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Board of Trustees of the Univeristy of Alabama v. Garrett and the Equal Education Opportunity Act: Another Act Bites the Dust

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BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT AND THE EQUAL EDUCATION OPPORTUNITY ACT: ANOTHER ACT BITES THE DUST

I. INTRODUCTION

The Supreme Court's recent decision in *Board of Trustees of the University of Alabama v. Garrett* not only expanded state immunity under the Eleventh Amendment but it also created new implications for Congressional acts based on Fourteenth Amendment rights. In its 5-4 holding in *Garrett*, the Court specifically overturned Congress's abrogation of state immunity within the American with Disabilities Act, stating several insufficiencies in Congress's reasoning. [1] This decision could affect many private rights of action against states, not only under the ADA, but also under other congressional acts based on section five of the Fourteenth Amendment.[2]

This case note will focus on the Supreme Court's analysis in *Garrett* and discuss this decision's implications for the Equal Education Opportunity Act. More specifically, section two will discuss the Equal Education Opportunity Act (EEOA). Section three will outline the legislative and judicial history of the Eleventh Amendment, including recent Supreme Court decisions leading up to *Garrett*. Section four will discuss the Supreme Courts analysis of *Garrett*. Section five will apply the *Garrett* analysis to the EEOA. Section six will be the conclusion.

II. THE EQUAL EDUCATION OPPORTUNITY ACT

The Equal Education Opportunity Act is based on legal principles found in the Bilingual Education Act of 1964 and the

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1. *Bd. of Trustees of the U. of Ala. v. Garrett*, 531 U.S. 356 (2001).

2. U.S. Const. amend. XIV, §5 (Section five is the Enforcement Clause; it reads, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."), *see* Erwin Chemerinsky, *Forecasting the Future of Federalism*, 37 Trial 18, 22 (2001).

Supreme Court's decision in *Lau v. Nichols*. Congress passed the Bilingual Education Act[3] in order to provide federal funds to develop bilingual education programs. The act did not mandate that schools adopt bilingual education programs. The act also provided extensive discretion as to how local authorities ran these programs.[4] In *Lau v. Nichols*, the Supreme Court held that the San Francisco school system's failure to provide special language education to non-English speaking Chinese students violated Title VI of the Civil Rights Act of 1964.[5] Title VI thus requires that school districts provide special language education to non-English speaking students who would otherwise be excluded from public education because of their inability to speak English.[6]

Responding to the *Lau* decision, Congress passed the EEOA in 1974. The EEOA provides that "no state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[7] By requiring schools to take "appropriate action to overcome language barriers,"[8] the EEOA does little more than codify the *Lau* decision.[9]

A fundamental problem with the EEOA is that neither the *Lau* decision nor the EEOA prescribe any particular education program for schools to use. School districts still possess wide discretion to create and operate bilingual education programs. The various results of this wide discretion are the primary source of litigation under the EEOA. Additional cases, primarily *Castaneda v. Pickard*, provide state and local education authorities wide latitude to decide actions they will take to

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3. 20 U.S.C. §§ 3221-61 (1988) (Now found in 20 U.S.C. §7401 (1994).).

4. *See* Nirej Sekhon, *Birthright Rearticulated: The Politics of Bilingual Education*, 74 N.Y.U. L. Rev. 1407 (1999).

5. *Lau v. Nichols*, 414 U.S. 563 (1974); *see also* Scott Ellis Ferrin, *Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language-Based Referenda*, 28 J.L. & Educ. 1, 9 (1999).

6. *See* Luis Rodriguez, *Discretion and Destruction*, 4 Tex. Forum on Civ. Liberties & Civ. Rights 189, 207 (1999).

7. 20 U.S.C. § 1703 (1974); Ronald D. Wenkart, *The Battle Over Bilingual Education in California*, 123 Ed. L. Rep. 459, 462 (1998).

8. 20 U.S.C. § 1703.

9. Rodriguez, *supra* n. 6, at 200.

overcome language barriers.[10]

In *Castaneda*, rather than requiring that local officials take specific action to address the needs of students who were English deficient, the U.S. Court of Appeals instead held that the EEOA required only appropriate action. In other words, local education officials are not required to offer any specific bilingual education program.[11] The court established a three-prong test for determining the appropriateness of the language remediation:

> First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based. . . . The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. . . . Finally, . . . [i]f a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned.[12]

The EEOA, initially thought ineffective, is now the law of choice for bilingual education litigation. Bilingual education litigation recently garnered national attention when California passed Proposition 227.[13] Proposition 227 is a perfect example of a state using the broad latitude granted to it by the EEOA to create a program to deal with English-deficient students. California mandated intensive English instruction for Limited English Proficient (LEP) students. Proposition 227 also prohibited any program designed to sustain a teaching program in a language other than English.[14] The controversial issue of Proposition 227 was whether requiring LEP students to learn English rather than allowing students to learn in their native language

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10. *Castaneda ex rel. Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981); *see also Keyes v. Sch. Dist. No. 1*, 576 F. Supp. 1503 (D. Colo. 1983); *see generally*, Ferrin, supra n. 5, at 11-12.

11. Wenkart, *supra* n. 7 at 463.

12. *Castaneda*, 648 F.2d at 1009-1010.

13. Rodriguez, *supra* n. 6 at 207; Wenkart, *supra* n. 7 at 465, 468.

14. Ferrin, *supra* n. 5, at 7.

was in accordance with the EEOA. The EEOA ". . . looks only at whether a program has the effect of excluding NEP [Non-English Speakers] and LEP students from the educational program and does not require proof of discriminatory intent."[15]

The EEOA's appropriate action requirement is likely broad enough to include English as a second language (ESL) programs or structured immersion programs much like the programs being established in California.[16] Given that proponents of legislation such as Proposition 227 are now focusing on federal legislation, the issue of bilingual education will likely be the source of continued litigation. As a result, the EEOA will be at the forefront of the legal battles.[17]

Congress specifically created a private right of action under the EEOA. Section §1706 of the EEOA provides that "an individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate."[18] Yet, the language of the EEOA is void of any specific abrogation of state immunity under the Eleventh Amendment. One possible reason that the EEOA lacks a specific abrogation clause is that school districts are not necessarily protected by sovereign immunity. Rather, sovereign immunity is only granted to states and does not protect municipal corporations, counties, and school boards.[19] However, when a bilingual education proposal becomes a statewide law, like California's Proposition 227, state sovereign immunity will likely be a factor in any litigation under that law.[20]

The EEOA is a prime candidate to be scrutinized under the

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15. Rachel F. Moran, *Bilingual Education as a Status Conflict*, 75 Cal. L. Rev. 321, 331 (1987).

16. *Id.*

17. Ferrin, *supra* n. 5, at 7.

18. 20 U.S.C. § 1706 (West 1999).

19. *See* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* vol. 1, §12.2, 156 (3d ed., West 1999).

20. *See* Ferrin, *supra* n. 5, at 11; John W. Borkowski, Alexander E. Dreier & Maya R. Kobersy, *The 2000-2001 Term of the United States Supreme Court and Its Impact on Public Schools*, 156 Educ. L. Rep 381, 394. In other words, if school districts or school boards create their own language programs independently, then they will not be protected by the Eleventh Amendment. If, however, a state law dictates how all schools are to handle bilingual language programs, it stands to reason that suits brought against the state based on this state law could call upon their Eleventh Amendment Immunity. Moreover, state law may recognize districts as arms of the state government. As a result, a district would enjoy state sovereign immunity.

Garrett analysis because the EEOA not only creates a private right of action for citizens but also implies that the action can only be against a state.

III. THE ELEVENTH AMENDMENT

A. The Eleventh Amendment's Historical Background

Congress and the states adopted the Eleventh Amendment in response to the 1793 Supreme Court decision in *Chislom v. Georgia*.[21] *Chislom* was a suit brought by two South Carolinians working for a British creditor. The plaintiffs attempted to recover bonds that the State of Georgia had confiscated. The Supreme Court held that Georgia was liable to private actions against it even though the State had not waived its sovereign immunity. This holding prompted Congress and the states to pass the Eleventh Amendment.[22] The Eleventh Amendment reads, "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."[23]

The amendment's authors only granted immunity to states being sued by citizens of *another* state, demonstrating that the amendment was written specifically for the facts in *Chislom*.[24] The Congress and state legislatures ratified the Eleventh Amendment within five years with little debate.[25] Because the Eleventh Amendment passed so quickly, its legislative history is relatively sparse, leaving the amendment open to interpretation and controversy.[26] This lack of legislative history and guidance lead to decisions like *New Hampshire v. Louisiana*, in which the Supreme Court held that the Eleventh Amendment also bars private actions by citizens against their own state. The Court in *New Hampshire* stated that the meaning of the Amendment is not limited to the plain meaning of the actual

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21. 2 U.S. 419 (1793). *See* Paul Brest, Sanford Levinson, J. M. Balkin & Akhil Reed Amar, *Processes of Constitutional Decisionmaking* 71-72 (4th ed., Aspen L. & Bus. 2000).

22. Brest, *supra* n. 21, at 72.

23. U.S. Const. amend. XI.

24. Brest, *supra* n.21, at 72 n.3.

25. *See* Rotunda, *supra* n. 19, at 151.

26. *Id.* at 152.

text. Instead, the authors of the Amendment intended that states should never be brought to court by private citizens against their will.[27]

Despite the Eleventh Amendment, states can still be sued by private citizens in one of two ways. First, a state can consent to be sued by a private party by waiving its immunity.[28] Second, Congress may abrogate a state's Eleventh Amendment immunity under congressional powers found in the Constitution. The Rehnquist Court has recently limited the powers Congress may rely on to abrogate state immunity to §5 of the Fourteenth Amendment.[29]

B. Contemporary Eleventh Amendment Case Law

"In the past ten years, the Supreme Court of the United States has begun a systematic reappraisal of doctrines concerning federalism, racial equality, and civil rights that, if successful, will redraw the constitutional map as we know it."[30] In 1990, Congress enjoyed seemingly limitless power to subject the states to its social and economic policy under the combined authority of the Commerce Clause and Section Five of the Fourteenth Amendment. Over the past decade the Supreme Court has whittled away at Congress's longstanding power over the states by renewing the states' authority and autonomy and by restricting national authority over the states, culminating in the *Garrett* decision; the Supreme Court's latest blow to federal authority over states.[31]

As recently as 1985, in *Garcia v. San Antonio Metropolitan Transit Authority*[32], the Supreme Court rejected "as unsound in

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27. *N.H. v. La.* 108 U.S. 76 (1883); Brest, *supra* n. 21, at 72 n. 3.

28. Rotunda, *supra* n. 19, at 164.

29. *Id, see Seminole Tribe v. Fla.* 517 U.S. 44 (1996) (The Court held that Congress cannot constitutionally use the Commerce Clause to create a private right of action against non-consenting states. One reason is that the Eleventh Amendment followed the Commerce Clause and, therefore, could not be altered by an earlier section. Of course, the Fourteenth Amendment came after the Eleventh and can bind the Eleventh Amendment).

30. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1052-1053 (2001).

31. 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, 92-93 (2000).

32. 469 U.S. 528 (1985) (Metropolitan Transit Authority brought action seeking declaratory judgment that it was entitled to Tenth Amendment immunity from minimum wage and overtime pay provisions of the Fair Labor Standards Act. On appeal,

principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional'."[33] Justice Blackmun's opinion was short-lived, however, as the Rehnquist Court would mark the beginning of its constitutional revolution with the 1991 decision in *Gregory v. Ashcroft*.[34]

Writing for majority in *Gregory*, Justice O'Connor rejected the Age Discrimination in Employment Act (ADEA) as it applied to the Missouri State Constitution, which set mandatory retirement ages for judges.[35] By advocating the importance of independent state sovereignty and by requiring Congress to use unmistakably clear language when it intends to infringe on a state's core functions, Justice O'Connor set the tone for the Court's subsequent state's rights decisions.[36]

The Supreme Court followed its decision in *Gregory* with several key constitutional decisions that expanded the bounds of state sovereignty. For example, the next year in *New York v. United States*, the Court held that the Congress lacked the constitutional power to command the states to legislate.[37] Following *New York*, the Court in *United States v. Lopez* invalidated the Gun Free School Zones Act of 1990, thus limiting congressional power to legislate under the Commerce Clause.[38] Then, in 1996, the Court decided *Seminole Tribe v. Florida*. In *Seminole Tribe* the Court invalidated Congress's direct abrogation of Florida's Eleventh Amendment sovereign immunity under the

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the Supreme Court, Justice Blackmun, held that transit authority was not immune from minimum wage and overtime requirements of the Act, essentially overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976).).

33. *Id.* at 546.

34. 501 U.S. 452 (1991).

35. *Id.* at 473

36. *Id.* at 460.

37. 505 U.S. 144 (1992) (Congress passed the Low-Level Radioactive Waste Policy Amendments Act of 1985, which, among other things, required New York to take title of radioactive waste and assume the liability of the waste. New York sued, claiming the act violated the Tenth Amendment of the United States Constitution. The Supreme Court declared the Act unconstitutional in part, holding that the take title clause exceeded the Tenth Amendment.).

38. 514 U.S. 549 (1995) (Lopez was convicted of violating the Gun-Free School Zones Act of 1990 after carrying a concealed handgun to school. On appeal, the court held the Gun-Free School Zones Act was beyond the power of Congress under the Commerce Clause.).

Indian Gaming Regulatory Act.[39] After *Seminole Tribe*, Congress could not abrogate state immunity unless the act for which Congress sought abrogation derived its basis from §5 of the Fourteenth Amendment.[40]

All of these decisions led to the *City of Beorne v. Flores* decision and its progeny, the cases which most influenced *Garrett*.[41] In *Flores*, the Court further constrained Congress's power to enact legislation under §5. The Court did this by restricting Congress's power to pass acts only for the purpose of remedying violations of constitutional rights as the Court interpreted them. *Flores* gave the Court substantial reviewing power over congressional acts that dealt with constitutional rights.[42] Moreover, the remedy that Congress desired to enforce had to be proportional and congruent to the scope and frequency of the violations.[43] Therefore, Congress was not only limited in its §5 powers to creating legislation that did not infringe on Eleventh Amendment state immunity, but that legislation was also restricted by intense judicial scrutiny of its appropriateness to remedy the violation.[44]

IV. *BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA V. GARRETT*

The *Garrett* decision is important because, for the first time, the court based its holding on the frailty of the legislative materials alone, signaling a break from the Court's tradition of deference to Congress as the fact finder.[45]

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39. 517 U.S. 44 (1996) (The Seminole tribe sued the state of Florida and its governor, alleging that the State had refused to enter into any negotiation for inclusion of gaming activities in a tribal-state compact, thereby violating Indian Gaming Regulatory Act. The State moved to dismiss, citing its sovereign immunity under the Eleventh Amendment. The trial court denied the motion. The appellate court reversed, holding that the State did have immunity under the Eleventh Amendment. The United States Supreme Court affirmed the appellate court's holding that the Eleventh Amendment prohibited Congress from making states liable for private actions.).

40. William E. Thro, *The Eleventh Amendment Revolution in the Lower Federal Courts* 25 J.C. & U.L. 501, 503 (1999).

41. 521 U.S. 507 (1997).

42. Balkin, *supra* n. 30, at 1054-55.

43. *Flores*, 521 U.S. at 520.

44. Balkin, *supra* n. 30, at 1055.

45. William W. Buzbee & Robert A. Shapiro, *Legislative Record Review* 54 Stan. L. Rev. 87 (2001).

A. *Facts and Procedural History*

In *Garrett*, the first respondent, Patricia Garrett, was a registered nurse employed by the University of Alabama in Birmingham hospital. In 1994, Garrett was diagnosed with breast cancer and underwent a lumpectomy, radiation treatment, and chemotherapy, which required her to take substantial time off of work. When Garrett returned to work in 1995, Garrett's supervisor informed her that she would have to give up her position as a director. Garrett transferred to another lower paying position.

The second respondent, Milton Ash, worked as a security officer for the Alabama Department of Youth Services. After beginning his job, Ash informed the Department that he was suffering from chronic asthma and that his doctor recommended that he avoid cigarette smoke and carbon dioxide. Ash asked that his duties be modified to minimize his exposure to these substances. Ash was later diagnosed with sleep apnea. On the advice of his doctor, Ash asked the Department to further modify his duties to accommodate his new condition. Despite Ash's requests, the Department refused to make any new changes to accommodate Ash's needs. Ash then filed a claim with the Equal Employment Opportunity Commission. After filing Ash saw a drop in his performance evaluation scores.[46]

Garrett and Ash filed separate lawsuits in district court seeking money damages from the State of Alabama under the ADA. Both defendants moved for summary judgment, citing their Eleventh Amendment immunity. The district court granted summary judgment for both cases. These cases were consolidated on appeal to the Eleventh Circuit, and the court of appeals reversed the district court decision, holding that the ADA validly abrogates the State's Eleventh Amendment immunity.[47] The Supreme Court granted certiorari.

B. *The Garrett Court's Analysis*

Chief Justice Rehnquist, writing for the five justice majority, reversed the circuit court by barring the respondent's action against the state under the Eleventh Amendment. Justice Rehnquist cited four reasons for barring the plaintiffs' actions:

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46. *Garrett*, 531 U.S. at 362.

47. *Id.*

(1) as long as the state's actions are rational, the Fourteenth Amendment does not require states to make special accommodations for the disabled; (2) Congress failed to identify a pattern of irrational state employment discrimination and, consequently, failed to abrogate the state's Eleventh Amendment immunity; (3) Congress's §5 enforcement authority under the Fourteenth Amendment can only be exercised for state transgressions, not for violations by local government units; and (4) the ADA does not pass the congruence and proportionality test.[48]

Under the first reason, the Court admits that Congress can abrogate state immunity if it does so pursuant to a proper exercise of its §5 power under the Fourteenth Amendment, but, Congress's action must be limited to remedies for violations of §1 of the Fourteenth Amendment.[49]

The Court must determine whether the state had demonstrated a pattern of irrational behavior towards the disabled.[50] In this case, the Court found that the state's actions against the disabled were rational.[51] For example, Justice Rehnquist stated, ". . . it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities. . . ."[52] The majority found that the legislative record for the ADA, though replete with many instances of discrimination, lacked the necessary evidence to support a pattern of state discriminatory actions against the disabled.[53] In essence, the Court stated that although the record contained some instances of state discrimination, the states' actions were neither irrational nor common enough to establish a pattern, making the states' duty to accommodate under the ADA greater that which is constitutionally required.[54]

Additionally, in response to the respondent's claim that the

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48. *Garrett*, 531 U.S. 356.

49. *Id.* at 368.

50. *Id.*

51. *Id.* at 369.

52. *Id* at 370 (Justice Rehnquist states that although a single incident of discrimination by a state may be unconstitutional, all of the incidents taken together fall short of suggesting a pattern of unconstitutionality.).

53. *Id.* at 965; ("While cases since 1995 had focused on the evidence before congress, in *Garrett* the Court for the first time based its ruling solely on the perceived inadequacy of complied legislative materials."). Buzbee, *supra* n. 47, at 87, 89.

54. *Garrett*, 531 U.S. at 370.

Fourteenth Amendment not only governs states but also local units of governments, the Court held that it would not extend its inquiry to local units of government as the Eleventh Amendment does not apply to them.[55] Again, the court used the inadequacy of the legislative record to justify its holding.[56]

In review, the cases leading up to *Garrett* restricted congressional abrogation of Eleventh Amendment immunity to legislation enacted under §5 of the Fourteenth Amendment. In *Garrett*, the court went to the legislative record to determine whether Congress was remedying a constitutional violation or enacting legislation beyond the scope of its §5 power.[57] If the remedies were beyond the scope of substantive guarantees of §1, then the remedy had to be proportionate and congruent to specific documented violations of the constitution.[58] The Court found that the legislative record for the ADA lacked sufficient specific instances to demonstrate that states were violating the constitutional rights of disabled persons.[59]

V. THE EEOA AND THE *GARRETT* SCRUTINY

A. *Specific Abrogation of Eleventh Amendment Immunity*

Because the EEOA lacks language that specifically abrogates state immunity, the EEOA will likely fail to meet the requirements for congressional abrogation of state immunity outlined in *Garrett*. Since *Seminole Tribe* and *Garrett*, any Congressional act that purports to abrogate a state's Eleventh Amendment immunity must contain an unequivocal expression of Congress's intent to abrogate.[60] For example, the ADA's abrogation section states, "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 juris-

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55. *Id.* at 366, n. 4.

56. *Id.*

57. Chemerinsky, *supra* n. 2, at 22.

58. Thro, *supra* n. 41, at 503-04.

59. Buzbee, *supra* n. 47, at 118. In cases leading up to *Garrett*, the courts' rigorous scrutiny was focused on the lack of legislative findings. In *Garrett*, the legislative record had ample evidence of discrimination, so the courts' scrutiny of the legislative facts marks a sharp departure from the courts' precedents.

60. Diane Heckman, *Title IX Tapestry: Threshold and Procedural Issues*, 153 Educ. L. Rep. 849, 856 (2001).

diction for a violation of this chapter."[61] The reason for this element is that congressional abrogation of state immunity is an extraordinary event under current Supreme Court doctrine; therefore, Congress must be clear and specific. The Court in *Garrett* was satisfied with Congress's intent to abrogate state immunity, so, alternatively, it took issue with whether Congress had acted constitutionally under its §5 powers.[62]

In contrast to the language of the ADA, §1706 of the EEOA maintains that "an individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate."[63] The authorization for federal suits makes no mention of suits against the state. The analysis of whether Congress articulated an abrogation of Eleventh Amendment immunity is objective, and does not rely on congressional intent.[64] Therefore, without an express declaration of congressional intent, the Court will not infer that Congress meant to abrogate state immunity.

Even if Congress had specifically abrogated the state's immunity, that abrogation must be a proper exercise of its §5 powers.[65] Thus the Court must investigate the reasons Congress passed the EEOA. First, Congress must state that it is acting under its §5 powers.[66] The EEOA, in §1702 (b), states,

> for the forgoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provision of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.[67]

Although the EEOA only makes reference to congressional powers in the Constitution, it seems unlikely that the Court would determine that the EEOA is based on anything but the

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61. 42 U.S.C. §12202.
62. *Garrett*, 531 U.S. at 363-64.
63. 20 U.S.C.A § 1706.
64. Moore's Federal Practice §123.42 [1][b][ii].
65. *Garrett*, 531 U.S. at 364.
66. Thro, *supra* n. 42, at 511-12.
67. 20 U.S.C. § 1702(b).

Fourteenth Amendment. Under these circumstances the Court will likely base its analysis on whether the statute goes beyond the Fourteenth Amendment.[68] The remedy mandated by the EEOA is to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."[69]

One concern the Court will likely have with the EEOA is that it does not require proof of discriminatory intent to demonstrate violations.[70] If the remedies under the EEOA do not require discriminatory intent, (the act itself is based on the restrictions of educational privileges based on race, sex, color, or national origin), violations of the act without the intent to discriminate do not violate any equal protection Fourteenth Amendment rights. The Court will therefore not likely find that Congress can sustain the act as a valid exercise of its §5 powers if it is only trying to remedy poor education rather than equal protection. Congressional attempts to go beyond the scope of §5 will be subject to the 'proportionality and congruence' test.[71]

Furthermore, because the federal Constitution does not guarantee any right to public education, any attempt to use a due process rationale when making an argument under the EEOA will be difficult. However, when states mandate public education for all children, current law holds that that mandate creates a property right for the citizens of that state. The Court has held this interest in guaranteed education is a property interest that is protected by the Fourteenth Amendment.[72] That being the case, depending on the state constitution, one could argue that a state law that does not take 'appropriate action to overcome language barriers' deprives students of property without due process of law. However, because the *Garrett* court also demonstrated an affinity for protecting the states' broad discretionary power, even this argument may not be sufficient to sustain the EEOC.

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68. Thro, *supra* n. 41 at 519.

69. 20 U.S.C. §1703(f).

70. Moran, *supra* n. 15, at 331; *see also* Julie Zwibelman, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 Harv. Civ. Rights-Civ. Libs. L. Rev. 527, 550 (2001).

71. Thro, *supra* n. 42, at 503-04.

72. *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

B. Standard of Review

If the EEOA were to overcome the hurdles of sufficient congressional abrogation and constitutional validity, it would then be subject to equal protection analysis. Equal protection analysis is a "three-tiered system of scrutiny by which the federal courts examine classifications made by state actors in light of the interests affected."[73] This three-tiered system corresponds with three types of groups affected by state classifications: suspect groups, quasi-suspect groups, and non-suspect groups.[74] Under an equal protection analysis the Court would not use a rational-basis review, as it did in *Garrett*, because the EEOA addresses constitutional violations of a suspect group.[75]

Suspect groups are classified based on race, ethnicity, sex, or a fundamental right such as free speech. When a state's action toward a suspect group is involved, the standard of review that a defendant state must meet is the strict scrutiny test. Under strict scrutiny review a defendant state must show that it had a compelling interest to justify the actions in question, and that its actions were narrowly tailored to its compelling interest.

Intermediate scrutiny, sometimes referred to as heightened scrutiny, is used when the court is dealing with a quasi-suspect class. For example, gender issues will trigger intermediate scrutiny. This level of scrutiny requires the defendant state show that its classification was substantially related to an important state interest.[76]

In contrast, the *Garrett* court was dealing with a non-suspect class.[77] The Court uses a rational basis review when dealing with a non-suspect class. Therefore, it applied a rational-basis standard, which places the burden on the plaintiff to demonstrate that the challenged measure bears no rational relationship to a legitimate state goal.[78]

Because the EEOA protects suspect groups, the state must demonstrate in an action under the EEOA that it had a com-

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73. Leonard, *supra* n. 31, at 100.

74. *Id.*

75. *See* 20 U.S.C. § 1701(1) (date needed) ("All children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin.").

76. *Id.* at 100-01.

77. *Garrett*, 531 U.S. at 366-67.

78. Leonard, *supra* n. 31, at 101.

pelling reason to make its classification. However, coupled with the Court's strict scrutiny is the state's higher level of discretion under the EEOA. Although the defendant state must demonstrate a compelling reason for its action, the EEOA simultaneously gives the states wide latitude in choosing actions when dealing with educational problems.[79] Under the *Garrett* analysis, the court is likely to defer to the state's discretion even though the state must simultaneously demonstrate a compelling interest that supports its actions.[80] Unlike *Garrett*, where the court looked for patterns of sustained irrational state discrimination, the court under the EEOA will look for patterns of state discrimination unsupported by compelling state interests. This standard will affect how the court reviews the legislative record.

C. Legislative Record

The EEOA legislative record must affirmatively identify instances of conduct by a state that violates the constitution.[81] The *Garrett* decision established that the Court will give Congress very little deference and will initiate a strict, skeptical review of the legislative record.[82] In section 1702 of the EEOA, Congress explains its findings:

> The congress finds that –
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> 1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment
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> 2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;
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> 3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amount of funds, thereby depleting their financial resources avail-

79. *See* Moran, *supra* n. 15, at 331.

80. Chemerinsky *supra* n. 2, at 18; *see also* Thro, *supra*, n. 42, at 501.

81. *Garrett*, 531 U.S. at 370.

82. Buzbee, *supra* n. 47, at 118.

able for the maintenance or improvement of the quality of educational facilities and instruction provided;

4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their education opportunity, is excessive;

5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

6) the guidelines provided by the courts for fashioning remedies to dismantle dual schools systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard of determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.[83]

A private party bringing suit against a state for a bilingual educational program will have immediate trouble under the *Garrett* analysis because the codified legislative findings make no mention of specific state violations.[84] The *Garrett* court pointed out that the "States alone employed some four and one half million people. It is telling... that Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled."[85] *Garrett* and its predecessors require that the EEOA findings focus on continuous constitutional violations by state actors that the EEOA would actually prevent.[86] If the congressional findings supporting the EEOA fail to demonstrate instances of state actions that violate the constitution, the EEOA is impermissible positive legislation, as opposed to permissible remedial legislation, which does not constitute a valid abrogation of the state's sovereign immunity.

The *Garrett* Court specified that it would not consider instances of discrimination from municipal entities when considering the legislative record. Included in the municipal classification are school boards and school districts.[87] Because the

83. 20 U.S.C. § 1702.

84. *Id.*

85. *Garrett*, 531 U.S. at 370.

86. *See* Leonard, *supra* n. 31, at 133.

87. Rotunda, *supra* n. 19, at §12.2, 156.

EEOA is based on discrimination in educational institutions, the legislative record will likely cite many instances of classification with schools, school districts, and decisions by school boards. As the Court in *Garrett* stated in regard to the ADA:

> These [units of local government] are subject to private claims for damages under the ADA without Congress' ever having to rely on § 5 of the Fourteenth Amendment to render them so. It would make no sense to consider constitutional violations on their par, as well as by the States themselves, when only the States are the beneficiaries of the Eleventh Amendment.[88]

In reality, without specific instances of constitutional discrimination beyond the schools and school districts, the court will not likely hold that Congress had reason to enact the EEOA against the states.[89]

Moreover, the EEOA was enacted in 1974, long before the recent revolution in constitutional law. Congress had no way of foreseeing the strict scrutiny the Supreme Court would place on the legislative record. Therefore, the legislative record will not likely support the pattern of specific instances of discrimination by state actors, which the Rehnquist court now requires before abrogating state immunity.[90]

VI. CONCLUSION

Under the *Garrett* standard, the EEOA will fail to abrogate states' Eleventh Amendment sovereign immunity for the following reasons.

1) The EEOA does not specifically abrogate the states' sovereign immunity by making a clear, unequivocal statement that it does so within the act itself. This problem could be easily remedied by a congressional amendment to the act indicating clear congressional intent to abrogate the state's right to immunity. The ADA contains language that could appropriately be added to the EEOA: "A state shall not be immune under the Eleventh Amendment to the Constitution of the United

88. *Garrett*, 531 U.S. at 369. One should note, however, that "school districts may or may not be directly affected by *Garrett* depending upon their status under state law. Districts that enjoy their states' Eleventh Amendment immunity, a question decided by state law, would no longer be subject to damage claims under the ADA." Borkowski, *supra* n. 20, at 394..

89. *Garrett*, 531 U.S. at 367.

90. Leonard, *supra* n. 31, at 130.

States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter."[91]

2) The remedies mandated by the EEOA do not apply to violations of the Fourteenth Amendment directly because they do not require a discriminatory intent. If a cause of action is brought under the EEOA that alleges a withholding of educational rights without discriminatory intent, the remedy is beyond the Section Five powers of Congress and will not likely pass the congruency and proportionality test. A plaintiff can argue, however, that his or her state right (dependent on state law) to education is property that is being taken without due process of law. Under that rationale, the EEOA could be used to successfully bring an action against a state if the language barriers do, in fact, prevent the student from receiving an appropriate education. However, given the Court's recent deference to the states' broad latitude to prescribe appropriate action to overcome language barriers, a due process claim will be difficult to sustain.

3) The EEOA congressional findings will not sufficiently demonstrate a continuing pattern of unconstitutional state action unattached to a compelling state purpose. Without a purpose for enacting the EEOA, the legislation becomes positive legislation as opposed to a remedy, and is, therefore, an invalid congressional exercise of power beyond its §5 powers. Part of the problem is that the EEOA was "enacted mainly out of concern about the wide-spread use of busing as a remedy for past segregation in the schools. Special [language] education programs . . . were simply an example of the kind of quality education programs might be substituted for unpopular busing remedies."[92] Consequently, the chance that Congress gathered the breadth of data that the *Garrett* court would require is unlikely.

Because bilingual education is a battle that will continue for years, eventually moving to the federal level, litigation under the EEOA will likely climb into the forefront of education law. Whether or not *Garrett* was correctly decided, the Court clearly indicated that the immediate future holds expanded sovereign immunity for states and a higher level of scrutiny for federal acts such as the EEOA. If litigated under the right cir-

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91. 42 U.S.C. §12202.

92. Moran, *supra* n. 15, at 339.

cumstances, plaintiffs may be unable to prove congressional intent to abrogating state immunity, leaving those plaintiffs without a claim and Congress with another worthless act on its hands.

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