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The Americans with Disabilities Act: Eleventh Amendment Issues

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Summary

The Supreme Court has granted certiorari and heard oral argument in *Garrett v. University of Alabama*, a case involving the application of the Eleventh Amendment to the Americans with Disabilities Act (ADA). *Garrett* is likely to be one of the most significant cases of the 2000-2001 Supreme Court term as it could have an impact on ADA coverage of states and localities and on the doctrine of federalism. This report will provide a brief overview of the Eleventh Amendment and its application to the ADA. It will be updated as appropriate. For a more detailed analysis of the ADA see Jones, "The Americans with Disabilities Act (ADA): Statutory Language and Recent Issues," CRS Report 98-921.

Supreme Court Interpretations of the Eleventh Amendment

Although federalism was for many years largely ignored, starting in 1992 with *New York v. United States*[1] the Supreme Court began what some commentators have referred to as a "rebirth of federalism."[2] A recent chapter in this "rebirth" involves a trio of cases from June 1999 where the Supreme Court expanded state sovereign immunity from suit under the Eleventh Amendment.[3] Essentially, these cases, combined with several from

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[1] 505 U.S. 144 (1992).

[2] Curt A. Levey, "The Quiet Revolution Conservatives Continue Federalism Resurgence by Expanding State Immunity," 157 N.J.L.J. 707 (August 23, 1999). See also Thomas, "Federalism and the Constitution: Limits on Congressional Power," CRS Report RL30315.

[3] *Alden v. Maine*, 527 U.S. 706 (1999)(Congress lacks the authority when exercising Article I powers to subject non-consenting states to private suits for damages in state courts); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U. S.666 (1999) (The Trademark Remedy Clarification Act, TRCA, which subjected states to suit for false and misleading advertising, did not validly abrogate state sovereign immunity; neither the right to be free from a business competitor's false advertising nor a more generalized right to be secure in (continued...)

previous terms, limit the extent to which Congress can abrogate the state's sovereign immunity from suit. In other words, Congress may statutorily allow a state to be sued by individuals but this congressional power is limited.

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has found that the Eleventh Amendment cannot be abrogated by the use of Article I powers but that section 5 of the Fourteenth Amendment can be used for abrogation in certain circumstances. Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

The circumstances where section 5 of the Fourteenth Amendment can be used to abrogate the Eleventh Amendment were discussed in the recent Supreme Court decisions in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board, supra, Florida Prepaid Postsecondary Educ. Expense Board v. College Savings Bank, supra,* and *Kimel v. Florida Board of Regents.*[4] They reiterated the principle that the Congress may abrogate state immunity from suit under the Fourteenth Amendment and found that there were three conditions necessary for successful abrogation.

- Congressional power is limited to the enactment of "appropriate" legislation to enforce the substantive provisions of the Fourteenth Amendment.

- The legislation must be remedial in nature.

- There must be a "congruence and proportionality" between the injury to be prevented and the means adopted to that end.

The clearest discussion of these conditions is found in *City of Boerne v. Flores*[5] where the Supreme Court held that the Religious Freedom Restoration Act (RFRA) exceeded congressional power. In reaching its holding, the Court acknowledged that section 5 was a positive grant of legislative power to Congress. "Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional...."[6] The grant of authority to Congress is not unlimited, however. Acknowledging that "the

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[3] (...continued)
one's business interests qualifies as a property right protected by the Due Process Clause); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank,*527 U.S. 627 (1999)(Congress may abrogate state sovereign immunity but must do so through legislation that is appropriate within the meaning of section 5 of the Fourteenth Amendment; Congress must identify conduct that violates the Fourteenth Amendment and must tailor its legislation to remedying or preventing such conduct).

[4] 528 U.S. 62 (2000).

[5] 521 U.S. 507 (1997).

[6] *Id.* at 518.

line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies," the Court emphasized that there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[7] In applying this analysis to factual situations, the Court compared and contrasted RFRA and the Voting Rights Act. Congress had before it a record of state voting laws passed due to bigotry when it passed the Voting Rights Act; the Court found no such record of religious persecution occurring during the past forty years examined during the enactment of RFRA. But even if there had been a stronger legislative record, the Court found that RFRA could not be considered remedial. "RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[8] The Court observed that RFRA would require a state to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest, a test that "is the most demanding test known to constitutional law."[9]

The Supreme Court's decision in *Kimel* used the same reasoning advanced in its earlier Eleventh Amendment cases to conclude that the Age Discrimination in Employment Act (ADEA) contained a clear statement of congressional intent to abrogate the Eleventh Amendment but exceeded congressional authority under section 5 of the Fourteenth Amendment. The ADEA prohibits discrimination by an employer due to age and provides several exceptions, for example, where there is a "bona fide occupational qualification." In 1974 the ADEA was amended to extend its discrimination prohibition to the States.

Quoting extensively from *Boerne, supra,* the *Kimel* Court adhered to its conditions for abrogation limiting congressional power to (1) the enactment of "appropriate legislation," (2) remedial legislation, and (3) a "congruence and proportionality" between the injury to be prevented and the means adopted to that end. The ADEA requirements were not found to be "appropriate." The Court stated that "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted under the Equal Protection Clause."[10] Age classifications were not seen as "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."[11] In addition, the Court found, older persons have not been subjected to a "history of purposeful unequal treatment" and "old age does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it."[12] As a consequence, the ADEA was found to prohibit "substantially

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[7] *Id.* at 519-520.

[8] *Id.* at 532.

[9] *Id.* at 534.

[10] *Kimel, supra,* at 18.

[11] *Id.* at 19 citing *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 440 (1985).

[12] *Id.* at 19.

more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[13]

The ADA and Sovereign Immunity. The ADA cites to the Fourteenth Amendment as its constitutional basis,[14] specifically abrogates state immunity under the Eleventh Amendment[15] and thus would appear to meet the specificity required for such a statement of abrogation by *Kimel*. The issue, then, is whether the other elements of a successful abrogation, as described by the Supreme Court in the cases discussed above, are present. The Supreme Court granted certiorari in two cases involving this issue, *Alsbrook v. City of Maumelle*[16] and Florida Department of Corrections v. Dickson,[17] but the cases were settled prior to oral argument.[18] However, the issue resurfaced when the Court granted certiorari in *Garrett v. University of Alabama.*[19]

In *Garrett*, the Eleventh Circuit held that the state was not immune from suits brought by state employees. The court of appeals decision involved two consolidated lawsuits by separate Alabama employees. One of these employees, Patricia Garrett, had been undergoing treatment for breast cancer when, she alleged, she was transferred from her unit after being told that her boss did not like sick people. The second plaintiff, Milton Ash, alleged that the Alabama Department of Human Services did not enforce its non-smoking policy and that he was not able to control his asthma.[20] The district court held that the accommodation provisions of the ADA were not a valid exercise of Congress' enforcement power under the Fourteenth Amendment and thus Congress did not abrogate the Eleventh Amendment.[21] The Eleventh Circuit disagreed and held that states do not have Eleventh Amendment immunity from claims brought under the ADA. The majority did not provide a detailed analysis in this decision but rather referred to the Eleventh Circuit's decision in *Kimel* regarding the ADA and observed that "we, of course, are bound by the decision...." *Kimel*, as was discussed above, was decided by the Supreme Court but only regarding the ADEA claim; the Supreme Court did not address the ADA issue that had been before the Eleventh Circuit. The Supreme Court held oral argument in *Garrett* on October 11, 2000.

Garrett is one of the most closely watched cases in the 2000-2001 Supreme Court term and the likely outcome is not at all clear. The courts of appeals had been split in their determinations prior to the Supreme Court's decision in *Kimel* but court of appeals

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[13] *Id.* at 22.

[14] 42 U.S.C. §12101(b)(4).

[15] 42 U.S.C. §12202.

[16] 68 U.S.L.W. 3478 (January 21, 2000).

[17] 2000 U.S. LEXIS 996 (January 25, 2000).

[18] 2000 U.S. LEXIS 1545 (Feb. 23, 2000). See Linda Greenhouse, "Justices Rebuff Inmate's Bid on Early Supervised Release," *The New York Times* A-18 (March 2, 2000).

[19] 68 U.S.L.W. 3649 (April 18, 2000).

[20] 9 BNA's Americans with Disabilities Act Manual 46, 47 (April 27, 2000).

[21] 989 F. Supp. 1409 (N.D. Ala. 1998).

decisions since *Kimel* have found that the ADA does not properly abrogate the Eleventh Amendment.[22]

An examination of the statutory language and legislative history indicates that the ADA could meet the Court's abrogation requirements to be "appropriate" legislation, remedial, and have a "congruence and proportionality" between the injury to be prevented and the means adopted to that end. However, given the recent lack of success in abrogating the Eleventh Amendment, the Court's examples regarding race and sex, and the high standard for finding "congruence and proportionality," it is possible the Court would find that the ADA does not successfully abrogate the Eleventh Amendment.[23]

Appropriate Legislation to Enforce the Substantive Provisions of the Fourteenth Amendment. The ADA is a civil rights statute. It enforces constitutional standards to address the major areas of discrimination faced by individuals with disabilities and specifically invokes "the power to enforce the fourteenth amendment."[24] In *Cleburne v. Cleburne Living Center,*[25] the Supreme Court applied the Fourteenth Amendment to individuals with mental retardation and found that, although such individuals were not part of a suspect class, a zoning ordinance which excluded group homes from certain locations violated the Fourteenth Amendment. Expanding upon *Cleburne*, the ADA specifically finds that "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."[26] The statement of findings and purposes and the legislative history of the ADA draw parallels to the treatment of individuals with disabilities and racial minorities whose protection the Court has found to be within congressional authority.[27]

Remedial Legislation. The ADA would arguably meet the Supreme Court's requirement that the legislation be remedial in nature. Although there was some legislative history under the ADEA, it was determined by the Supreme Court in *Kimel* to be inadequate to fulfill the remedial requirement of successful abrogation. The record under the ADA is more extensive and includes statutory language, report language, and hearing testimony.

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[22] See *Lavia v. Commonwealth of Pennsylvania*, 224 F.3d 190 (3d Cir. 2000); *Erickson v. Northeastern Illinois University*, 207 F.3d 945 (7th Cir. 2000); *Popovich v. Cuyahoga County Court of Common Pleas,* 2000 U.S. App. LEXIS 23388 (September 18, 2000).

[23] It should be noted that although the Supreme Court has considered other cases under Title II of the ADA, the Eleventh Amendment issue was not addressed.

[24] 42 U.S.C. §12101(b)(4).

[25] 473 U.S. 432 (1985).

[26] 42 U.S.C. §12101(a)(7).

[27] See, 42 U.S.C. §12101; Testimony of Sandy Parrino, quoted in S.Rept. 101-116, 101st Cong., 1st Sess. (1989).

The ADA's statement of findings and purpose indicates that historically society has tended to isolate and segregate individuals with disabilities and notes that individuals with disabilities, unlike individuals who have experienced discrimination due to race, have often had no legal recourse to remedy such discrimination. The ADA states that its purpose is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities."[28] The instances of discrimination detailed in the hearings on the ADA and described in the House and Senate Reports also support the remedial nature of the legislation and specifically discuss the inadequacy of state laws.[29] For example, the House report states: "State laws are inadequate to address the pervasive problems of discrimination that people with disabilities are facing....Too many States, for whatever reason, still perpetuate confusion.....The fifty State Governor's Committees, with whom the President's Committee on Employment of People with Disabilities works, report that existing state laws do not adequately counter acts of discrimination against people with disabilities."[30]

"Congruence and Proportionality" Between the Injury to be Prevented and the Means Adopted. The Supreme Court also requires that when Congress uses its power to abrogate state immunity by legislating pursuant to section 5 of the Fourteenth Amendment there must be a "congruence and proportionality" between the injury to be prevented and the means adopted. The finding of the inadequacy of existing remedies in both the statute and its legislative history combined with the remedies enacted by the ADA suggest a proportionality sufficient to meet the Supreme Court's requirements.

It could be argued that the requirement of the ADA for reasonable accommodations places a burden on employers and others that is inappropriate; however, the ADA also contains limitations on this requirement. For example, for the purpose of employment, an employer need not make an accommodation if he or she can demonstrate that the accommodation would impose an undue hardship on the operation of the business.[31]

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[28] 42 U.S.C. §12101(b)(2).

[29] See S.Rept.101-116, 101st Cong., 1st Sess. (1989); H.Rept. 101-485, Part 2, 101st Cong., 2d Sess. (1990).

[30] H.Rept. 101-485, Part 2, 101st Cong., 2d Sess. 47 (1990), reprinted in 4 USCCAN 329 (1990). In addition to this report language, hearings on the ADA also contain testimony and studies which indicate discrimination against individuals with disabilities by states and localities. For example, testimony by Laura D. Cooper before the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee on the ADA gave several examples of discrimination she had experienced including inaccessible municipal buses and inaccessible voting places. "Americans with Disabilities Act of 1989," Hearings before the Subcommittee on Civil and Constitutional Rights, House Judiciary Committee (August 3, 1989), reprinted in 3 "Legislative History of Public Law 101-336 The Americans with Disabilities Act," Prepared for the House Committee on Education and Labor, 101st Cong., 2d Sess. (Dec. 1990), Serial No. 102-C at 1984. See also testimony regarding problems with police services, *Id.* at 1005, 1008, 1118, 1197; testimony regarding access to state courts, *Id.* at 1079; testimony regarding state hospitals, *Id.* at 1203;and testimony regarding state employment, *Id.* at 1225, 1247.

[31] 42 U.S.C. §12112(b)(5)(A).