

Chapter 4

Recent Supreme Court Decisions Affecting Congress' Ability to Redress Employment Discrimination¹

by Michael H. Gottesman²

*University of Alabama-Birmingham v. Garrett*³ is the latest in a series of decisions in which a five-person majority on the present Court has struck down, one after another, a number of congressional statutes attempting to protect citizens against wrongdoing by state officials. In the past six years, the Court, in most instances by a 5 to 4 vote, has declared nearly 30 federal statutes to be unconstitutional in whole or in part, a rate of roughly five per year. By contrast, in the entire 200-year history of the nation before that, the Court had struck down only 129 statutes, an average of one statute every two years.⁴

This article focuses on just two of the doctrines the Court has used to achieve these results — an expanded reading of the immunity accorded states by the 11th Amendment, and a contracted reading of the powers conferred on Congress by the 14th Amendment. It is these two doctrines that led the Court to invalidate the private damage suit provisions of the Age Discrimination in Employment Act and the Americans with Disabilities Act (ADA), as well as of other statutes. These decisions are not manifestations of traditional divides between liberals and conservatives, or Democrats and Republicans. Rather, these decisions — which represent a degree of judicial activism that is unprecedented, and abandon traditional understandings of the meaning of our Constitution articulated in

prior Supreme Court decisions — position the Court's present majority outside the mainstream of contemporary American thought about the relationship between federal and state governments.

This is a harsh assessment. But just two recent examples show that it is accurate. In the *Garrett* case, the Court struck down a provision of the ADA that was approved in the Senate by a vote of 91 to 6, and in the House by a vote of 377 to 28. This provision was signed into law by President George H. W. Bush, who declared it one of the landmark civil rights laws in our country's history, one that would bring us "closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty and the pursuit of happiness."

Title I of the ADA imposed duties upon states (as well as on all other employers in America) to stop discriminating against persons with disabilities, and authorized private-party lawsuits as a means to enforce those duties. Although this legislation subjected States to damages actions by employees claiming disability discrimination, the states did not oppose any part of the ADA. Quite the contrary, the bill that became the ADA was vigorously supported by the National Association of Attorneys General and other national organizations of state officials.

The *Garrett* case came to the Court a decade after the ADA's passage, but nothing

had happened in the interim to diminish the broad enthusiasm for the statute, including for its provisions regulating the states and authorizing private suits to enforce and for damages. Former President Bush filed an amicus brief in the Supreme Court urging the Court to uphold the challenged provision of the ADA.⁵ Similarly, those in both parties who had championed the ADA at the time of its enactment filed an amicus brief urging that the Court uphold the provision.⁶

Nor had there been any broad defection by states in the decade since the ADA's passage. Although states were now finding themselves defendants in numerous private suits seeking damages for violating the ADA, and although Alabama urged all the states to join in an amicus brief supporting its effort to invalidate the ADA's authorization of private-party suits, only seven states answered Alabama's call. Remarkably, twice as many states responded by filing an amicus brief urging the Court to *uphold* the provision that subjected them to these suits. This brief advised the Court that the problems of disability discrimination by individual state actors remained real, that state laws were inadequate to solve the problem, and that states were willing to suffer these damage suits in order to assure that the public interest in ending discrimination against persons with disabilities is vindicated.

Other recent decisions in which the Court's five person majority has struck down federal legislation have similarly lacked any significant constituency within our nation. For example, in *Morrison v. United States*, the Court struck down an important provision of the Violence Against Women Act, which had been enacted by Congress with the votes of huge majorities in both parties. That triumph for "state's rights" was achieved although 37 states had joined in an amicus brief urging the Court to *uphold* the provision, and only one state had filed a brief urging the result the Court reached. A

similar story can be told about other congressional statutes that have been declared unconstitutional as applied to the states, among them the Age Discrimination in Employment Act, the Religious Freedom Restoration Act, and the Patent Remedy Act.

The five-person majority on the Court has achieved these results by ignoring well-established Supreme Court precedents; by ignoring (as it admits) the plain language of the Constitution in favor of a vision of the states as "equal sovereigns" (a vision that ignores the Constitution's Supremacy Clause); and by discarding the tradition of deference to the fact-finding and policy judgments of Congress, a deference that previously had been a hallmark of the Court's approach to assessing the constitutionality of federal statutes.

This article will briefly describe the two 180-degree turns in the Court's jurisprudence that led to the invalidation of the ADA's private-suit provision in *Garrett*.

I. The 11th Amendment

The 11th Amendment provides that: "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*" (emphasis added).⁷ As is evident from its wording, the 11th Amendment does not purport to deprive the federal courts of jurisdiction to entertain suits against states *brought by their own citizens*. This is not an accident. It reflects the limited purpose the 11th Amendment was adopted to serve.

The 11th Amendment was added to the Constitution to overturn one of the Supreme Court's earliest decisions, *Chisholm v. Georgia* (1793).⁸ *Chisholm* held that the "diversity of citizenship" clause in Article

III of the Constitution conferred jurisdiction on federal courts to adjudicate claims brought by non-citizens alleging that a state had violated *state law*. Justice Iredell, who dissented in *Chisholm*, argued that this was error — that the diversity of citizenship clause should not be construed to deprive states of their traditional immunity when sued *under state law*. But even Justice Iredell conceded that the federal courts had jurisdiction over suits against states seeking to enforce *federal law*; that followed logically from the fact that the Constitution contained a Supremacy Clause declaring federal law to be supreme and binding on the states.

The 11th Amendment was designed to incorporate into the Constitution the vision expressed in *Chisholm* by Justice Iredell. That is why it is worded as it is. True to the literal language and the clear purpose of the 11th Amendment, the Supreme Court had held, prior to enactment of the ADA, that the 11th Amendment is no bar to Congress' creating private causes of action against states to enforce the obligations imposed upon states *by federal statutes*.⁹ But six years after enactment of the ADA, the new five-person majority on the Court overruled *Union Gas*, in *Seminole Tribe v. Florida* (1996),¹⁰ and held that, except for statutes enacted by Congress in the exercise of its power to enforce the 14th Amendment, the 11th Amendment denied Congress any power to create private causes of action against states.

The *Seminole Tribe* majority conceded that its ruling was contrary to the language of the 11th Amendment. As it acknowledged, "the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts."¹¹ Nonetheless, the Court ruled that the Amendment also restricted the *federal question* jurisdiction of the federal courts, because "[i]t is inherent in the nature of [state] sovereignty not to be amenable to the

suit of an individual without [the state's] consent."¹² The Court made no effort to square this reasoning with the Constitution's Supremacy Clause, which clearly declares that states are not "sovereign" when Congress has enacted a federal law.

Just how far from the mainstream the Court's *Seminole Tribe* decision wanders can be discerned from the reaction of Justice John Paul Stevens — who was appointed to the Court by President Gerald Ford, and who is not by nature given to hyperbolic diatribes. Traditionally, Justices who dissent from a decision (as Justice Stevens had in *Seminole Tribe*), nonetheless will accept it as controlling precedent, and apply it in future cases despite their misgivings. When the challenge to the Age Discrimination in Employment Act was before the Court in *Kimel*, Justice Stevens explained why he could not follow that traditional course:

I remain convinced that Union Gas was correctly decided and that the decision of five Justices in Seminole Tribe to overrule that case was profoundly misguided. Despite my respect for stare decisis, I am unwilling to accept Seminole Tribe as controlling precedent . . . [B]y its own repeated overruling of earlier precedent, the majority has itself discounted the importance of stare decisis in this area of the law. The kind of judicial activism manifested in cases like Seminole Tribe . . . represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.

Justice Stevens' assessment is shared by the virtually unanimous scholarly literature tracing the history of the 11th Amendment and its limited purpose.

II. The 14th Amendment

As noted above, the *Seminole Tribe* majority allowed an exception for statutes enacted by Congress pursuant to its power to enforce the 14th Amendment. Congress could create private causes of action to enforce the 14th Amendment because the 14th Amendment was enacted long after the 11th, and expressly empowered Congress to enact statutes enforcing it.

But in recent decisions that same five-person majority has dramatically narrowed the understanding of what Congress' 14th Amendment power encompasses. It has achieved that narrowing by two devices working in tandem.

A. Decreased Protection Against Discrimination

First, the five-person majority has reconstrued the 14th Amendment substantively, so that it affords less protection against discrimination than previous Court decisions had provided. This narrowing process reached its climax (so far, at least) in *Garrett*, where the Court declared that actions taken by states that intentionally discriminate against persons with disabilities, and that are motivated solely by prejudice and aversion toward such persons, are not violations of the Equal Protection Clause, so long as some "rational" basis for taking that action can be imagined, and even though it is clear that the action was not motivated by that "rational" consideration but instead by irrational animus. The Court declared in *Garrett* that a classification disqualifying persons with disabilities is constitutional unless the challenging party can carry the burden of "negative[ing] any reasonably *conceivable* state of facts that *could* provide a rational basis for the classification."¹³ That an action was taken

solely out of animus toward persons with disabilities "does not a constitutional violation make." As the four dissenters explained, prior Supreme Court decisions (including a decision finding a denial of equal protection against persons with disabilities) had held that the Equal Protection Clause invalidates "discrimination that rests solely upon 'negative attitude[s],' 'fea[r],' . . . or 'irrational prejudice,'" [citing prior cases].

B. Congressional Authority

Second, the five-person majority has abandoned entirely the deference to congressional fact-finding, and to the congressional determination of what steps are necessary to vindicate 14th Amendment rights, and has imposed its own judgments about these matters in substitution for those of our elected representatives. This has been clear in several recent decisions, but nowhere more dramatically than in *Garrett*, where the Court dismissed out of hand Congress' express findings of rampant discrimination against persons with disabilities, and mocked the massive evidentiary record Congress had compiled in arriving at those findings. As the dissenters noted, the majority had "review[ed] the congressional record as if it were an administrative agency record." This is in stark contrast to the Court's traditional approach.

III. Conclusion

The two doctrinal issues described in this article are only a part of a larger arsenal with which the Court's present majority is eviscerating, in the name of "states' rights," Congress' ability to legislate. These five Justices have also narrowed the traditional understanding of Congress' powers under the Commerce Clause, and have invented an

entirely new doctrine that prevents Congress from imposing any affirmative obligations on states. On these issues, as on the ones I have discussed, the agenda of the Court's majority lacks any significant constituency in our nation. Neither party in Congress holds the views (or seeks the ends) espoused in these decisions. And the states have shown no interest in enjoying the new-found "rights" that the Court's majority is so eager to bestow upon them.

The Court's recent decisions in these cases imperil numerous other federal statutes enacted with bipartisan majorities, many of

them aimed at preventing employment discrimination. For example, the logic of the five-person majority, and the rigor with which it has shown itself willing to enforce that logic, place in jeopardy the disparate impact provisions of Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, Title II of the ADA, the Fair Housing Act, and many other civil rights statutes. Cases are pending on certiorari today that may provide the Court the opportunity to apply its new jurisprudence to many of these statutes.

Endnotes

¹ This article is adapted from the statement of Michael H. Gottesman before the Senate Committee on Health, Education, Labor and Pensions, concerning recent Supreme Court decisions affecting Congress' ability to redress employment discrimination, on Apr. 4, 2001.

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³ *University of Alabama-Birmingham v. Garrett*, 531 U.S.C. § ____ (Feb. 21, 2001) ("*Garrett*").

⁴ The data appears in Seth Waxman, "Defending Congress," 79 *North Carolina Law Review* 101 (2001).

⁵ To my knowledge, this is the first time in our nation's history that an ex-President felt so strongly about a bill he had signed as to file a brief in the Supreme Court defending it.

⁶ This brief was filed by, among others, Senators Dole, Hatch, Jeffords, Kennedy and Harkin.

⁷ U.S. Constitution amendment XI.

⁸ 2 U.S.C. § 419 (1793).

⁹ *Pennsylvania v. Union Gas Co.*, 491 U.S.C. § 1 (1989).

¹⁰ 517 U.S.C. § 44 (1996).

¹¹ *Id.* at 54.

¹² *Id.*

¹³ *Garrett*.