pronounced judicial movement, the Court is expanding this federalism movement to include the Eleventh Amendment and intends to "invalidat[e] legislative means that interfer[e] with state sovereignty").

47. 517 U.S. 44 (1996).

48. See *supra* note 36 for the text of the Commerce Clause.

49. 25 U.S.C. § 2701 (1988); *see also Seminole Tribe*, 517 U.S. at 47 (noting that this Act authorized a tribe to sue a state in federal court if the duty to negotiate in good faith was not fulfilled).

50. 491 U.S. 1 (1989), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

51. *See supra* notes 36-40 and accompanying text.

52. *See Seminole Tribe*, 517 U.S. at 72. The Court stated that:

> In overruling *Union Gas* today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government.

Id.

53. *See* Cunningham, *supra* note 16, at 425.

54. *Seminole Tribe*, 517 U.S. at 72.

the enactment of a socially significant regulation "cannot be used to circumvent . . . constitutional limitations."[55]

Seminole Tribe removed Congress' ability to use its Commerce Clause power to authorize private suits against a state in federal court,[56] but left unanswered the issue of whether individuals could bring such a suit in their state courts.[57]

3. *Alden v. Maine*

In 1999, the Court returned to the question of whether individuals could sue a state in their state courts with its decision in *Alden v. Maine*.[58] The Court found that even before the Eleventh Amendment became part of the Constitution, the protection provided by state sovereign immunity shielded the states from non-consensual suits.[59] The Supreme Court reiterated the founders' intention to preserve federalism by stating that "federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[60]

While sovereign immunity and the Eleventh Amendment do not immunize a state from all suits,[61] the *Alden* Court expanded the new federalism. The Court held that Congress could not use its enumerated powers under the Commerce Clause to authorize a private suit against a state in a state's court because it unconstitutionally abrogated the Eleventh Amendment.[62]

After *Seminole Tribe* and *Alden*, the Supreme Court had once again significantly reduced Congress' power by reintroducing the Eleventh

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55. *Id.* at 73; *see also* Levy, *supra* note 7, at 1642 (noting that Congress could regulate these activities, but the Court would "invalidate[ ] legislative means that interfered with state sovereignty").

56. *See* Chad A. Horner, *Eleventh Amendment Sovereign Immunity*, 22 U. ARK. LITTLE ROCK L. REV. 777, 777 (2000).

57. *See infra* Part II.A.3.

58. 527 U.S. 706 (1999).

59. *Id.* at 715-16 ("[T]he doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.").

60. *Id.* at 748.

61. *See id.* at 755-56. First, if a state consents, sovereign immunity does not shield a state from suits based on alleged violations of law, including statutes that Congress properly enacts to enforce the Fourteenth Amendment, because there are instances when federal law reigns supreme. *Id.* at 755-56. Second, sovereign immunity only protects the suits against states, not entities like "a municipal corporation or other governmental entity which is not an arm of the State." *Id.* Finally, sovereign immunity does not completely protect state officers from suits. *Id.*

62. *See id.* at 752-54. If the Court allowed suits authorized by Congress' Commerce Clause power to continue in state courts, its ruling would be inconsistent with *Seminole Tribe* in which it prohibited these same suits in federal courts. *See Seminole Tribe*, 517 U.S. at 47.

Amendment into the nation's jurisprudence.[63] However, Congress still had other avenues to direct its legislation around state sovereignty.[64] The Supreme Court next turned its attention to the related issue of whether Congress could abrogate the states' Eleventh Amendment immunity through appropriate legislation upholding the Fourteenth Amendment.[65]

B. Removing Congress' Power Under Section 5 of the Fourteenth Amendment

Section 1 of the Fourteenth Amendment[66] protects individuals from a violation of their rights secured by the Amendment,[67] and Section 5 of the Fourteenth Amendment[68] serves as the constitutional basis for Congress to provide legislation to meet this end.[69] However, because the Supreme Court had historically defined Congress' power to regulate the states in terms of interstate commerce, the Court never clarified congressional authority under other powers, including Section 5.[70] Most notably, the United States Supreme Court had to decide whether Congress abused its Section 5 power in passing legislation that abrogated state sovereignty by authorizing suits against the states.[71] The Court gave a broad interpretation of this power in *Katzenbach v. Morgan*.[72] In *Katzenbach*, the Court allowed Congress to pass legislation to enforce the Fourteenth Amendment's substantive protections, but it went further and:

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63. *See Alden*, 527 U.S. at 758 (noting that "Congress has vast powers but not all powers"); *Seminole Tribe*, 517 U.S. at 47.
64. *See Alden*, 527 U.S. at 758. While Congress cannot regulate a state as freely as it could a corporation, Congress may still require states to comply with federal statutes if, in passing these statutes, Congress treats the states as independent sovereigns and "joint participants in a federal system." *Id.*
65. Horner, *supra* note 56, at 780. To validly open a state to suits under a federal statute, "Congress has to enact a law pursuant to another power in the Constitution, such as the Fourteenth Amendment." *Id.*; *see also infra* Part II.B.
66. U.S. CONST. amend. XIV, § 1.
    > No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

    Id.
67. *Id.*
68. U.S. CONST. amend. XIV, § 5. "The Congress shall have power to enforce by appropriate legislation, the provisions of this article." *Id.*
69. Levy, *supra* note 7, at 1647.
70. *Id.* at 1645.
71. *Id.* at 1646-47.
72. 384 U.S. 641 (1966). In this case, the Supreme Court examined the constitutionality of the Voting Rights Act of 1965 in which Congress intended to preserve the right to vote for Puerto Rican immigrants who were registered voters in New York City and who were prevented from voting because the election laws of New York required the voter to be able to read and write English. *Id.* at 643-44.

> [H]eld that Congress could act based upon either its determination that regulating conduct may prevent future violations or on factual determinations that would establish a violation of substantive rights as defined by the Court, and even implied that Congress might by statute broaden the scope of substantive rights protected by the Fourteenth Amendment.[73]

This case appeared to give Congress unlimited discretion in its use of the Fourteenth Amendment in passing appropriate legislation, but since 1997, the Supreme Court handed down a triad of cases,[74] which signify that the return to federalism also concerns Congress' power under Section 5 of the Fourteenth Amendment.

1. *City of Boerne v. Flores*

In the first of the cases signifying a return to federalism, *City of Boerne v. Flores*,[75] the Supreme Court examined the constitutionality of the Religious Freedom Restoration Act of 1993 (RFRA),[76] which Congress enacted in response to *Employment Division Department of Human Resources of Oregon v. Smith*.[77] In *Boerne*, Congress had implemented RFRA's requirements on the states through its authority granted by Section 5 of the Fourteenth Amendment.[78] The Court did not deny Congress' ability to pass laws under its Section 5 power to enforce the right to free exercise of religion[79] but declined to authorize unlimited congressional authority to enforce "appropriate legislation."[80]

In *City of Boerne*, the Court stated that Congress abused its power because it did not enforce a constitutional right with a remedy, but

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73. Levy, *supra* note 7, at 1647.

74. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999); City of Boerne v. Flores, 521 U.S. 507 (1997).

75. 521 U.S. 507 (1997).

76. 42 U.S.C.A. § 2000bb to 2000bb-4 (West Supp. V 1993).

77. 494 U.S. 872 (1990). *Smith* involved the firing of two Native American employees who lost their jobs because of their use of peyote, a drug used in their culture's religious ceremonies. *Id.* at 874. The Supreme Court in *Smith* held that the government's regulation of drugs and other harmful conduct does not hinge upon a balance of the government's action on an individual versus that individual's religious belief. *Id.* at 890; *see also Boerne*, 521 U.S. at 512-14. In response to this case, Congress created the RFRA, which "prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability . . . ." *Id.* at 515 (alterations in original) (quoting RFRA, 42 U.S.C.A. § 2000bb-1).

78. *Boerne*, 521 U.S. at 517.

79. *Id.* at 519.

80. *Id.* ("Congress' power under [Section] 5, however, extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment.").

rather changed the right's substance.[81] The Court argued that RFRA went beyond remedying wrongs against which the Fourteenth Amendment protects,[82] and hindered federalism in two ways. First, it imposed a large load of litigation onto the state courts.[83] Second, it usurped the states' traditional regulatory power.[84] The Court concluded that Congress exceeded its authority in enacting RFRA because it violated the system of separate powers in the federal government, but more importantly, it upset the state-federal balance in favor of federal supremacy.[85]

2. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*

After *Bourne*, the Supreme Court continued to reserve more autonomy for the states. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[86] the Supreme Court examined the constitutionality of the Patent and Plant Variety Protection Remedy Clarification Act[87] ("Patent Remedy Act").[88] With the Patent Remedy Act, Congress specifically abrogated the states' Eleventh Amendment immunity by exposing the states to suits for patent infringement.[89] After *Seminole Tribe*,[90] Congress could not abrogate state sovereign immunity using the Commerce Clause, but the federal government argued that Section 5 of the Fourteenth Amendment justified the legislation.[91] However, the Court again held that Eleventh Amendment immunity is not absolute and "that for Congress to invoke [Section] 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[92] The Court found that Congress did not include any constitutional justification for the abrogation under the Fourteenth Amendment[93] and held as unconstitutional the use of Section 5 to enforce this legislation.[94]

81. *See id.* ("[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.").
82. *Id.* at 534.
83. *Id.*
84. *Id.*
85. *Id.* at 536.
86. 527 U.S. 627 (1999).
87. 35 U.S.C. § 296 (1992).
88. *Fla. Prepaid*, 527 U.S. at 631.
89. *Id.* at 630.
90. See *supra* Part II.A.2 for a discussion of *Seminole Tribe*.
91. *Fla. Prepaid*, 527 U.S. at 638-39.
92. *Id.* at 639.
93. *Id.* ("In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.").
94. *Id.* at 647.

Acknowledging that Congress did not have a constitutional basis to abrogate state sovereign immunity, the Court also added a powerful warning to Congress that it must allow the states to provide regulations and that it could not regulate every aspect of the country from the nation's capital.[95] Congress had created the Patent Remedy Act because a patent infringement that does not have a remedy would violate the Fourteenth Amendment.[96] However, Congress provided its own remedy without determining whether the states could regulate this problem themselves.[97] Congress "barely considered the availability of state remedies for patent infringement and hence whether the States' conduct might have amounted to a constitutional violation under the Fourteenth Amendment."[98]

At the congressional hearings for the Act's adoption, witnesses testified about potential state remedies.[99] One witness stated that, "[t]he primary point made by these witnesses, however, was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent law."[100] The Court noted the importance of uniform patent laws but held that this rationale could not justify the abrogation of state sovereign immunity.[101]

3. *Kimel v. Florida Board of Regents*

In *Kimel v. Florida Board of Regents*,[102] the most important of the three cases, the Supreme Court held that Congress had exceeded its Section 5 power by abrogating state sovereign immunity with the Age Discrimination in Employment Act of 1967[103] (ADEA).[104] Congress enacted the ADEA to eliminate age employment discrimination.[105] Originally, the ADEA offered to an employee claiming age discrimination a remedial civil suit against any *private* employer who violated the Act.[106] However, in 1974, Congress extended the meaning of "employer" and "employee" to cover state employers and employees, and in effect extended the "application of the ADEA's

95. *Id.* at 645.
96. *Id.* at 639.
97. *Id.* at 640.
98. *Id.* at 643.
99. *Id.*
100. *Id.*
101. *Id.*
102. 528 U.S. 62 (2000).
103. 29 U.S.C. §§ 621-634 (1994 & Supp. V 2000).
104. *Kimel*, 528 U.S. at 67.
105. *See id.* at 66 (citing 29 U.S.C. § 623(a)(1), which states that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age").
106. *Id.* at 67.

substantive requirements to the States."[107] The Supreme Court concluded that this statutory revision indicated Congress' intent to abrogate the states' Eleventh Amendment immunity to civil suits brought by private citizens.[108] Repeatedly, the Court found that no ambiguity existed in the ADEA's language, and the Court read Congress' words as a usurpation of state sovereignty.[109]

In *Kimel*, the issue centered on Congress' power set by Section 5 of the Fourteenth Amendment to expose the states to civil suits under the ADEA.[110] Looking at the ADEA, the Court concluded that the Act was not "appropriate legislation" under Section 5.[111] Because the ADEA does not protect "a suspect class,"[112] and does not fall under "equal protection jurisprudence,"[113] the Court concluded that Congress' use of Section 5 does not merit the abrogation of Eleventh Amendment immunity.[114] Additionally, the Court went back to the congressional record in an effort to find a justification for Congress' paternalism over the states passing the ADEA, and it found none.[115]

Justice O'Connor, in writing for the *Kimel* court, could have concluded her opinion with Congress' misappropriation of its Section 5 power with respect to a government of duel sovereigns, but she did

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107. *Id.* at 68 (noting that the revision of 29 U.S.C. § 630(b) includes state employers and employees).
108. *Id.* at 67.
109. *Id.* at 74.
110. *Id.* at 80. The Court's recognition that "the Eleventh Amendment and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of [Section] 5 of the Fourteenth Amendment." *Id.* (citations omitted).
111. *Id.* at 82-83. Section 5 of the Fourteenth Amendment gives Congress broad power to secure the rights and protections guaranteed under the Fourteenth Amendment, and it grants Congress the ability to create remedies, and to deter future violations of the Amendment. *Id.* at 80. However, Section 5 also imposes limits upon Congress only to "enforce" constitutional violations, and not determine what constitutes one. *Id.* at 81 (noting the separation of powers issue and the Court's ultimate responsibility to determine the Fourteenth Amendment's substantive meaning).
112. Unlike race and gender, age does not qualify as a suspect class, a class that deserves more protection under the Equal Protection Clause. *Id.* at 83. "Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment.'" *Id.* (citations omitted). Governmental age discrimination only requires rational review; thus "[s]tates may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." *Id.* at 83.
113. *Id.* at 87-88 (stating "that the ADEA's protection extends beyond the requirements of the Equal Protection Clause").
114. *Id.* at 67.
115. *Id.* at 91 ("A review of the ADEA's legislative record as a whole, then, reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age.").

not. The Court again referred to the states' laws for remedies concerning age discrimination by state employers, and it reassured employees that without this federal legislation, the country would not leave its elder employees without recourse.[116] Justice O'Connor found little evidence of rampant age discrimination by a state in its employment practices, but if any existed, she stated that an individual would have a state remedy:[117] "State employees are protected by state age discrimination statutes, and may recover money damages from their state employers in almost every State of the Union."[118] In stating this, the Court wanted to send a message to Congress that it should ensure that the states have adequate remedies before it legislates. The Court reminded Congress that once again, it is not the substance of the legislation that is important, but rather that these laws do not violate a state's rights.

4. The Dissents: Criticism of the New Federal Movement

While the United States Supreme Court continues to release opinions supporting the return to federalism,[119] this movement does not have the support of the entire Court.[120] In both *Kimel*[121] and *Florida Prepaid*,[122] the Supreme Court was split five to four with a slight majority in favor of preserving state sovereignty through the Eleventh Amendment.[123]

In *Kimel*, the four anti-federalist Justices began their dissent with the position that Congress *does* have the power to impose its regulation over the states.[124] They concluded that Congress could use the ADEA to eliminate work-related age discrimination against both private and state employers.[125] They reasoned that saying otherwise would strike at the heart of the way Congress passes laws that bind our society.[126] The dissent found that neither the Eleventh Amendment nor state

116. *Id.* at 91-92.
117. *Id.* at 91.
118. *Id.*
119. *See supra* notes 6-8, 33-35 and accompanying text.
120. Funk, *supra* note 30, at 7.
121. 528 U.S. 62 (2000). See also *supra* Part II.B.3 for a discussion of the majority's decision in *Kimel*.
122. 527 U.S. 627 (2000). See also *supra* Part II.B.2 for a discussion of the majority's decision in *Florida Prepaid*.
123. Funk, *supra* note 30, at 6-7. "*Kimel*, like the other Eleventh Amendment/ states rights cases, was a 5-4 decision, with the Court splitting along what is becoming an increasingly frequent fault-line – Rehnquist, Scalia, Thomas, O'Connor, and Kennedy v. Souter, Breyer, Ginsburg, and Stevens." *Id.* at 7.
124. *Kimel*, 528 U.S. at 93 (noting that Justice Stevens was joined by Justices Souter, Ginsburg, and Breyer dissenting in part and concurring in part).
125. *Id.* The dissent equates the ADEA's goals to those of wage and health regulations. *Id.*
126. *Id.* ("Congress' power to authorize federal remedies against state agencies that violate statutory obligations is coextensive with its power to impose those obligations on the States in the first place.").

sovereign immunity places any limitations on Congress' ability to implement remedies against anyone who violates a federal statute.[127]

The dissent in *Kimel* saw sovereign immunity, not as a system of the federal and state governments working independently as part of a single union, but as an "ancient judge-made doctrine."[128] They believed that the majority's form of neo-federalism incorrectly manipulated and misplaced the ideals that the founders preached.[129] The dissent did not want the Court to serve as the protector of federalism[130] because the "structural safeguards" in place when Congress passes a law should automatically preserve the states' interests.[131] The dissent concluded that the states have their voices heard when Congress enacts a law because each state is given an equal voice in the Senate by sending two representatives.[132] Accordingly, the dissent argued for the ADEA's constitutionality because one "can safely presume that the burdens the statute imposes on the sovereignty of the several States were taken into account during the deliberative process leading to the enactment of the measure."[133]

While the majority used its opinion to attack Congress' use of Section 5 of the Fourteenth Amendment to authorize the ADEA's abrogation of a state's Eleventh Amendment immunity,[134] the dissent in *Kimel* chose to criticize the majority's assertion of federalism.[135] In the dissents' view, Congress passed a valid law; it did not abuse its power.[136] The dissent argued that the majority's return to states' rights forced the Court to examine the extent of Congress' power granted under Section 5 of the Fourteenth Amendment.[137] The dissent accused the majority of "judicial activism" when it decided *Seminole Tribe*, *Alden*, *Florida Prepaid*, and *Kimel*, and demanded that this abuse of judicial power face opposition.[138]

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127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 93, 95. "[T]he Framers did not view the Court as the ultimate guardian of the States' interest in protecting their own sovereignty from impairment by 'burdensome' federal laws." *Id.* at 95.
131. *Id.* at 93.
132. *Id.*
133. *Id.* at 96.
134. *See supra* Part II.B.3.
135. *Kimel*, 528 U.S. at 97 (noting that "today's decision . . . rests entirely on a novel judicial interpretation of the doctrine of sovereign immunity, which the court treats as though it were a constitutional precept").
136. *See id.* at 98.
137. *See id.* (stating that the Court has unnecessarily been forced "to resolve vexing questions of constitutional law respecting Congress' [Section 5] authority").
138. *Id.* at 98-99.

III. THE AMERICANS WITH DISABILITIES ACT AND THE ELEVENTH AMENDMENT

Since the enactment of the Americans with Disabilities Act, the American public has praised the Act as the hallmark of modern American civil rights legislation.[139] The Act stands as a symbol of our nation's accommodation of all of its disabled citizens.[140] Political analysts regard the Act as evidence of the good that can come out of a bipartisan effort in the federal government.[141] Few can argue against the ADA's purpose of providing a "clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[142] However, before the Supreme Court decided *Board of Trustees of the University of Alabama v. Garrett*,[143] applying the Eleventh Amendment to the ADA caused a lot of confusion throughout our nation's courts.[144]

A. *Various Approaches in Applying the Eleventh Amendment to the ADA Among the Circuits*

Two schools of thought existed concerning the issue of whether Congress violated the Eleventh Amendment when it passed the ADA, allowing state employers to be sued under the Act. The ADA included a regulatory scheme that allowed individuals to sue a state in federal court for monetary damages, and this issue divided the circuits before the Supreme Court intervened.[145]

1. The Seventh Circuit's Approach

First, some courts advocated a form of neo-federalism, which enforces the Eleventh Amendment and demands that Congress respect state sovereignty through its legislation. In *Erickson v. Board of Governors of State Colleges and Universities for Northeastern Illinois University*,[146] the Seventh Circuit started where the United States Supreme Court left off; it looked at the Court's last three decisions

139. Thomas D. Kershaw, *An ADA Primer: What the General Practitioner Should Know*, 43 ADVOC. 8, 8 (Sept. 2000).
140. *Id.*
141. *Id.* (noting that when the ADA was passed in 1990, President George H. W. Bush held office); *see also* Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 30, 30 n.2 (2000) (noting the overwhelming bipartisan approval of the ADA in both the Senate and the House).
142. 42 U.S.C. § 12101(b)(1) (2000).
143. 531 U.S. 356 (2001).
144. *See id.* at 363 (stating that the court granted certiorari "to resolve a split among the Courts of Appeals"); *see also infra* Part III.A.
145. *See Garrett*, 531 U.S. at 363.
146. 207 F.3d 945 (7th Cir. 2000).

concerning Congress' Section 5 power.[147] In *Erickson*, the Seventh Circuit equated the ADA to the ADEA,[148] first, by holding that the ADA explicitly abrogated the states' sovereign immunity under the Eleventh Amendment,[149] and second, by holding that disability discrimination only requires rational review under the Equal Protection Clause.[150] Referring to *Cleburne v. Cleburne Living Center*,[151] the Court understood that the government's consideration of an employee's disability is a constitutional issue.[152] The Court held that if the RFRA[153] and the ADEA "exceed the [Section] 5 power, then so does the ADA – at least to the extent it extends beyond remedies for irrational discrimination."[154]

2. The Eleventh Circuit's Approach

Other courts have held that Congress properly abrogated the states' Eleventh Amendment immunity with the passage of the ADA. In *Garrett v. University of Alabama at Birmingham Board of Trustees*,[155] the Eleventh Circuit examined the ADA's abrogation of state sovereignty and held that states are not immune from private civil suits under the ADA.[156] The Eleventh Circuit stated that Congress showed a clear intent to abrogate states' sovereign immunity with the ADA, and that the Eleventh Amendment does not shield any state from a lawsuit.[157] It concluded that "the ADA is a valid exercise of the Enforcement Clause of the Fourteenth Amendment and that the states do not have sovereign immunity from claims brought under the ADA."[158]

147. *Id.* at 947 ("Three times during the last four Terms, the Supreme Court has addressed the extent of the legislative power under [Section] 5.").
148. See *supra* Part II.B.3 for discussion of *Kimel v. Florida Board of Regents* and why the Supreme Court held that the ADEA was an unconstitutional abrogation of the state's Eleventh Amendment immunity.
149. *Erickson*, 207 F.3d at 947.
150. *Id.*
151. 473 U.S. 432 (1985).
152. *See Erickson*, 207 F.3d at 949.
153. See *supra* Part II.B.1 for a discussion of *City of Boerne v. Flores* and why the Supreme Court held that RFRA violated the Eleventh Amendment.
154. *Erickson*, 207 F.3d at 951.
155. 193 F.3d 1214 (11th Cir. 1999), *rev'd*, Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding that Congress validly abrogated the Eleventh Amendment and individuals may sue the state). See also *infra* Part III.B for a discussion of the facts and the Supreme Court's decision.
156. *Garrett*, 207 F.3d at 1216.
157. *Id.* at 1218 (noting that in 42 U.S.C. § 12202 (1994) "Congress [had] unequivocally expressed its intent for the ADA to abrogate sovereign immunity").
158. *Id.*

3. The Fourth Circuit's Approach

The Fourth Circuit, the circuit that presides over Maryland, stood internally divided over this issue.[159] In *Amos v. Maryland Department of Public Safety and Correctional Services*,[160] the Fourth Circuit held that private ADA claims were allowed against state prisons.[161] Here, the court examined the history that Congress had compiled of past discrimination against individuals with disabilities to prove that a violation of the Equal Protection Clause had occurred.[162] With the existence of sufficient evidence, the ADA "[was] indeed adequately justified as remedial legislation and therefore fully within the scope of Congress' enforcement power under the Fourteenth Amendment."[163] Because the court determined that Congress did not exceed its Section 5 power in enacting the ADA, Maryland could not assert the defense of sovereign immunity under the Eleventh Amendment.[164]

Conversely, the same circuit, in the same year, issued another decision that advocated state sovereignty.[165] In *Brown v. North Carolina Division of Motor Vehicles*,[166] the Fourth Circuit held unconstitutional a regulation based on the ADA that prohibited the state from charging disabled drivers five dollars for a placard that enabled them to park in handicapped spots.[167] The court recapped the history of North Carolina's system of accommodating the disabled with parking.[168] It then emphasized that with an adequate state system in place, the federal government decided to implement the ADA.[169] Because disability discrimination only receives rational review under equal protection analysis,[170] this court concluded that Congress could only

159. *Compare* Amos v. Md. Dep't of Pub. Safety, 178 F.3d 212 (4th Cir. 1999) (holding that an individual may sue a state under the ADA), *with* Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) (holding as unconstitutional a regulation that requires an accommodation by the state's motor vehicle agency).
160. 178 F.3d 212 (4th Cir. 1999).
161. *Id.* at 223.
162. *Id.* at 218-19 ("When enacting the ADA, Congress made several findings of both past and present discrimination against the disabled in the country's general population that it had determined violated the Equal Protection Clause.").
163. *Id.* at 219.
164. *See id.* at 223 ("The State of Maryland is entitled under the 11th Amendment of the United States Constitution to immunity from suit under the ADA unless Congress has validly abrogated that immunity. . . . The defense of sovereign immunity is not available to Appellees in this case.").
165. *See supra* note 159 and accompanying text.
166. 166 F.3d 698 (4th Cir. 1999).
167. *Id.* at 701.
168. *Id.* (noting that since 1972, the State provided parking for the disabled and it has maintained and improved this system over the years).
169. *Id.* ("Nearly twenty years after North Carolina began providing for handicapped parking, Congress passed the Americans with Disabilities Act.").
170. *See infra* note 204 and accompanying text.

use Section 5 to pass the ADA over the existing state law if the state clearly demonstrated animus to this group.[171] The court did not find the animus necessary to justify the abrogation of state sovereignty.[172]

Two separate interpretations of the ADA's validity exist, but the Supreme Court provided some clarity and cohesion in deciding *Board of Trustees of the University of Alabama v. Garrett*.[173] The Supreme Court continued the federalist revolution by advocating state sovereignty.[174] It removed the ability of individuals to sue the state for disability discrimination under the ADA.[175] While the Court held one aspect of the ADA unconstitutional, it also recommended that individuals who seek redress against the state look to their own state's laws for remedies.[176]

B. *The United States Supreme Court's Decision in* Board of Trustees of the University of Alabama v. Garrett

1. Factual and Procedural Background

Board of Trustees of the University of Alabama v. Garrett[177] involved two separate plaintiffs, both of whom worked for the State of Alabama.[178] Patricia Garrett worked for the University of Alabama at Birmingham Hospital, where she served as the Director of Nursing.[179] During her employment, she developed breast cancer, which forced her to take a lot of time off work for her medical treatment.[180] When she came back to work, her supervisor informed her that she could no longer hold a director position, and she had to take a lower paying, less prestigious position.[181]

The other plaintiff, Milton Ash, worked for the Alabama Department of Youth Services as a security guard.[182] He originally had chronic asthma that required him to avoid carbon monoxide and cigarette smoke, and he later learned that he suffered from sleep apnea.[183] To accommodate his disabilities, Ash asked his employer to

171. *See Brown*, 166 F.3d at 707.
172. *Id.* "Animus 'in the air,' however, does not permit Congress to effect a wholesale redistribution of power between the states and the central government." *Id.*
173. 531 U.S. 356 (2001).
174. *See infra* Part III.B.2.
175. *See infra* note 208 and accompanying text.
176. *See infra* notes 209-10 and accompanying text.
177. 531 U.S. 356 (2001).
178. *Id.* at 362.
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.*; *see also* STEDMAN'S MEDICAL DICTIONARY 114 (26th ed. 1995) (defining "apnea" as an "[a]bsence of breathing," and "sleep apnea" as apnea "during sleep, associated with frequent awakening and often with daytime sleepiness").

reassign him to the day shift and place him in a location where he would avoid smoky areas.[184] When the state employer refused to provide these accommodations, Ash filed suit with the Equal Employment Opportunity Commission alleging discrimination.[185] After filing suit, Ash noticed that his performance evaluations had suffered.[186]

Both plaintiffs sued the State under the ADA for money damages in federal district court.[187] The State made a motion for summary judgment on the basis that the ADA unconstitutionally abrogated its protection under the Eleventh Amendment and that Congress had exceeded its power in enacting this portion of the Act.[188] In a single decision, the district court granted summary judgment, siding with the State.[189] However, on appeal, the Eleventh Circuit consolidated both cases and held that Congress did not exceed its power in enacting the ADA, and that the states could not claim Eleventh Amendment immunity as a defense.[190] The United States Supreme Court then granted certiorari "to resolve a split among the Courts of Appeals on the question whether an individual may sue a State for money damages in federal court under the ADA."[191]

2. Legal Analysis

The majority in *Garrett*[192] began its rationale with the rule that if the Eleventh Amendment applied, private individuals could not sue a state in federal court, under federal legislation, without the state's consent.[193] However, the Court noted that there are times when Congress could use its constitutional authority to abrogate this immunity.[194] For a federal regulation to supercede state sovereignty and impose compliance on the state governments, Congress must affirmatively answer two questions.[195] The first question is whether Congress expressly authorized private suits against the states.[196] With

184. *Garrett*, 531 U.S. at 362.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 362-63.
190. *Id.* at 363.
191. *Id.*
192. *Id.* at 360 (noting that this case was decided by a five to four Court in which Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas joined for the majority).
193. *Id.* at 363. "The ultimate guarantee of the Eleventh Amendment is that non-consenting States may not be sued by private individuals in federal court." *Id.* (citation omitted).
194. *Id.*
195. *Id.*
196. *Id.*

the ADA, Congress satisfied this requirement.[197] The ADA specifically provides that states cannot shield themselves from private suits filed under the ADA.[198]

According to the Court in *Garrett*, the second question Congress must answer is whether Congress possesses the constitutional authority to regulate the subject matter proposed in the prospective legislation.[199] For this question, the Court examined whether Congress had the constitutional authority to abrogate the Eleventh Amendment from the states through the ADA.[200]

The Supreme Court had already removed Congress' Commerce Clause power as a valid source of constitutional authority to abrogate the Eleventh Amendment,[201] but Congress can force states into federal court with appropriate legislation under Section 5 of the Fourteenth Amendment.[202] As the Court noted, with the ADA Congress clearly used Section 5 as a basis for enacting this legislation.[203] However, legislation intended to prevent disability discrimination does not constitute "appropriate legislation" under Section 5 because the Equal Protection Clause of the Fourteenth Amendment does not afford individuals with disabilities "suspect class" status.[204]

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197. *Id.* at 363-64 (stating that the "first of these requirements is not in dispute here").

198. *Id.* at 364 (quoting 42 U.S.C. § 12202, the Court noted that Congress wrote that "'[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter'").

199. *Id.*

200. *Id.* ("The question, then, is whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA.").

201. *Id.* (noting that Congress cannot use its power enumerated in Article I to abrogate the Eleventh Amendment); *see also supra* Part II.B.

202. *Garrett*, 531 U.S. at 365 (noting that Section 5 allows Congress to pass laws that enforce the rights secured under Section 1 of the Fourteenth Amendment).

203. *Id.* at 364 n.3; *see also* 42 U.S.C. § 12101(b)(4) (stating that one of the ADA's purposes is "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").

204. *Garrett*, 531 U.S. at 366. Referring to *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), the Court followed the rule that state action that classifies based on disabilities only receives rational review. *Id.* (noting that in *Cleburne*, the Court held "that such legislation incurs only the minimum 'rational-basis' review applicable to general social and economic legislation"). This holding means that a state may classify or make a decision based on an individual's disability and not violate the Equal Protection Clause. *Id.* at 366-67. The state does not need to provide its reason for the classification when it makes its decision, and only upon a challenge to the decision's legitimacy, does the state need to provide "'a rational basis for the classification.'" *Id.* at 367 (quoting Heller v. Doe, 509

While the ADA does not demand a higher form of scrutiny under the Equal Protection Clause, the Court stated that Congress could still qualify this Act as appropriate legislation and force the states into court if Congress found a pattern of discrimination against individuals with disabilities by the states.[205] However, the Court found no evidence of a pattern of statewide discrimination against individuals with disabilities that would rise to the level of a Fourteenth Amendment violation.[206] Of course, circumstances exist where state employers irrationally discriminate against an individual with a disability, but the Court reasoned that these instances were so limited that the ADA does not qualify as appropriate legislation under Section 5.[207] Without a pattern of irrational discrimination by the states, the Supreme Court held that the Eleventh Amendment bars suits by private individuals against a state in federal court under the ADA.[208]

Because the Court held that the ADA no longer provides individuals with disabilities the ability to receive monetary damages against a state employer, the Court directed such individuals to seek redress under state law and state discrimination statutes.[209] The Court found that every state has its own set of laws to combat disability discrimination, and the states had these laws in place before Congress enacted the ADA granting additional protection.[210] Through its holding in this case, the Supreme Court once again let Congress know

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U.S. 312, 320 (1993)). See also *supra* note 112 for the meaning of suspect class.

205. *Id.* at 363. "Accordingly, [Section] 5 legislation reaching beyond the scope of [Section] 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Id.* at 365 (quoting City of Boerne v. Flores, 521 U.S. 507, 536 (1997)).

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

207. *Id.* at 370 (finding that "these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination on which [Section] 5 legislation must be based").

208. *Id.* at 360.

209. *Id.* at 374 n.9 ("[S]tate laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress."); *see also* Brief for Petitioners, Bd. of Trs. of the Univ. of Ala. v. Garrett, No. 99-1240, 2000 WL 821035 app. A (2001) (noting that this appendix contains the disability discrimination laws of all fifty states).

210. *Garrett*, 531 U.S. at 368 n.5.

> It is worth noting that by the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that "this is probably one of the few times where the States are so far out in front of the Federal Government, it's not funny."

Id. (quoting Hearing on Discrimination Against Cancer Victims and the Handicapped before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 100th Cong., 1st Sess., 5 (1987)).

that the states should share in the governance of the country, and that Congress must enact its legislation properly and respect its co-sovereignty with the states.

3. A Five-Four Decision

The dissent in *Garrett*[211] did not direct individuals with disabilities to state law to seek remedies because these Justices concluded that Congress did *not* exceed its power in enacting the ADA as appropriate legislation under Section 5.[212] Using the same evidence that the majority found not to constitute a pattern of irrational discrimination by the states, the dissent concluded that the states' role in discriminating against individuals with disabilities was more prevalent.[213] The dissent noted that Congress had discovered that disability discrimination existed in both private businesses and local governments, and this finding "implicates state governments as well, [because] state agencies form part of that same larger society."[214] The dissent accumulated over three hundred examples of discrimination against individuals with disabilities[215] and concluded that this could serve as a valid basis for appropriate Section 5 legislation.[216]

The fact that the Court did not come to a unanimous conclusion based on the evidence highlights the growing division in the Court and reflects some ideological differences.[217] As this new form of federalism grows, the Court continues to take more power from the federal government and give it back to the states.[218] The ADA is merely the latest target of the federalism movement.[219] If the Court continues to advocate state sovereignty, individuals will continually

211. *Id.* at 376 (noting that Justices Breyer, Stevens, Souter and Ginsburg joined in the dissent).
212. *Id.* at 377 ("In my view, Congress reasonably could have concluded that the remedy before us constitutes an 'appropriate' way to enforce this basic equal protection requirement. And that is all the Constitution requires.").
213. *Id.*
214. *Id.* at 378.
215. *Id.* at 391-424 app. C. Specifically, in Maryland, the State did not provide safe and accessible public transportation for individuals with disabilities and had several instances in which deaf individuals were not provided interpreters. *Id.* at 409 app. C.
216. *Id.* at 379 (quoting the majority, the dissent stated that "I fail to see how this evidence 'fall[s] far short of even suggesting the pattern of unconstitutional discrimination on which [Section] 5 legislation must be based'").
217. See *supra* Parts II.B, III.A for a description of the struggle between Justices Rehnquist, O'Connor, Scalia, Kennedy and Thomas, and Justices Breyer, Stevens, Souter, and Ginsburg, and how *Garrett* continued the new federalism movement.
218. Alison B. Bianchi, *State Worker Cannot Sue Under ADA, Justices Rule*, 2001 U.S.L.W. 169, Mar. 5, 2001, at 1 (quoting David Fram of the National Employment Law Institute, that the "'Supreme Court is in a very pro-states' mindset'").
219. *See supra* notes 205-10 and accompanying text.

have to turn to their own state's laws to seek assistance when they wish to sue the State. Without the protection under the ADA, Maryland state employees can still find similar remedies under state law, because Maryland protects its citizens with disabilities by allowing them to sue the State.[220]

IV. MARYLAND DISABILITY DISCRIMINATION LAWS: HOW THE STATE CAN PICK UP THE SLACK

In *Kimel v. Florida Board of Regents*,[221] when Justice O'Connor held the ADEA unconstitutional, she did not leave the elderly without recourse when she directed individuals toward their own state's laws to recover damages against state employers.[222] In *Board of Trustees of the University of Alabama v. Garrett*,[223] Chief Justice Rehnquist gave the same instructions regarding the ADA.[224] After *Garrett*, the citizens of every state must now turn to the laws provided by their state legislators if they wish to sue the state for unlawful disability discrimination in employment, and the citizens of Maryland are no exception.[225] Before the ADA entered our national conscience and jurisprudence, individuals with disabilities in Maryland were able to seek some protection from employment discrimination by relying on the laws of their own state.[226]

A. Allowing Private Suits Against the State

Because a state's discrimination against individuals with disabilities is only susceptible to rational review,[227] there is no constitutional mandate for the ADA.[228] In searching for protection, nothing in state or federal common law gave a victim of disability discrimination a right to assert a cause of action.[229] However, Maryland saw a societal need to protect the physically and mentally disabled from

220. *See* Brief for Petitioners, Bd. of Trs. of the Univ. of Ala. v. Garrett, No. 99-1240, 2000 WL 821035, app. A (2001); *see also infra* Part IV.B.2.
221. 528 U.S. 62 (2000); *see also supra* Part II.B.3.
222. *See Kimel*, 528 U.S. at 91; *see also supra* notes 116-18 and accompanying text.
223. 531 U.S. 356 (2001); *see also supra* Part III.B.
224. *See supra* notes 209-10 and accompanying text.
225. *See supra* notes 208-09 and accompanying text.
226. *See infra* Part IV.A-B.
227. *See supra* note 204 and accompanying text (noting that the Supreme Court in *Cleburne v. Clebourne Living Center*, 473 U.S. 432 (1985), held that the disabled do not constitute a suspect class, and are only afforded rational review).
228. *See supra* notes 204-08 and accompanying text (noting that under rational review, state employers could discriminate on the basis of an individual's disability without any accountability if the state can show a legitimate reason for doing so).
229. Dillon v. Great Atl. and Pac. Tea Co., 43 Md. App. 161, 163, 403 A.2d 406, 407 (1976) (noting that at "common law no claim may be successfully asserted on the ground that the claimant was discriminated against in employment because of a physical handicap or disability").

employment discrimination, and the state legislators responded.[230] Through the enactment of Article 49B, "the Maryland General Assembly created an elaborate and comprehensive statutory scheme for the investigation and disposition of employment discrimination claims . . . ."[231]

1. Prohibiting Disability Discrimination in Maryland

Maryland adopted its legislation to curb disability discrimination in 1974, sixteen years before the federal government enacted the ADA.[232] In 1990, the ADA became the preferred legislation to eliminate disability discrimination in the workplace.[233] However, the ADA's general prohibition of disability discrimination does not differ significantly in scope from what Maryland considers an unlawful employment practice under its laws,[234] except that the state version also includes protection for other classes: age, race, religion, color, sex, national origin, and marital status.[235] Maryland specifically protects individuals with disabilities from an employer who hires, fires, limits, segregates, or negatively classifies an employee on the basis of the employee's disability.[236]

Ironically, before the ADA was enacted, both state and federal courts repeatedly held that comparable federal statutes did not preempt the states' fair employment laws.[237] In *Westinghouse Electric*

230. *Id.* at 164 n.8, 403 A.2d at 408 n.8 (noting that before 1974, an individual with a disability did not receive any "legislative protection" for being discriminated against until the General Assembly enacted section 19 of Article 49B, which "is currently codified as Md. Ann. Code art. 49B, § 16").
231. *See* Chekey v. BTR Realty, Inc., 575 F. Supp. 715, 716 (D. Md. 1983).
232. *See supra* note 230 and accompanying text.
233. *See supra* notes 139-42 and accompanying text.
234. *See infra* Part IV.B.
235. *Compare* 42 U.S.C.A. § 12112(a) (West 1995), *with* MD. ANN. CODE art. 49B § 16(a)(1) (2000). *See also* 2001 Md. Laws 340 (noting that the Maryland General Assembly has amended section 16 to include sexual orientation as another protected class under Article 49B).
236. *See* MD. ANN. CODE art. 49B § 16(a).

> It shall be an unlawful employment practice for an employer:
>
> (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . physical or mental handicap . . . .
>
> (2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of the individual's . . . physical or mental handicap . . . .

Id.

237. *See* Westinghouse Elec. Corp. v. Md. Comm'n on Human Relations, 520 F. Supp. 539, 550 (D. Md. 1981); Minn. Mining & Mfg. Co. v. State, 289 N.W.2d 396, 400-01 (Minn. 1979), *appeal dismissed*, 444 U.S. 1041 (1980);

Corporation v. Maryland Commission on Human Relations,[238] the employer claimed that the federal statutory scheme to curb abuse and inequality with employment benefit plans, specifically Employee Retirement Income Security Act,[239] preempted the protection provided by Maryland law.[240] The court rejected this claim and emphasized the need to maintain both federal and state laws.[241] When the Maryland General Assembly decided to codify the prohibition of certain types of employment discrimination in section 16, it asserted the state's constitutional police powers.[242] When a state legitimately uses its police powers, the court assumed that the federal government would only invoke the Supremacy Clause on limited occasions.[243] Here, the ideals of federalism preserved Maryland's legislation.[244]

2. Waiving the Defense of Sovereign Immunity

Under Maryland's disability discrimination laws, the state is accountable for its unlawful employment actions. The term "employer" covers both private employers and the State of Maryland as an employer.[245] To hold Maryland accountable under these standards, the General Assembly went an extra step and waived the state's defense of sovereign immunity.[246]

While Maryland waives its defense of sovereign immunity under the state law, this same issue made the ADA problematic.[247] When

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Mountain States Tel. & Tel. Co. v. Comm'r of Labor and Indus., 608 P.2d 1047, 1057-58 (Mont. 1979), *appeal dismissed*, 445 U.S. 921 (1980).

238. 520 F. Supp. 539 (D. Md. 1981).

239. 29 U.S.C. §§ 1001-1461 (1994).

240. *See Westinghouse Elec. Corp.*, 520 F. Supp. at 542 (noting that the plaintiff claimed that federal law preempted sections 16 and 17 of Title 49B in the Annotated Code of Maryland).

241. *Id.* at 542, 550 (noting that the "national importance of the continued enforcement of state fair employment laws is self-evident . . .").

242. *See id.* at 542.

243. *Id.* "[W]hen a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting Ray v. Atl. Richfield Co., 435 U.S. 151, 157 (1998) (second citation omitted)).

244. *See id.* "This assumption provides assurance that 'the federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the Courts." *Id.* (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (second citation omitted)).

245. *See* MD. ANN. CODE art. 49B § 15(b).

246. *Id.* § 17A ("This State, its officers, and its units may not raise sovereign immunity as a defense against a salary award in an employment discrimination case under § 16 of this article.").

247. *See supra* note 208 and accompanying text (noting that without a pattern of irrational discrimination by the states, Congress needed to have the states waive their Eleventh Amendment immunity because Congress did not have power under the Fourteenth Amendment to pass this legislation over the states).

enacting this section,[248] the Maryland General Assembly intentionally decided to waive sovereign immunity only for the state law, and it did not give an unconditional waiver that also included the ADA.[249] Every state could waive its Eleventh Amendment immunity under the ADA; however, the states were not afforded this opportunity. Without deferring to the states, Congress unconstitutionally abrogated the states' Eleventh Amendment immunity and made them subservient to the federal plan.[250]

B. Seeking Relief Under Maryland Law

In Maryland, an individual who has suffered employment discrimination because of a disability may issue a complaint with the Maryland Commission on Human Relations (MCHR).[251] A claim filed with the MCHR will follow different procedures than a claim filed under the ADA. While an individual who claims a violation of the ADA initially files a claim with the Equal Employment Opportunity Commission (EEOC),[252] the ultimate adjudication of the ADA claim takes place in a courtroom.[253] The EEOC conducts an investigation to determine whether "reasonable cause exists to believe that an unlawful employment practice has occurred or is occurring under Title VII or the ADA."[254] Once the EEOC determines that

248. *See* MD. ANN. CODE art. 49B § 17A (noting that Maryland enacted this provision in 1993, which was after Congress had established the ADA).
249. *See id.*
250. *See supra* note 210 and accompanying text.
251. *See* MD. ANN. CODE art. 49B § 9A(a).

> Any person claiming to be aggrieved by an alleged discrimination prohibited by any section of this article may make, sign and file with the Human Relations Commission (hereinafter referred to as the "Commission") a complaint in writing under oath. The complaint shall state the name and address of the person, firm, association, partnership, corporation, State agency, department or board alleged to have committed the act of discrimination together with the particulars thereof; and the complaint also shall contain such other information as may be required from time to time by the Commission. A complaint must be filed within six months from the date of the occurrence alleged to be a violation of this article.

Id.; *see also* THE MARYLAND INSTITUTE FOR CONTINUING EDUCATION OF LAWYERS, INC., PRACTICE MANUAL FOR THE MARYLAND LAWYER, CH. TWO: ADMINISTRATIVE LAW § 2.4 (2000) (stating that "[e]mployment discrimination claims may be adjudicated . . . by the Maryland Commission on Human Relations . . ."); Martin Marietta Corp., Aero and Naval Sys. v. Md. Comm'n on Human Relations, 38 F.3d 1392, 1395 (4th Cir. 1994) (noting that the former employee filed a complaint with the MCHR when he claimed his employer discriminated against him because of his disabilities).

252. *See* 29 C.F.R. § 1601.6(a) (2000) ("The Commission shall receive information concerning alleged violations of Title VII or the ADA from any person.").
253. *See infra* note 255 and accompanying text.
254. 29 C.F.R. § 1601.21(a).

reasonable cause exists, the agency may issue a notice of the right to sue, and the aggrieved party may start the judicial process.[255] However, Maryland discrimination law differs from the ADA, because the state has delegated the authority to handle the employment discrimination claims to the MCHR[256] and has given this agency quasi-judicial power.[257] In *Garrett*,[258] the Supreme Court removed the ability to sue and seek judicial recourse against a state for employment discrimination under the ADA,[259] but Maryland's administrative system still provides many advantages.

1. Administrative Actions

While Article 49B requires an administrative adjudication, which excludes the right to a jury trial that exists under federal discrimination laws,[260] the Maryland system also has benefits. The basic benefits of creating an agency either to implement rules or to handle adjudications are present with the MCHR's handling of disability discrimination suits: judicial economy and client accessibility.[261]

First, Article 49B promotes judicial economy because it diverts employment discrimination claims away from the courthouse and to an administrative hearing.[262] In Maryland, a claimant does not present a case before a judge and jury; an administrative law judge (ALJ) hears the argument instead.[263] While Maryland addresses these claims in an administrative setting, the state's choice of forum does

255. *Id.* § 1601.28(b).
256. *See* THE MARYLAND INSTITUTE FOR CONTINUING EDUCATION OF LAWYERS, INC., *supra* note 251, § 2.3 (noting that a state administrative agency in Maryland is created by the General Assembly, which sets the scope of the agency's power); *see also supra* note 251 and accompanying text.
257. THE MARYLAND INSTITUTE FOR CONTINUING EDUCATION OF LAWYERS, INC., *supra* note 251, § 2.6 (defining quasi-judicial power as an agency's ability to "adjudicate[ ] the rights of individual parties"); *see also id.* § 2.4 (noting that the MCHR has this adjudicative power).
258. See *supra* Part III.B.2 for a discussion of the Supreme Court's rationale and holding in *Garrett*.
259. *See supra* notes 208-10 and accompanying text.
260. *See* Rosetta E. Ellis, Note, *Mandatory Arbitration Provisions in Collective Bargaining Agreements: The Case Against Barring Statutory Discrimination Claims from Federal Court Jurisdiction*, 86 VA. L. REV. 307, 312 (2000).
261. *See infra* notes 262-72 and accompanying text.
262. *See* Jason W. Bridges & Cara J. Heflin, *Recent Decisions: The Maryland Court of Appeals*, 58 MD. L. REV. 979, 1004 (1999). "Allowing resolution outside the court system is another function that promotes judicial economy and efficiency." *Id.* at 1004 n.191 (citing Craig Lyle Ltd. P'ship v. Land O'Lakes, Inc., 877 F. Supp. 476, 483 (D. Minn. 1995)).
263. *See* THE MARYLAND INSTITUTE FOR CONTINUING EDUCATION OF LAWYERS, INC., *supra* note 251, § 2.6 (noting that the ALJ has many of the same powers as a court judge); *see also* Md. Comm'n on Human Relations v. Mayor and City Counsel of Balt., 86 Md. App. 167, 171, 586 A.2d 37, 39 (1991) (noting that in the MCHR, the ALJ has the title of hearing examiner).

not deprive the claimants of due process.[264] In *Vavasori v. Commission on Human Relations*,[265] the Court of Special Appeals of Maryland held that filing claims of employment discrimination in an agency gives due process because it provides the "'*opportunity* [to be heard] . . . at a meaningful time and in a meaningful manner.'"[266]

Second, an administrative hearing avoids the long, complex, and expensive process that accompanies getting an ADA claim ready for trial.[267] To initiate an Article 49B claim, the aggrieved party may submit a watered down complaint requiring only "the name and address of the person or entity alleged to have committed the discriminatory act, 'the particulars thereof,' and 'other information as may be required from time to time by the Commission.'"[268] Article 49B's administrative nature removes some of the adversarial tension found in a judicial proceeding[269] and avoids a protracted suit with prompt resolution.[270] Also, in an MCHR hearing, the rules of evidence are relaxed, and an ALJ can make a decision based on hearsay evidence alone.[271] Additionally, if both parties consent, the ALJ can conduct the hearing over the telephone,[272] which can enhance the more informal atmosphere of these proceedings.

While the informality of an agency hearing allows an individual to proceed *pro se*, an attorney is still recommended to guide the individual through the administrative procedure.[273] An attorney may help preserve the record[274] for judicial review.[275] An attorney could

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264. *See* Laura B. Black et al., *Administrative Law*, 46 MD. L. REV. 541, 566 (1987).
265. 65 Md. App. 237, 500 A.2d 307 (1985).
266. *Id.* at 249, 500 A.2d at 313 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)); *see also* Black, *supra* note 264, at 566.
267. *See* Kohler v. Shenasky, 914 F. Supp. 1206, 1209-10 (D. Md. 1995) (noting that the procedural burdens such as filing a complaint, statute of limitations, investigations, and developing a case imposed on a litigant who pursues an ADA claim is lessened under Article 49B).
268. *Id.* at 1210 (quoting MD. ANN. CODE art. 49B § 9A(a) (1979)).
269. *Id.* at 1210 n.4.
270. *See id.* at 1210. "'The stated goal of the state administrative procedure is the prompt identification and resolution of [ ] disputes. The administrative scheme, including a short statute of limitations, encourages conciliation and private settlement through the agency's intervention in live disputes.'" *Id.* (alteration in original) (quoting Burnett v. Grattan, 468 U.S. 42, 54 (1984)); *see also* THE MARYLAND INSTITUTE FOR CONTINUING EDUCATION OF LAWYERS, INC., *supra* note 251, § 2.27 ("As opposed to a traditional court trial, agency hearings may be exceedingly informal.").
271. THE MARYLAND INSTITUTE FOR CONTINUING EDUCATION OF LAWYERS, INC., *supra* note 251, § 2.27.
272. *Id.*
273. *Id.* § 2.9 (stating that "a practitioner can never with great safety counsel a client to appear at any kind of agency proceeding unrepresented. However, financial realities may compel this").
274. *Id.*
275. *See id.* § 2.32 (noting that when an appeal is filed to an ALJ's order under the MCHR, before the case can reach the circuit court, there is a committee that serves as an intermediate step).

also make sure that all administrative remedies are exhausted before an appeal becomes available.[276] These benefits under the Maryland administrative process may present a viable alternative even for those individuals who can still sue and recover under the ADA. Overall, the Maryland administrative process provides a valid and appealing alternative for those who cannot seek protection in court under the ADA.

2. Maryland Commission on Human Relations

The desire to create judicial economy and a forum that helps move claims through to a swift and fair resolution makes the Maryland system alluring, but in comparison to the remedies available under the ADA, Article 49B falls short.[277] However, Article 49B does provide enough relief to "make whole"[278] the aggrieved party.[279]

a. Equitable Relief

The hearing examiner in the MCHR has several forms of relief available to award the plaintiff if the examiner concludes that the state employer committed an unlawful employment act and discriminated based on an individual's disability.[280] First, the hearing examiner may issue a cease and desist order to immediately stop the employer from continuing its harmful actions.[281] Second, if the state is found to have committed the alleged unlawful employment practice, the MCHR can provide multiple remedies.[282] A remedy may include reinstating the employee, hiring of the disabled individual with the possibility of granting back pay, providing any equitable relief that the hearing examiner deems necessary, or combining any of these remedies.[283] In *Martin Marietta Corp., Aero & Naval Systems v. Maryland Commission on Human Relations*,[284] the Fourth Circuit held that under Article 49B "the MCHR possesses broad powers to issue a consensual order

276. *See id.* § 2.33 ("Statutorily prescribed administrative remedies, including administrative levels of appeal, must ordinarily be pursued and exhausted before you can file a petition for judicial review.").
277. *See, e.g.*, STANLEY MAZAROFF, MARYLAND EMPLOYMENT LAW § 7.12 (2d ed. 2001) ("Federal equal opportunity laws differ with regard to the relief available to a victim of discrimination, and they differ as well with the relief available under their primary State counterpart, Article 49B.").
278. *See id.* (noting that employment discrimination laws exist so "the victim of the discrimination should be placed in the same position he would have been but for the act of discrimination").
279. *Martin Marietta Corp.*, 38 F.3d at 1403 (noting that through Article 49B, "the MCHR possesses broad powers to issue a consensual order requiring an employer to eliminate discrimination and reinstate an employee . . .").
280. *See* MD. ANN. CODE art. 49B § 11(e).
281. *Id.*
282. *See infra* Part IV.B.2.b, C.
283. *See infra* Part IV.B.2.b.
284. 38 F.3d 1392 (4th Cir. 1994).

requiring an employer to eliminate discrimination and reinstate an employee, and to award further equitable relief."[285]

b. Monetary Relief

The MCHR most importantly has the option to provide monetary relief.[286] Maryland has allowed monetary relief under the Maryland Code since 1977,[287] but this authority is not as extensive as the remedial powers that courts have with the ADA. Under the ADA, a court may award both punitive and compensatory damages,[288] which are two remedies that are unavailable under Article 49B.[289] Before the Supreme Court held Congress' abrogation of the states' Eleventh Amendment immunity unconstitutional,[290] Article 49B was not intended to serve as "an exclusive state remedy for such discrimination."[291] However, after *Garrett*, for state employees seeking redress for disability discrimination, the only relief they may be able to seek is through the law of Maryland. The Maryland General Assembly needs to amend Article 49B to include punitive and compensatory damages, and make its law as appealing as the ADA by affording state employees in Maryland the same protection under state law that all other employees are afforded under the ADA.

3. Reasonable Accommodation

Like the ADA, Article 49B also requires an employer to provide "reasonable accommodation" for disabled employees in the workplace.[292] While Maryland's disability laws do not expressly

285. *Id.* at 1403. *See* Makovi v. Sherwin-Williams Co., 316 Md. 603, 623, 561 A.2d 179, 189 (1989); Univ. of Md. at Balt. v. Boyd, 93 Md. App. 303, 309, 612 A.2d 305, 311 (1992).

286. *See* MD. ANN. CODE art. 49B § 11(e); *see also* Chekey v. BTR Realty, Inc., 575 F. Supp. 715, 716 (D. Md. 1983) ("The Maryland Human Relations Commission is empowered under the statute to award monetary relief for violations thereof.").

287. MD. ANN. CODE art. 49B § 11(f).

288. *See* 42 U.S.C.A. § 1981a(a)(2) (West 1994). Under "Section 102 of the Americans with Disabilities Act of 1990 . . . [t]he complaining party may recover compensatory and punitive damages . . . ." *Id. But see* 42 U.S.C.A. § 1981a(b) (noting that plaintiffs who sue under the ADA are limited by caps on compensatory and punitive damages).

289. *See* MAZAROFF, *supra* note 277, § 7.12.

290. *See supra* note 208 and accompanying text (discussing the holding in *Garrett*).

291. *See Kohler*, 914 F. Supp. at 1211.

292. *See* MD. ANN. CODE art. 49B § 16(a); *Garrett*, 531 U.S. at 361 (noting that the ADA requires the employer to provide reasonable accommodations to "'mak[e] existing facilities used by the employees readily accessible to and usable by individuals with disabilities'" (quoting 42 U.S.C. § 12112(5)(B) (2000)). It is discrimination for an employer to deny "employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or

require employers to take this extra step, the Court of Appeals of Maryland has interpreted the law as requiring employers to "reasonably accommodate" disabled employees.[293] An employer "reasonably accommodates" if it satisfies two elements.[294] First, an employer must make the workplace accessible to an individual with disabilities.[295] Second, an employer must reasonably provide the disabled employee a restructured job, or flexible work schedule.[296] Those individuals who want to hold the state accountable for its disability discrimination have comparable protection under Maryland state law, with the exception of slightly limited remedies, as they would under the ADA,[297] and the administrative forum may provide an appealing alternative to the burdensome procedures of bringing a claim in federal court.[298]

4. Other Remedies

In addition to suing the state under state law, there are other avenues of recourse that a disabled individual may take.[299] In *Garrett*, the majority noted that the holding did not totally prohibit individuals from taking action against the state under the ADA.[300]

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mental impairments of the employee or applicant." *Id.*; *see also* 42 U.S.C. § 12111(9):

> The term "reasonable accommodation" may include –
> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id.

293. *See Martin Marietta Corp.*, 38 F.3d at 1398-99.
294. *Id.* at 1398-99 n.4.
295. *Id.*; *see also* EEOC v. Humiston-Keeling, Inc., 227 F.3d 1024 (7th Cir. 2000). The court stated that "[reasonable] accommodations can take various forms, such as making the workplace accessible to a person who is wheelchair bound, or, of particular pertinence here, 'reassignment [of the disabled person] to a vacant position.'" *Id.* at 1026 (quoting 42 U.S.C.A. § 12111(9)(B)).
296. *Martin Marietta Corp.*, 38 F.3d at 1398-99 n.4. *But see* Olmstead v. L.C., 527 U.S. 581 (1999). The Court stated that "'[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.'" *Id.* at 592 (quoting 28 C.F.R. § 35.130(b)(7) (1998)).
297. *See supra* Part IV.B.2.a.
298. *See supra* notes 267-72 and accompanying text.
299. *See Garrett*, 531 U.S. at 374 n.9.
300. *See infra* Part IV.C.1-3.

a. Actions Against Local Governments

First, in *Garrett,* the Supreme Court concluded that smaller government entities within the state do not receive immunity from the Eleventh Amendment under the ADA.[301] While cities and states are considered "state actors" and held to abide by the Fourteenth Amendment,[302] "only states are beneficiaries of the Eleventh Amendment."[303] Therefore, the Eleventh Amendment does not apply to local governments, and "[t]hese entities are subject to private claims for damages under the ADA without Congress' ever having to rely on [Section] 5 of the Fourteenth Amendment . . . ."[304] However, this exception does not apply if the local entity "is an arm of the state."[305] If the exception does not apply, and a city or county employer discriminates on the basis of disability, then an individual may still seek damages under the ADA.[306]

b. Injunctive Relief

A state employee can no longer use the ADA to sue the state for money damages in federal court,[307] but there are other forms of recourse for state employees under the ADA.[308] Another alternative to suing the state under state law is to have private individuals seek injunctive relief against the state.[309] When state employees are barred by the Eleventh Amendment from seeking money damages, they may still file a claim with the EEOC to get an injunction, but their focus must turn from suing the State of Maryland to suing a state official who discriminated against the claimant when acting in his or her official capacity.[310]

c. ADA Enforcement Through the Department of Justice

The third way to sue under the ADA and avoid state law is to have the United States, through the Department of Justice (DOJ), enforce the Act's standards against the state employer on behalf of the

301. *Garrett,* 531 U.S. at 396.
302. *Id.*
303. *Id.*
304. *Id.*
305. Helen Irvin, *EEOC Will Still Investigate Charges After* Garrett, *Memo Tells Field Offices,* DAILY LABOR REPORT, Nov. 20, 2001, at 11 ("Whether a local government entity has [Eleventh] Amendment immunity must be determined on a case-by-case basis and depends on state law . . . .").
306. *Garrett,* 531 U.S. at 369.
307. *Id.* at 360 (noting the Court's holding); *see also supra* note 209 and accompanying text.
308. *See Garrett,* 531 U.S. at 374 n.9 ("Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination.").
309. *Id.*; *see also Ex parte* Young, 209 U.S. 123 (1908).
310. Irvin, *supra* note 305, at 10.

plaintiff.[311] Suing through the United States and the DOJ still allows for the recovery of money damages.[312] In the aftermath of *Garrett*, the EEOC sent a memo advising its field offices to pursue this avenue and continue their investigation of valid claims of disability discrimination by state employers against state employees.[313] While this memo raises hope for individuals with disabilities who are aggrieved by the State of Maryland, they should not rely on the DOJ to take their case because this agency rarely sues the states.[314] Donald R. Livingston, a former general counsel for the EEOC, stated that "'[t]he states have had little to fear from litigation by the federal government.'"[315]

C. *Federal Attempts to Aid State Employees Under the ADA*

While the Supreme Court invalidated Congress' abrogation of the states' sovereign immunity, the ADA may once again control employment discrimination litigation against the states if the states waive their rights under the Eleventh Amendment.[316] However, as of the writing of this Comment, only Minnesota has taken this step,[317] and it is difficult to predict whether other states will follow Minnesota's lead.[318] To have other states follow Minnesota's example, several politicians have proposed ways to entice the states to waive their Eleventh Amendment immunity.

Senator Edward Kennedy believes that "the only way to provide adequate protection for the right to be free from age [and disability] discrimination is to give the employee the right to sue an employer in court for discrimination."[319] Both Senator Kennedy and Senator Jim Jeffords have introduced a proposal that would allow state employees to sue the state under the ADEA,[320] and could propose a similar bill for the ADA.[321] Because Congress cannot provide a statutory remedy

311. *See Garrett*, 531 U.S. at 374 n.9.
312. *Id.*
313. Irvin, *supra* note 305, at 10 (noting that the EEOC wants its field offices to "continue to coordinate charges that have 'litigation potential' with the Department of Justice"); *id.* at 12 (noting that the EEOC can conduct an investigation and push for mediation, but it cannot sue the states itself because only the DOJ can assume that role).
314. *Id.*
315. *Id.*
316. *Id.*
317. *Id.* at 11-12.
318. *Id.* at 13 (quoting Donald Livingston who stated that "'I suppose no one knows whether other states will follow the example of Minnesota and waive their sovereign immunity under the ADA'").
319. 69 U.S.L.W. 2156, 2157 (2000).
320. *Id.* at 2156.
321. *Id.* (noting that before *Garrett* was decided, Senator Kennedy believed that the Supreme Court would preserve an aggrieved party's ability to sue a state under the ADA and that no legislation would be necessary, but after *Garrett*, one could infer that he may want to extend the proposed legislation to apply to the ADA).

against the states for discriminating against individuals with disabilities in their employment practices without the states consenting to expose themselves to suit, these Senators might have to entice the states to relinquish their Eleventh Amendment immunity with these regulations.[322] They have proposed a bill that would allow the states to receive federal financial assistance in return for the states' waiver of their sovereign immunity under the Eleventh Amendment.[323]

IV. CONCLUSION **SHOULD THIS BE "V."?**

With the reemergence of the Eleventh Amendment, federalism has once again become a strong force in our national jurisprudence.[324] For the past few years, the United States Supreme Court has limited Congress' Commerce Clause and Fourteenth Amendment powers to legislate, because these laws unconstitutionally abrogated the states' Eleventh Amendment rights.[325] The infringement on state sovereignty has led the Court to restrict the provisions of federal legislation that allow private individuals to sue the state for money damages in federal court.[326] The ADA is the latest legislation affected by this movement.[327]

In *Board of Trustees of the University of Alabama v. Garrett*,[328] the Supreme Court held that the Eleventh Amendment barred Congress from allowing private suits against the states for money damages under the ADA.[329] According to the Court's majority, no widespread evidence of the states discriminating against individuals existed to justify Congress' assertion of federal paternalism.[330] While few can discredit the importance of the ADA,[331] the legislation's social value cannot outweigh the necessity of respecting the states as co-equal sovereigns.[332] The Court prohibited suits against states for damages under the ADA while directing the aggrieved to state law.[333]

Maryland law offers protection comparable with the ADA.[334] Most importantly, Maryland law covers those that, after *Garrett*, are left

322. *Id.*
323. *Id.*; *see also* Helen Irvin, *California Waived 11th Amendment Immunity to Rehab Act Claims by Taking Federal Funds*, DAILY LABOR REPORT, Nov. 19, 2001, at 5 (noting that a debate is brewing in the circuits over whether Rehabilitation Act claims might have survived *Garrett* and whether states have waived their Eleventh Amendment immunity "by accepting Rehabilitation Act funds").
324. *See supra* Part II.
325. *See supra* Part II.A.
326. *See supra* Part II.B.
327. *See supra* Part III.B.
328. 531 U.S. 356 (2001).
329. *See supra* notes 207-08 and accompanying text.
330. *See supra* notes 205-06 and accompanying text.
331. *See supra* notes 139-42 and accompanying text.
332. *See supra* note 208 and accompanying text.
333. *See supra* notes 209-10 and accompanying text.
334. *See supra* Part IV.B.2, C.

without federal recourse by allowing individuals to sue the state for equitable relief.[335] However, two major differences exist between seeking recourse under the ADA and Article 49B.

First, Article 49B does not authorize all of the same remedies as the ADA.[336] Most notably, under Maryland law, an aggrieved party cannot receive compensatory or punitive damages.[337] The inequality between the two remedies calls for the Maryland General Assembly to amend Article 49B so that state employees who are victims of disability discrimination may be "made whole" to the same extent as someone who has brought a suit under the ADA.

Second, under Maryland's legislation, one must first go through an agency rather than bring a suit in court.[338] This difference has been criticized as to the adequacy of Maryland's remedy as compared to the ADA.[339] The United States District Court for the District of Maryland found that "Maryland's administrative proceeding is designed primarily to 'eliminate the discrimination by conference, conciliation and persuasion.'"[340] However, this court believes that this quick fix does not protect an individual's rights as well as the ADA.[341]

The Maryland system may not have procedural pomp and circumstance such as filing and pursuing a claim through federal court under the ADA, but it does have some appeal.[342] First, the state administrative system does not deprive individuals of their due process rights.[343] Second, arguing before an ALJ offers a more informal setting that will cost less then filing a claim in federal court.[344]

While the Supreme Court has recently reestablished the Eleventh Amendment and struck down provisions of federal statutes that unconstitutionally abrogate state sovereignty,[345] it more significantly appears to be directing Congress to respect federalism. Situations exist where Congress has the ability under Section 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity,[346] but this power is not infinite in establishing social reform.[347] With disability discrimination, every state has already

335. *See supra* Part IV.A.2.
336. *See supra* notes 286-89 and accompanying text.
337. *See supra* note 289 and accompanying text.
338. *See supra* Part IV.B.1.
339. *See* Kohler v. Shenasky, 914 F. Supp. 1206, 1210 n.4 (D. Md. 1995).
340. *See id.* (quoting McNutt v. Duke Precision Dental & Orthodontic Lab., 698 F.2d 676, 679 (4th Cir. 1983)).
341. *See id.* at 1210.
342. *See supra* Part IV.B.1.
343. *See supra* note 264 and accompanying text.
344. *See supra* notes 261-72 and accompanying text.
345. *See supra* Parts II, III.B.2.
346. *See supra* notes 194-202 and accompanying text.
347. *See supra* Part II.

enacted legislation to curb this problem,[348] but because Congress did not see this as sufficient, it intentionally abrogated the Eleventh Amendment although the states already regulated themselves.[349] Congress must respect federalism, the concept that our Founding Fathers built our nation upon. The Court has held, and may continue to hold, that "[a]lthough the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[350]

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348. *See supra* note 210 and accompanying text.

349. *See supra* note 210 and accompanying text; *see also* 42 U.S.C.A. § 12202 (1995):

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available in an action against any public or private entity other than a State.

Id.

350. Alden v. Maine, 527 U.S. 706, 748 (1999).