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Constitutional Law: The Eleventh Amendment, the Fourteenth Amendment and Rational Basis Review, Board of Trustees v. Garrett, 121 S. Ct. 955 (2001)

Scott Givens

CASE COMMENT

CONSTITUTIONAL LAW: THE ELEVENTH AMENDMENT, THE FOURTEENTH AMENDMENT AND RATIONAL BASIS REVIEW

Board of Trustees v. Garrett, 121 S. Ct. 955 (2001)

Scott Givens[*]

I. INTRODUCTION

Appellees, two Alabama state employees, suffered from serious physical illnesses, which caused them to need special work accommodations.[1] Appellees sued the state of Alabama in federal court seeking monetary damages under the Americans with Disabilities Act (ADA), which provides in pertinent part that employers, including state governments and agencies,[2] shall not discriminate against otherwise qualified individuals who are disabled.[3] The ADA also provides that an employer must make "reasonable

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1. Bd. of Trustees v. Garrett, 121 S. Ct. 955, 961 (2001). Appellee, Patricia Garrett, was diagnosed with breast cancer and underwent treatment which required her to miss a lot of time from work. *Id.* Appellee, Milton Ash, suffered from asthma which was aggravated by exposure to carbon monoxide and cigarette smoke. He was also diagnosed with sleep apnea. *Id.*

2. *Id.* at 960.

3. 43 U.S.C. § 12112(a) (2001) ("No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

accommodations" for employees who suffer from a disability.[4] Appellees claimed that the actions that Alabama took upon learning of their disabilities violated the ADA.[5] The U.S. District Court for the Northern District of Alabama found that the ADA did not properly abrogate the state's Eleventh Amendment immunity from suit in federal court and granted appellant's motion for summary judgment.[6] Appellees appealed to the Eleventh Circuit Court of Appeals, which reversed the district court and found that Congress had acted within its enforcement powers under the Fourteenth Amendment when it provided that states could be sued under the ADA.[7] The U.S. Supreme Court granted certiorari on the question of whether the abrogation of state immunity in the ADA was a valid exercise of Congressional power.[8] The Court reversed and remanded the case to the Eleventh Circuit[9] and HELD, that Congress had not acted within its Fourteenth Amendment powers when it allowed states to be sued in federal court for money damages under the ADA.[10]

II. THE ELEVENTH AMENDMENT PROVIDES IMMUNITY

The Eleventh Amendment to the U.S. Constitution expressly provides a state with immunity from law suits in federal court when the suit is filed by a citizen of another state.[11] The U.S. Supreme Court extended that protection to include immunity from suits against a state filed by a citizen

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4. *Id.* § 12112(b)(5)(A) ("[T]he term 'discriminate' includes . . . not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.").

5. *Bd. of Trustees*, 121 S. Ct. at 960-61. In *Board of Trustees*, Garrett was informed that because she was missing work time, due to her cancer treatment, she would have to give up the Director of Nursing position that she held. *Id.* at 961. Ash requested certain changes to his shift and working environment to accommodate his illnesses. The requests were denied by his state employer. *Id.*

6. *Id.*; *see* Garrett v. Bd. of Trustees, 989 F. Supp. 1409, 1410, 1412 (N.D. Ala. 1998).

7. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"); Garrett v. Bd. of Trustees, 193 F.3d 1214, 1218 (11th Cir. 1999).

8. Bd. of Trustees v. Garrett, 529 U.S. 1065, 1065 (2000).

9. *Bd. of Trustees*, 121 S. Ct. at 968.

10. *Id.*

11. U.S. CONST. amend. XI ("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.").

of that state.[12] While Congress can abrogate the Eleventh Amendment immunity enjoyed by the states, it must act according to a constitutional grant of power, as the Court ruled in *Seminole Tribe of Florida v. Florida*.[13]

In *Seminole Tribe*, the appellants sued the state of Florida in federal court under the Indian Gaming Regulatory Act, alleging that the state had failed to enter into negotiations with the tribe over gaming activities that it wished to conduct on its reservation.[14] Among the provisions of the Act was a requirement that the states enter into good faith negotiations governing gaming activities.[15] This right to fair negotiations was enforceable in U.S. district courts.[16] Thus, Congress had abrogated the states' Eleventh Amendment immunity for suits brought under the Act.

The U.S. Supreme Court, focusing on whether Congress could abrogate the states' immunity under the Act, found that there were only two sources from which Congress could derive such power.[17] In the past, one of the sources was Congress's Article I Commerce Clause power.[18] However, the Court in *Seminole Tribe* decided to overrule precedent allowing abrogation under the Commerce Clause, and found that Article I could not be a source for such Congressional action.[19] Therefore, the federal courts did not have proper jurisdiction over the action involved in this matter.[20] However, the

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12. *See* Hans v. Louisiana, 134 U.S. 1, 15 (1890). The U.S. Supreme Court turned to history and the intent of the original framers of the U.S. Constitution to extend the protection granted by the Eleventh Amendment to the states to suits brought by citizens against the state in which they reside.

13. 517 U.S. 44, 72-73 (1996).

14. *Id.* at 52.

15. *Id.* at 49 (citing 25 U.S.C. § 2710(d)(3) which provides in pertinent part,

> Any Indian tribe having jurisdiction over the Indian lands upon which . . . gaming activity is being conducted . . . shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a . . . compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith . . .).

16. *Id.* (citing 25 U.S.C. § 2710(d)(7)(A)(i) providing that "The United States district courts shall have jurisdiction over any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations . . .").

17. *Id.* at 59.

18. *Seminole Tribe,* 517 U.S. at 59 (citing Penn. v. Union Gas Co., 491 U.S. 1 (1989)).

19. *Id.* at 72.

20. *Id.* at 73.

Court upheld precedent establishing Section Five of the Fourteenth Amendment as an additional source for Eleventh Amendment abrogation.[21]

The U.S. Supreme Court addressed the second source of abrogation of state immunity from suit in federal court in *Kimel v. Florida Board of Regents*.[22] In *Kimel*, the appellants filed suit against their state employers under the Age Discrimination in Employment Act (ADEA).[23]

While the U.S. Supreme Court interpreted the statute to mean that Congress had expressly intended to abrogate the Eleventh Amendment,[24] the Court ruled that this abrogation was not within the powers granted to Congress by the Enforcement Clause of the Fourteenth Amendment.[25] Based on precedent, the Court ruled, that age was not a suspect classification. Thus, any state action taken according to such a classification must only satisfy rational basis review.[26] The Court found that Congress failed to identify a pattern of age discrimination that was not rationally related to a legitimate state interest in the ADEA.[27] As a result, the Court ruled that Congress overstepped its Fourteenth Amendment powers by abrogating immunity under this statute.[28]

III. A RATIONAL BASIS TEST

In *Cleburne v. Cleburne Living Center,*[29] the U.S. Supreme Court found that classifications based on mental disability like the age classification in *Kimel,* need only pass a rational basis test. In *Cleburne*, the appellee requested a special use permit[30] for a parcel of land to be used as a group

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21. *Id.* at 65-66.

22. 528 U.S. 62 (2000).

23. *Id.* at 66-67 (citing 29 U.S.C. § 623(a)(1) which provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual . . . with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age"); *id.* at 70-71 (The appellants in this case, a group of librarians, all over the age of forty, who worked for the state university system argued that the state of Florida's failure to provide previously agreed upon salary adjustments had a disparate impact on older employees and thus violated the ADEA.).

24. *Id.* at 73-74.

25. *Id.* at 82-83.

26. *Id.* at 83.

27. *Kimel*, 528 U.S. at 89.

28. *Id.* at 91.

29. 473 U.S. 432, 446 (1985).

30. The land on which the group home was to be located was zoned in such a way that, among other uses, it could be used for apartments, boarding houses, fraternity or sorority houses, or hospitals. *Id.* at 436 n.3.

home for mentally handicapped adults.[31] The permit was denied by the city.[32] The appellee challenged the city's decision, arguing that it discriminated against mentally handicapped people in violation of the Equal Protection Clause of the Fourteenth Amendment.[33]

In ruling that the city's denial of the permit was unconstitutional, the U.S. Supreme Court held that state action which made classifications based on mental disability only needs to satisfy rational basis review.[34] According to the Court, the mentally handicapped are not a suspect, or even quasi-suspect, class and thus any classification based on this characteristic only needs to be rationally related to a legitimate state interest.[35] The Court also expressed concern that, should it find the mentally disabled to be a suspect class, determining who belongs within the class would be difficult because of the varying degrees of mental disability.[36]

In the instant case, the U.S. Supreme Court followed the precedent set forth in *Cleburne,* holding that the physically disabled are not a suspect class, and therefore laws which classify on this basis only need to satisfy the rational basis standard.[37] The Court found that the failure of states to make special accommodations for the disabled did not violate the Fourteenth Amendment as long as the refusal to accommodate is rationally related to a legitimate governmental interest.[38]

The Court, having determined that the disabled are not a suspect class, turned as it did in *Kimel,* to the question of whether Congress had identified an irrational pattern of state action directed at the disabled.[39] Despite the fact that the legislative record included several apparently discriminatory

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31. *Id.* at 437.

32. *Id.*

33. *Id.*

34. *Cleburne*, 473 U.S. at 446-48.

35. *Id.* at 446. The U.S. Supreme Court argued that the legislative response, both at the national and state level proved that the problems of the mentally handicapped are being addressed by legislatures and that there is no need for the judiciary to apply heightened scrutiny to state action affecting this group. *Id.* at 443.

36. *Id.* at 442-43. The U.S. Supreme Court stated "[A]s the testimony in this record indicates, they range from, those whose disability is not immediately evident to those who must be constantly cared for . . . How this large and diversified group is to be treated under the law is a difficult and often a technical matter . . . ." *Id.*

37. Bd. of Trustees v. Garrett, 121 S. Ct. 955, 964 (2001).

38. *Id.*

39. *Id.* The U.S. Supreme Court stated "Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled . . . [C]ongress' § 5 authority is appropriately exercised only in response to state transgressions." *Id.*

examples of state action taken against the disabled,[40] the Court ruled that the examples were, at best, minimal evidence of possible discrimination,[41] and that Congress had not shown a pattern of unconstitutional abuse by the states.[42] Thus, abrogation under the ADA was not an appropriate action for Congress.[43]

IV. ABROGATION IS NOT APPROPRIATE UNDER ADA

The holding in the instant case that abrogation was not appropriate under the ADA continued the trend of construing the powers of Congress as abrogating the Eleventh Amendment in a narrow fashion.[44] The U.S. Supreme Court raised the bar that Congress must cross when it abrogates Eleventh Amendment immunity in accordance with the legislative branch's Fourteenth Amendment enforcement powers.[45] When combined with the Court's ruling in *Seminole Tribe* that the Commerce Clause was not a source for Congressional abrogation, this higher standard made it much more difficult for private citizens to enforce rights granted to them by federal law.[46]

Garrett can be criticized for several reasons, including its dismissal of evidence in the legislative record that indicated a pattern of employment discrimination against the disabled by the states, which could have justified abrogation pursuant to Congress's Commerce Clause power.[47] The

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40. *Id.* at 965. The U.S. Supreme Court cited several examples of discrimination that were included in the ADA's legislative record including an administrator at the University of North Carolina who refused to hire a person because he was blind, a student in South Dakota being denied the opportunity to practice teaching because of blindness, and a state worker who was fired in Kansas because he suffered from epilepsy. *Id.*

41. *Id.*

42. *Bd. of Trustees*, 121 S. Ct. at 965-66 (citing 42 U.S.C. § 12101(a)(1), the U.S. Supreme Court relied on data that Congress used in enacting the ADA that found there were 43 million people who suffered from some sort of mental or physical disability and the states employed 4.5 million people. The Court found that when compared with these numbers the evidence Congress had assembled as to instances of discrimination was minimal.).

43. *Id.* at 968.

44. *See generally, e.g., Note: The Irrational Application of Rational Basis: Kimel, Garrett, and Congressional Power to Abrogate State Sovereign Immunity*, 114 HARV. L. REV. 2146 (2001) (providing an overview of the U.S. Supreme Court's narrowing of the abrogation of the Eleventh Amendment through the application of rational basis review).

45. *Id.* at 2147.

46. *Id.* at 2169.

47. *Bd. of Trustees*, 121 S. Ct. at 969-70 (Breyer, J., dissenting) In responding to the majorities' finding of only minimal evidence of state discrimination against the disabled, the dissent states "Congress compiled a vast legislative record documenting 'massive society-wide

majority cited several of these instances, but dismissed them as only "minimal evidence of unconstitutional state discrimination in employment against the disabled."[48] However, the record contained over three hundred instances of discrimination by states alone, along with numerous instances of discrimination by society at large.[49] Such large numbers would seem to indicate that, despite the majority's holding, there was a pattern of unconstitutional discrimination against disabled individuals by the states, which justifies Congressional abrogation of state immunity.[50]

However, regardless of the number of examples of discrimination contained in the record, the majority also suggested that it could not tell whether the instances were irrationally based and thus unconstitutional.[51] The U.S. Supreme Court explained that the incidents were not fully described, making it impossible for the rational basis test to be applied.[52] The Court appeared to be demanding the sort of evidentiary standards required in a court of law.[53] Precedent had not required Congress to meet such a standard.[54] The instant decision made the situations under which Congress can abrogate the Eleventh Amendment narrower because it appeared that the Court required Congress to gather more evidence in order to find a pattern of discrimination sufficient to trigger the Fourteenth Amendment.[55]

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discrimination,' against persons with disabilities." *Id.* (dissent quoting testimony of Justin Dart, Chairperson, Rights and Empowerment of Americans with Disabilities Task Force).The dissent documented that Congress held 13 hearings to discuss the matter and created a special task force that was attended by "more than 30,000 people, including thousands who had experienced discrimination first hand." *Id.*

48. *Id.* at 965-66.

49. *Id.* at 970 (Breyer, J., dissenting).

50. *Id.* (Breyer, J., dissenting) (Justice Breyer stated that "the powerful evidence of discriminatory treatment throughout society in general, including discrimination by private persons and local governments, implicates state governments as well, for state agencies form part of that same larger society.").

51. *Id.* at 965.

52. *Bd. of Trustees*, 121 S. Ct. at 965. The U.S. Supreme Court states "several of these incidents undoubtedly evidence an unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA. Whether they were irrational under our decision in *Cleburne* is more debatable, particularly when the incident is described out of context." *Id.*

53. *Id.* at 972 (Breyer, J., dissenting).

54. *Id.* at 971 (Breyer, J., dissenting) (citing Katzenbach v. Morgan, 384 U.S. 641, 652-56 (1966)).

55. *Id.* (Breyer, J., dissenting).

V. CONCLUSION: THE EXCLUSIVE POWER OF CONGRESS

The U.S. Supreme Court can be criticized because the rules that restrain the judiciary from drawing conclusions without sufficient evidence do not apply to legislative determinations.[56] While some may question the ability of Congress to properly carry out fact—finding functions,[57] there is no reason to require the legislature to adhere to the strict standards of the judiciary.[58] As evidenced by the legislative record in the instant case, Congress has the ability to gather facts from across the nation and from the broad group of constituents which elect its members.[59] Thus, Congress's mission is much different from that of a court and it should not be limited by constraints that regulate a branch of government that does not have such powers.[60]

In addition, under Section Five of the Fourteenth Amendment, Congress is given exclusive power to enforce that Amendment.[61] To scrutinize a decision of Congress as closely as the U.S. Supreme Court did in the instant case, and to require it to follow judicial rules, takes that power away from the legislative branch.[62] When the Court allowed this to take place, a violation of the doctrine of separation of powers occurred because the U.S.

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56. *Id.* at 972-73 (citing Oregon v. Mitchell, 400 U.S. 112 (1970) (Brennan, White, Marshall, J.J., concurring in part and dissenting in part) and FCC v. Beach Communications, Inc., 508 U.S. 307 (1993)). The dissent in *Beach Communications* argued that the restraints required of judges should not be applied to Congress, particularly in this case because "rational basis review — with its presumptions favoring constitutionality — is 'a paradigm of judicial restraint.'" *Id.*

57. Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1182-84 (2001) (stating in general that there is an argument that Congress will not take fact-finding seriously and that the quality of the legislative record may be compromised by a number of variables. Thus, courts may in fact do a better job of fact-finding.).

58. *Bd. of Trustees*, 121 S. Ct. at 971 (Breyer, J., dissenting) ("[C]ongress, unlike courts, must, and does, routinely draw general conclusions . . . from anecdotal and opinion-based evidence . . . particularly when the evidence lacks strong refutation.").

59. *Id.* at 973 (Breyer, J., dissenting).

60. *Id.* Justice Breyer stated "To apply a rule designed to restrict courts as if it restricted Congress' legislative power is to stand the underlying principle — a principle of judicial restraint — on its head." *Id.*

61. *Id.* at 975-76 (Breyer, J., dissenting).

62. *Id.* at 976 (Breyer, J., dissenting). In discussing the majority decisions, Justice Breyer states, "Its decision saps § 5 of independent force, effectively 'confining the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch [is] prepared to adjudge unconstitutional.'" *Id.* (citing Katzenbach v. Morgan, 384 U.S. 641, 648-49 (1966)).

Constitution has expressly granted the power to enforce the Fourteenth Amendment to the legislature, not to the judiciary.[63] Thus, the Court should grant a great deal of judicial deference to decisions made by that body.[64]

Because the U.S. Supreme Court in the instant case required Congress to meet a higher standard of fact—finding with regards to legislation involving classes of people not deemed to be suspect, the already narrow power of Congress to abrogate the Eleventh Amendment under Section Five powers was further limited. While individuals may still sue a state for an injunction, in some cases that remedy may be insufficient if the harm has already occurred. In those instances, individuals who have had a right granted to them by the federal government, but taken from them by the state, no longer have a remedy unless the Court finds Congress's fact—finding to be sufficient. The Court's decision in *Garrett* should be seen as a violation of separation of powers that hinders Congressional power to enforce the provisions of the Fourteenth Amendment.

63. *Bd. of Trustees*, 121 S. Ct. at 975-76 (Breyer, J., dissenting). Justice Breyer states, "The Court through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies, improperly invades a power that the Constitution assigns to Congress." *Id.* (citing *Morgan*, 384 U.S. at 648 n.7).

64. *Id.* at 973 (Breyer, J., dissenting).