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INTRODUCTION

Recent decisions by the Supreme Court have begun to address some of the legislative gaps left open by Congress when it enacted the Rehabilitation Act (RA). Unlike its more comprehensive statutory sister, the Americans With Disabilities Act (ADA), there were several unanswered important questions about the scope of and remedies available under the RA. This Article surveys the relevant case law, and provides an overview of the impact of various recent Supreme Court decisions affecting the RA which should assist practitioners litigating and advising clients in the area of disability discrimination.

Part I of this Article discusses the first issue facing disability-discrimination claimants; namely, whether there is a private right of action implied under the RA. The statutory scheme of the RA does not specifically address this issue. Although most circuit courts have ultimately come to the conclusion that an implied right of action exists under the RA, the question initially caused much dispute among the circuit courts. Recently, the United States Supreme Court resolved the right of action issue in *Barnes v. Gorman* when it summarily acknowledged that a private right of action exists under the RA.[1]

After determining that a claim can be brought by an individual under the RA, the next issue to be confronted by claimants is the proper scope of remedies available under the RA. Once again, this issue was left unanswered by Congress, which created another circuit court split. Accordingly, Part II first discusses the possible rem-

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1. Barnes v. Gorman, 536 U.S. 181, 185 (2002).

edies available for an RA violation. Part II discusses the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools*[2] and the Court's determination that monetary damages are available as a remedy under Title VI of the Civil Rights Act. Part II also discusses how the Supreme Court's analysis of remedies under the RA impacted competing arguments proffered by lower courts in concluding whether punitive damages are or are not available under the RA.

Part III discusses the Supreme Court's holding in *Barnes* concluding that punitive damages are not available under either the ADA or the RA. This Article concludes that if the *Gorman* decision is an inaccurate interpretation of congressional intent Congress could abrogate a state's sovereign immunity from punitive damages.

Having decided that a right of action exists under the RA and the scope of available remedies for a violation thereunder, the next question facing litigants is whether sovereign immunity exists. Part IV of this Article discusses the Supreme Court's decision in *Board of Trustees of the Univ. of Ala. v. Garrett,* in which the Court held that Congress exceeded its authority in abrogating the states' Eleventh Amendment immunity under the ADA.[3] This Article concludes that Congress exceeded its authority in abrogating the states' Eleventh Amendment immunity in enacting the RA as well. Part IV then discusses whether Congress can exact a waiver of a state's sovereign immunity from RA violations through the Spending Clause. Part IV also briefly discusses the doctrine of "unconstitutional conditions" and concludes that the acceptance of federal funds does not constitute a waiver of Eleventh Amendment immunity.

Part V of this Article briefly discusses the next issue facing claimants: whether a litigant can completely avoid the turbulent and judicially uncertain waters of the RA by pursuing a civil rights claim under 42 U.S.C. § 1983 based upon a violation of the RA. Part VI discusses whether a jury trial is available when bringing an RA claim and focuses on the right to a jury trial stemming from the Seventh Amendment.

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2. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

3. Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2000).

Part VII discusses the applicable statute of limitations for an RA violation. Once again, Congress failed to identify a specific statute of limitations period for the RA. The United States Supreme Court has not yet spoken on the statute of limitations issue in a conclusive manner and the circuit courts are divided yet again. Part VII first discusses the application of 42 U.S.C. § 1988 to the selection of the appropriate statute of limitations period. It discusses application by various courts of a forum state's analogous personal injury statute and compares the statute of limitations to the administrative requirements under the ADA. Part VII concludes that because the RA and the ADA are twin statutes, the statute of limitations period for an RA violation should be comparable to the administrative filing deadlines that apply to the ADA. The Supreme Court's recent decision in *National R.R. Passenger Corp. v. Morgan*[4] provides some guidance regarding the limitations period for RA claims based on a hostile work environment. Part VII discusses the Supreme Court's conclusions in *Morgan* and contends that *Morgan* is applicable to hostile work environment claims brought under the RA.

Finally, Part VIII briefly discusses whether an individual, rather than a government entity, can be personally liable for a violation of the RA.

I. IMPLIED RIGHTS OF ACTION FOR RA VIOLATIONS

In 1973 Congress enacted Section 504 of the RA, 29 U.S.C. § 701-796l, as a general civil rights provision for the handicapped.[5]

4. 536 U.S. 101 (2002).

5. Alexopulos v. San Francisco Unified Sch. Dist., 817 F.2d 551, 554 (9th Cir. 1987) (Section 504 is a "civil rights statute . . . closely analogous to section 1983"); Morse v. University of Vermont, 973 F.2d 122, 127 (2d Cir. 1992) ("Like § 1983, § 504 may also be described as 'conferring a general remedy for injuries to personal rights.'" (quoting Wilson v. Garcia, 471 U.S. 261, 278 (1985))).

Section 501 of the RA, 29 U.S.C. § 791, prohibits discrimination in employment. Section 502, 29 U.S.C. § 792, deals with architectural and transportation barriers to mainstreaming persons with handicaps. Section 503, 29 U.S.C. § 793, prohibits discrimination by federal contractors. These provisions, including § 504 and § 505, are generally referred to as Title V of the RA ("Title V").

There are four types of discriminatory barriers that handicapped individuals may confront when seeking employment: (1) intentional discrimination for reasons of social bias; (2) neutral standards with disparate impact; (3) surmountable barriers to the impaired; and (4) insurmountable barriers to the impaired. Prewitt v. United States Postal Serv., 662 F.2d 292, 305 n.19 (5th Cir. 1981) (citing Note, *Accommodating the Handi-*

Section 504 prohibits discrimination against disabled individuals by entities receiving federal funding.[6] Section 504 originally applied only to programs receiving federal funding, but the 1978 Amendments to the RA made Section 504 applicable to federal agencies.[7] In enacting the RA Congress's stated intent was "to prevent discrimination against all handicapped individuals. . .in employment, housing, transportation, education, health services, and any other federally-aided programs."[8]

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capped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act, 55 N.Y.U.L. REV. 881, 883-84 (1980)).

6. Section 504 provides in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794 (a).

Section 504 closely tracks the language of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (d) ("Title VI"), which apparently was its model. Title VI involved effective and operative prohibition against discrimination on the ground of race, color or national origin. Although Section 504 was enacted as part of the Rehabilitation Act of 1973, its nondiscrimination principle was initially proposed as an amendment to Title VI. Representative Vanik first introduced this proposed amendment in the House. *See* H.R. 14033, 92d Cong., 2d Sess., 118 CONG. REC. 9712 (1972); H.R. 12154, 92d Cong., 1st Sess., 117 CONG. REC. 45945 (1971). Senators Humphrey and Percy proposed a similar measure in the Senate. *See* S. 3044, 92d Cong., 2d Sess., 118 CONG. REC. 525-526 (1972). The nondiscrimination principle was reshaped in the next Congress and enacted as Section 504. Senator Humphrey and Representative Vanik stated that the intent of their original amendments to Title VI had been incorporated into Section 504. 119 CONG. REC. 6145 (1973) (statement of Sen. Humphrey); 118 CONG. REC. 32310 (1972) (same); 119 CONG. REC. 7114 (1973) (statement of Rep. Vanik). *See also*, 118 CONG. REC. 30680 (1972) (statement of Sen. Randolph describing origins of Section 504).

7. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 1, 92 Stat. 2982 (1978) (hereinafter "1978 Amendments"). The1978 Amendments closed the loophole and subjected the federal government to Section 504. *See also*, 124 CONG. REC. 13,901 (1978) (statement of Rep. Jeffords) (stating that 1978 Amendments eliminate federal government's exemption); *id.* at 38,549 (statement of Rep. Brademas) (stating that 1978 Amendments require federal compliance); *id.* at 38,551 (statement of Rep. Jeffords) (stating that 1978 Amendments eliminate federal government's exemption); *id.* at 38,552 (statement of Rep. Sarasin) (stating that 1978 Amendments extend coverage to federal government).

8. Lora v. Bd. of Educ. of City of New York, 456 F. Supp. 1211, 1228 (E.D.N.Y. 1978) (quoting S. REP. No. 1294, 93rd Congr., 1st Sess., *reprinted in* 1979 U.S.C.C.A.N. 6373, 6388). *See also*, 29 U.S.C. § 794. This statute does not prohibit discrimination against the handicapped as such; it simply bars the use of federal funds to support programs or activities that so discriminate. *See* U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986).

Facially, Section 504 did not authorize suits by private parties.[9] Prior to the 1978 Amendments to the RA, several circuit courts concluded that a private right of action existed for Section 504 violations.[10] Several courts found that a private right of action against a

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Section 504 is similar to other statutes placing conditions on the receipt of federal funding. *See e.g.*, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (1982) (sex discrimination prohibited by any educational program or activity receiving federal funds). The Supreme Court has observed:

> Under the program-specific statutes, Title VI, Title IX, and § 504, Congress enters into an arrangement in the nature of a contract with the recipients of the funds: the recipient's acceptance of the funds triggers coverage under the nondiscrimination provision.

U.S. Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605-06 (1986). This approach must be distinguished by those enactments that Congress, in the exercise of its regulatory power, prohibits discrimination directly. *See e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000a (1982); Heart of Atlanta Hotel, Inc. v. U.S., 379 U.S. 241, 245-49 (1964).

The federal policies underpinning the RA and the Americans with Disabilities Act, 42 U.S.C. § 12101-12213 ("ADA"), are similar. Both statutes were enacted to, among other things, assist disabled persons in finding and maintaining employment. *Compare* 29 U.S.C. § 701(b)(2) (one purpose of the RA is "to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities . . . and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment") *with* 42 U.S.C. § 12101(b)(1) (an objective of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities"). The language of Title II of the ADA also tracks the language of Section 504. Congress's intent was that Title II extend the protections of the RA "to cover all programs of the state of local governments, regardless of the receipt of federal financial assistance' and that it work in the same manner as Section 504." Hainze v. Richards, 207 F.3d 795, 799 (5th Cir. 2000). Federal employees, however, have no remedy for employment discrimination under the ADA. Their sole claim for discrimination on the basis of disability, if any, is under the RA. Rivera v. Heyman, 157 F.3d 101, 103-04 (2nd Cir. 1998).

9. Doe v. Attorney Gen. of U.S., 941 F.2d 780, 787 (9th Cir. 1991).

10. Davis v. Southeastern Cmty. Coll., 574 F.2d 1158 (4th Cir. 1978); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); United Handicapped Fed'n v. Andre, 558 F.2d 413 (8th Cir. 1977); Lloyd v. Reg'l Transp. Auth., 548 F.2d 1277 (7th Cir. 1977); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977). *See also*, Kling v. County of L.A., 633 F.2d 876, 878 (9th Cir. 1980); Camenisch v. Univ. of Tex., 616 F.2d 127, 131 (5th Cir. 1980); NAACP v. Med. Ctr., Inc., 599 F.2d 1247 (3d Cir. 1979); Coleman v. Darden, 595 F.2d 533 (10th Cir. 1979).

The Supreme Court had also suggested that a private right of action does exist under Section 504. *See*, Campbell v. Kruse, 434 U.S. 808 (1977).

Lower courts had also held that a private right of action existed under Section 504. Cain v. Archdiocese of Kansas City, 508 F. Supp. 1021 (D. Kan. 1981); Coleman v. Casey County. Bd. of Educ., 510 F. Supp. 301 (W.D. Ky. 1980); Patton v. Dumpson, 498 F. Supp. 933 (S.D.N.Y. 1980); Miener v. Missouri, 498 F. Supp. 944 (E.D. Mo. 1980); Simon v. St. Louis County, Mo., 497 F. Supp. 141 (E.D. Mo. 1980); Guertin v. Hackerman, 496 F. Supp. 593 (S.D. Tex. 1980); Larry P. v. Riles, 495 F. Supp. 926 (N.D. Cal. 1979);

non-government defendant could be implied even though particular statutory language grants no such right explicitly. Many also agreed that this conclusion remained even though the legislative history of a particular statute is silent on Congress's intent to provide it.[11] The United States Supreme Court has delineated four fac-

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Poole v. S. Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980); Upshur v. Love, 474 F. Supp. 332 (N.D. Cal. 1979); Cruz v. Collazo, 84 F.R.D. 307 (D.P.R. 1979); Boxall v. Sequoia Union High Sch. Dist., 464 F. Supp. 1104 (N.D. Cal. 1979); Howard S. v. Friendswood Indep. Sch. Dist., 454 F. Supp. 634 (S.D. Tex. 1978); Davis v. Bucher, 451 F. Supp. 791 (E.D. Pa. 1978); Michigan Paralyzed Veterans of Am. v. Coleman, 451 F. Supp. 7 (E.D. Mich. 1977); Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295 (E.D. Pa. 1977), *aff'd. in part, rev'd. in part*, 612 F.2d 84 (3rd Cir. 1979), *rev'd. on other grounds*, 451 U.S. 1 (1981); Crawford v. Univ. of N.C., 440 F. Supp. 1047 (M.D.N.C. 1977); Barnes v. Converse Coll., 436 F. Supp. 635 (D.S.C. 1977).

11. Northwest Airlines, Inc. v. Transp. Workers Union of Am., AFL-CIO, 451 U.S. 77, 94 (1981) (holding that silent legislative history would not be fatal in implying private right of action with some other indication of congressional intent); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 18 (1979) (holding that congressional intent to grant private right of action need not be express but may "appear implicitly in the language or structure of the statute, or in the circumstances of enactment"); Cannon v. Univ. of Chi., 441 U.S. 677, 694 (1979) (holding that when a statute grants specific rights to a certain class, the explicit purpose to deny a remedy would be controlling and not the absence of an explicit purpose to create one); Osborn v. Am. Ass'n of Retired Persons, 660 F.2d 740, 745 (9th Cir. 1981) ("congressional silence is not necessarily fatal to implication of a private right of action").

However, if a statute is silent and the legislative history is silent as to a private right of action, then such silence cannot justify implying a private right of action against the United States because Congress must unequivocally express its intent to create such a right. *Doe*, 941 F.2d at 789. Federal courts have consistently refused to imply private rights of action against the United States or to ignore a condition on a sovereign immunity waiver when the statute and legislative history are either silent or indicate a congressional intent not to grant the right requested. *See* United States v. Mottaz, 476 U.S. 834, 844-48 (1986) (holding that government waived its sovereign immunity in Quiet Title Act only with respect to one class of cases because the United States was not mentioned as a potential party with regard to other class); Block v. N.D., 461 U.S. 273, 287-90 (1983) (holding that language of Quiet Title Act and legislative history contained no indication that Congress intended to exempt states from condition on sovereign immunity waiver); Lehman v. Nakshian, 453 U.S. 156, 160-70 (1981) (holding that Age Discrimination in the Employment Act's language, structure, and legislative history indicated Congress's intent that waiver of United States' sovereign immunity was conditioned on the victim having no right to a jury trial); United States v. Testan, 424 U.S. 392 (1976) (holding that there was no indication either in the language of the Classification Act or its legislative history that plaintiffs were entitled to back pay for positions to which they should have been appointed); Gaj v. U.S. Postal Serv., 800 F.2d 64 (3d Cir. 1986) (holding that the Postal Reorganization Act is proscriptive with no focus on a benefited class, and that the statute's language and legislative history did not show a congressional intent to create a private remedy); California v. Walters, 751 F.2d 977

tors in deciding whether Congress implies a private right of action in a federal statute: (1) whether the plaintiff falls within "the class for whose especial benefit the statute was enacted;" (2) whether Congress indicated an intent, either explicitly or implicitly, to create or deny a remedy; (3) whether the remedy is consistent with the statute's underlying purposes; and (4) whether the cause of action is traditionally pursued in a state, rather than federal, forum.[12]

In the pre-1978 Amendment era, the Seventh Circuit Court of Appeals in *Lloyd v. Reg'l Transp. Auth.*, noted that the Supreme Court held that Title VI provided a private right of action in a unanimous decision.[13] The Circuit Court held that Title VI was nearly identical to Section 504 and that, therefore, the Supreme Court's ruling was dispositive on the issue of whether a private right of action was available under Section 504. Although the Seventh Circuit's holding in *Lloyd* did not address the enumerated factors discussed above, in *Doe v. Attorney Gen. of the U.S.*, the Ninth Circuit did.[14] In so doing, the Ninth Circuit noted that the second factor – Congress's intent to create or deny a remedy – is the central inquiry in determining whether a private right of action is available under Section 504.[15] Consequently, the Ninth Circuit primarily focused on Congress's intent in deciding the issue.

The congressional debates on the 1978 Amendments demonstrate that Congress was aware federal courts were interpreting Section 504 to provide a private right of action.[16] However, Congress

(9th Cir. 1984) (per curiam) (holding that the language and legislative history of a statute on hazardous waste disposal, 42 U.S.C. § 6961, indicated congressional intent to waive sovereign immunity only from suits for injunctive relief and not from criminal sanctions); Patentas v. U.S., 687 F.2d 707, 710-13 (3d Cir. 1982) (holding that there was no explicit congressional intent in language or legislative history of the Ports and Waterways Safety Act of 1972 to waive immunity from private lawsuits against Coast Guard); California v. Quechan Tribe of Indians, 595 F.2d 1153, 1155-56 (9th Cir. 1979) (holding that neither the express terms of the statute nor the legislative history of 18 U.S.C. § 1162, jurisdictional statute for criminal offenses in Indian territory, revealed any congressional intent to waive Tribe's sovereign immunity).

12. Cort v. Ash, 422 U.S. 66, 78 (1975).

13. 548 F.2d at 1277 (citing Lau v. Nichols, 414 U.S. 563 (1974)).

14. 941 F.2d 780 (9th Cir. 1991).

15. *Id.* at 788 n.15 (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 575 (1979)).

16. 124 CONG. REC. 37,508 (statement of Sen. Stafford) ("[t]o date we have permitted certain private enforcement of Title V" of the RA). *Doe*, 941 F.2d at 787 n.13 ("Congress was aware that section 504 provided an implied private right of action. Yet

chose not to expressly abolish a private right of action. In fact, Congress recognized that Section 502(a), the implementing provision of Section 504, permitted a judicial remedy through a private right of action.[17] Congress provided for the recovery of attorneys' fees for successful litigants as a means to encourage private enforcement.[18] The Ninth Circuit determined, from the 1978 debates, that

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Congress did not eliminate this remedy but rather enforced it by adding section 505. We see no congressional intent to abolish the private right of action and every intent to reinforce it."). Congress also knew that Title VI provided an implied private right of action when it amended Section 504 and added the remedy provision contained in Section 505(a)(2). *Id.* at 787 (citing 124 CONG. REC. 30,349 (statement of Sen. Bayh)).

17. The committee report to the Senate stated:

> This approach to implementation of Section 504, which closely follows [Title VI], . . . would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.*

S. REP. NO. 93-1297, at 39-40 (1974), *reprinted in* 4 U.S.C.C.A.N. 6373, 6391 (emphasis added).

18. Section 505(b) provides in pertinent part: "In any action or proceeding to enforce or charge a violation of a provision of [Title V], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The Ninth Circuit Court of Appeals noted in *Doe* that the Senate focused on the attorneys' fees provision in Section 505 to encourage private enforcement and intended for the provision to parallel the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988. 941 F.2d at 792.

The Ninth Circuit primarily focused on Senator Alan Cranston's remark during the congressional debates. Senator Cranston believed that the attorneys' fees provision in Section 505(b) would permit access to the courts by handicapped individuals:

> Such allowance of attorneys' fees would be an important step in assisting all handicapped individuals in their struggle by permitting equal access to the courts to enforce the provisions of Title V.

124 CONG. REC. 30,346. Senator Cranston also believed that private enforcement was an essential part of vindicating the rights of handicapped individuals. *Id.* ("Private enforcement of these title V rights is an important necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys' fees should assist substantially in this respect."); *see also, id.* at 30,349 (statement of Sen. Cranston) (commenting on the need to provide attorneys' fees to handicapped individuals to ensure private enforcement of Title V to the RA). Senator Cranston also noted that the senate report accompanying the Civil Rights Attorneys' Fee Awards Act of 1976 also extolled the needs of private enforcement:

> (A)ll . . . civil rights law depend [sic] heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate congressional policies which these laws contain.

Doe, 941 F.2d at 792 (quoting S. REP. NO. 94-1011).

Senator Stafford echoed Senator Cranston's remarks and reiterated the need for private enforcement of Title V:

Congress wanted to develop uniformity among Title V's provisions to give all handicapped individuals equal opportunities to achieve justice. Thus, the Ninth Circuit concluded that Congress intended to encourage private parties to pursue enforcement of Section 504 through a private right of action.[19]

Section 504 provides that the procedures set forth to enforce Title VI shall be available for the enforcement of the RA.[20] Several circuit courts addressing the issue of implied private rights of action hold that litigants suing private recipients of federal funds under Section 504 do not need to exhaust Title VI administrative remedies.[21] Essentially, these courts agree that Title VI's administrative remedies provide for the termination of federal financial assistance for violations, but do not "include or encompass equitable relief for the affected individual."[22] Thus, these circuit courts hold that the applicable remedies under Title VI do not provide meaningful indi-

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> To date we have permitted certain private enforcement of Title V and, yet, we have not provided the means by which such private rights of action are meaningful. This provision will go a long way toward assisting handicapped individuals in their efforts to achieve their full and equal share of the rights to which they are entitled.

124 CONG. REC. 37,507.

19. *Doe*, 941 F.2d at 792.

20. 29 U.S.C. § 794a(a)(2).

21. *See, e.g.*, Freed v. Consol. Rail Corp., 201 F.3d 188, 191 (3rd Cir. 2000); Brennan v. King, 139 F.3d 258, 268 n.12 (1st Cir. 1998); Tuck v. HCA Health Serv. of Tenn., Inc., 7 F.3d 465, 470-71 (6th Cir. 1993); Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990); Miener v. State of Mo., 673 F.2d 969, 978 (8th Cir. 1982); Pushkin v. Regents of the Univ. of Colo., 658 F.2d 1372, 1382 (10th Cir. 1981); *Lloyd*, 548 F.2d at 1287. *See also*, Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 282 n.17 (3rd Cir. 1996) (Section 504 "is not ordinarily subject to an exhaustion requirement"); *but see*, Downey v. Runyon, 160 F.3d 139, 145-46 (2nd Cir. 1998) ("The purpose of the requirement of primary resort to the EEOC is to provide notice to the employer and to encourage conciliation and voluntary compliance.").

Title VI provides two different paths for pursuing relief, depending on the claimant's status. Recipients of federal assistance may pursue judicial or administrative relief when challenging an agency's administrative or regulatory action as a funds administrator. *Doe*, 941 F.2d at 787 (citing 42 U.S.C. § 2000d-2). Victims of discrimination can pursue an implied private right of action. *Id.*

22. *Pushkin*, 658 F.2d at 1381 (holding that Title VI provides for the termination of federal financial assistance to "programs" that violate Title VI and does not "include or encompass equitable relief for the affected individual."); *Tuck*, 7 F.3d at 471 ("the applicable remedies provide no individual relief, including no damage orders against an employer").

vidual relief[23] and that a victim of discrimination can recover damages directly in court.[24] Congress's reluctance to expressly enact legislation requiring a victim of discrimination to exhaust administrative remedies before bringing a lawsuit under Section 504 lends further support to the contention that discrimination victims can go directly to court.[25]

Although Congress could have explicitly provided for a private right of action when amending Section 504 and enacting Section 505, Congress's failure to do so (or silence) should not be construed as foreclosing a private right of action. Given that during the congressional debates, Congress specifically addressed the issue of private enforcement of Section 504 and explicitly provided for attorneys' fees for successful litigants, it stands to reason that an implied private right of action should be available under Section 504. The administrative remedies available are simply inadequate to vindicate the rights of discrimination victims and a strict adherence to such remedies would only frustrate the purposes of the RA.[26] The Supreme Court recently resolved the issue in *Barnes v.*

23. For example, the Department of Transportation regulations implementing Section 504 (49 C.F.R. pt. 27) allow an aggrieved individual to file a written complaint. 49 C.F.R. § 27.123(b). However, the regulations do not provide for individual relief. In addition, an informal dispute resolution may be held with the recipient of federal funds, but if these efforts are unsuccessful, the Department of Transportation may determine, after a hearing, if it should suspend or terminate funding. *See* 49 C.F.R. §§ 27.123(d) & 27.125. The complainant is notified of the time and place of the hearing, but the regulations do not make any provisions for the complainant to participate in the hearing or to recover damages. *See* 49 C.F.R. §§ 27.127 & 27.127(a)(2). *See also, Freed*, 201 F.3d at 193 (holding that the Department of Transportation regulations were inadequate); *Miener*, 673 F.2d at 978 (finding that the Department of Health and Human Services administrative process is inadequate because a Section 504 plaintiff may not furnish evidence or participate in an investigation, appeal an adverse decision, or recover damages); *Doe*, 941 F.2d at 787 (noting that Title VI and the pre-1978 Section 504 "provide only for review of the administrative and regulatory actions taken by an agency in administering its funding programs.").

24. *Freed*, 201 F.3d at 193-94; *Pushkin*, 658 F.2d at 1382 ("We hold that under § 504 of the Rehabilitation Act the plaintiff is not compelled to pursue a remedy which is irrelevant to his particular need.").

25. Andrews v. Consol. Rail Corp., 831 F.2d 678, 684 (7th Cir. 1987).

26. As a remedial statute, Section 504 should be broadly construed to effectuate its purposes. *Cf.*, Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) ("[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.").

Gorman[27] when it implicitly acknowledged without substantial discussion that a private right of action is available under the RA.

II. REMEDIES AVAILABLE FOR RA VIOLATIONS

The RA was amended in 1978 to provide remedies for violations of Section 504.[28] Section 505 was later added and Congress provided that "[t]he remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et. seq.*) shall be available to any person aggrieved by any act or omission by any recipient or provider of federal assistance under Section 794. . ."[29] Title VI prohibits, among other things, discrimination based on race "under any program or activity receiving Federal financial assistance."[30] However, Title VI did not indicate what remedies were available for violations of that statute.[31] As a result, courts

27. 536 U.S. 181 (2002). See Section III *infra* for a discussion of *Gorman*.

28. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 1, 92 Stat. 2982 (1978).

29. 29 U.S.C. § 794(a)(2). In order to state a cause of action under Section 504 a claimant must allege discrimination by or exclusion from a "program or activity" receiving federal financial assistance. 29 U.S.C. § 794. The financial assistance requirement was discussed by the Supreme Court in United States Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597 (1986). Federal financial assistance may be either monetary or non-monetary. Section 504 is program specific: "it proscribes discrimination only with respect to 'programs' or 'activities' receiving federal financial assistance." Foss v. City of Chi., 817 F.2d 34, 35 (7th Cir. 1987).

In 1988 Congress amended the definition of "program" or "activity" to broaden the reach of Section 504 to "all the operations" of "a department, agency, special purpose district, or other instrumentality of a state or of a "local government" that receives federal funding. Act of Mar. 22, 1988, Pub. L. No. 100-259, § 4, 102 Stat. 29 (1988); *see* Section 794(b)(1)(A). All of the operations of a department or similar entity receiving federal financial assistance are subject to regulation. Shroeder v. City of Chi., 715 F. Supp. 222, 225 (N.D. Ill. 1989), *aff'd*, 927 F.2d 957 (7th Cir. 1991).

The mandate of Section 504 is inapplicable to future conduct when federal funding has ended and there is no indication that federal funding will be renewed. Great Los Angeles Council on Deafness, Inc. v. Zolin, 812 F.2d 1103 (9th Cir. 1987).

Congress explicitly made Title VII remedies available for violations of Section 501. Congress also limited the remedies for violations of Section 504 to those available under Title VI. Circuit courts have held that the two sections were not intended to provide alternative means of obtaining relief for the same act of discrimination against an individual. Rivera v. Heyman, 157 F.3d 101, 104-05 (2nd Cir. 1998).

30. 42 U.S.C. § 2000d (2003).

31. The court in Landgraf v. U.S.I. Film Prod., 511 U.S. 244, 254 n.8 (1994), observed that by amending the RA to authorize Title VI remedies for Section 504 litigants,

were divided over the scope of available remedies under both Title VI and the RA.[32]

The Supreme Court initially ruled that in an action under Title VI or the RA a private claimant could recover damages in the form of back pay. The Court did not, however, directly address what additional remedies might be available under either statute.[33] Before the Supreme Court's ruling in *Franklin v. Gwenett County Pub. Sch.*,[34] many lower courts were divided on whether tort-style damages such as compensatory damages for pain, suffering and emotional distress, were available under Section 504.[35] A majority of courts addressing the issue of whether monetary damages for mental anguish, emotional distress, and humiliation were available determined that they were not.[36]

Although damages are available under Title VI when there is proof of intentional conduct, Title VI's provisions do not address the need for proof of discriminatory intent. The general rule is that

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Congress, at least in some respects, transformed Section 504 from "a general right to sue statute to one with a 'set of circumscribed remedies.'"

32. Justice v. Pendleton Place Apartments, 40 F.3d 139 (6th Cir. 1994); *see also*, L. Larson & A. Larson, 3A EMPLOYMENT DISCRIMINATION § 106.37, endnote 64-65 (1990 and supplement 1993) (collecting cases demonstrating the split over the availability of compensatory and punitive damages).

33. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983) (Title VI); Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) (Section 504).

34. 503 U.S. 60 (1992).

35. *Compare* Eastman v. Va. Polytech Inst. & State Univ., 939 F.2d 204, 209 (4th Cir. 1991) (concluding that Section 504 permits neither compensatory damages for pain and suffering nor punitive damages), *with* Kling v. County of L.A., 769 F.2d 532, 534 (9th Cir.), *rev'd on other grounds*, 474 U.S. 936 (1985) (allowing compensatory damages for pain and suffering under Section 504).

36. *See* Rivera Flores v. P.R. Tele. Co., 776 F. Supp. 61, 71 (D.P.R. 1991) (mental suffering); Jenkins v. Skinner, 771 F. Supp. 133, 136 (E.D. Va. 1991); ADAPT, Salt Lake Chapter v. Skywest Airlines, Inc., 762 F. Supp. 320, 325 (D. Utah 1991) (emotional distress or mental anguish); Rhodes v. Charter Hosp., 730 F. Supp. 1383, 1385-86 (S.D. Miss. 1989) (emotional distress); Shuttleworth v. Broward Co., 649 F. Supp. 35, 36-38 (S.D. Fla. 1986) (mental suffering or humiliation); Martin v. Cardinal Glennon Memorial Hosp. for Children, 599 F. Supp. 284, 284 (E.D. Mo. 1984) (mental anxiety and humiliation); Bradford v. Iron Co. C-4 Sch. Dist., 1984 WL 1443, 35,404 (E.D. Mo. June 13, 1984) (emotional distress). *But cf.*, Tanberg v. Weld Co. Sheriff, 787 F. Supp. 970, 972-73 (D. Colo. 1992) (holding that damages for loss of professional opportunity, mental anguish, and pain and suffering are available for intentional violation of Section 505); Tyler v. City of Manhattan, 849 F. Supp. 1442 (D. Kan. 1994).

damages are only available for intentional conduct.[37] Compensatory damages, however, are not available for unintentional violations of Section 504.[38] In *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*,[39] the Supreme Court expressed concerns that when a recipient of federal funds "unintentionally" discriminates, the recipient

37. Ferguson v. City of Phoenix, 157 F.3d 668, 674 (9th Cir. 1998) (noting that *Franklin* dealt with damages for intentional violations and did not discuss the availability of damages for non-intentional violations). Lane v. Pena, 518 U.S. 187 (1996) (noting that a "clear majority" of the justices in Guardians Ass'n v. Civil Serv. Comm'n of N.Y., 463 U.S. 582 (1983), confirmed that damages were available for intentional violations of Title VI). A majority of the justices in University of Cal. Regents v. Bakke, 438 U.S. 265 (1978), concluded that Title VI reached only intentional discrimination. It is unclear, however, whether the justice in *Guardians* would have read an intent requirement into Title VI if they did not give *stare decisis* to the *Bakke* decision. *See* 463 U.S. at 626 (O'Connor, J., concurring in judgment) ("Were we construing Title VI without the benefit of any prior interpretation from this Court, one might well conclude that the statute was designed to redress more than purposeful discrimination." (citation omitted)).

The Ninth Circuit in *Ferguson* held that, although Title VI was enacted pursuant to Congress's Spending Clause power, it does not necessarily follow that compensatory damages are limited to intentional violations of civil rights legislations based upon Congress's Spending Clause power as oppose to legislation based upon Congress's Section 5 power. 157 F.3d at 674.

38. *E.g.*, Wood v. President & Trustees of Spring Hill College, 978 F.2d 1214 (11th Cir. 1992); Carter v. Orleans Parish Pub. Sch., 725 F.2d 261 (5th Cir. 1984).

Congress perceived discrimination against the handicapped as a product of benign neglect, thoughtlessness and indifference and not invidious animus. Alexander v. Choate, 469 U.S. 287, 295 (1985). Representative Vanik introduced the predecessor to Section 504 in the House. He described the treatment of handicapped individuals as one of the country's "shameful oversights" which caused handicapped individuals to live among society "shunted aside, hidden, and ignored." 117 CONG. REC. 45974 (1971). Senator Humphrey introduced a similar measure in the Senate and asserted during the congressional debates that "we can no longer tolerate the invisibility of the handicapped in America." 118 CONG. REC. 525-526 (1972). Senator Cranston described the RA as a response to "previous societal neglect." 119 CONG. REC. 5880, 5883 (1973); *see also* 118 CONG. REC. 526 (1972) (statement of Sen. Percy) (describing the legislation as a national commitment to eliminate the "glaring neglect" of the handicapped). Federal agencies have also found that discrimination against the handicapped is primarily the result of apathy rather than discriminatory animus. *See, e.g.*, United States Commission on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 17 (1983). Commentators have similarly concluded. *See, e.g.*, Note, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of the Rehabilitation Act*, 55 N.Y.U. L. REV. 881, 883 (1980). Nevertheless, invidious discrimination against the handicapped does exist. *See, e. g.*, Judith Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401, 403, n. 2 (1984).

39. 463 U.S. 582 (1983).

may not be aware of its obligations under a voluntary Title VI program.[40] "[T]he point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award."[41]

This Article next discusses the Supreme Court's analysis of the availability of punitive damages under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"),[42] and contrasts that analysis with the currently divergent judicial views regarding the scope of remedies available under the RA.

A. *The Supreme Court's Analysis in* Franklin v. Gwenett County Pub. Sch.

A turning point in the debate over the scope of remedies available under the RA came in 1994 with the Supreme Court's decision in *Franklin v. Gwenett County Pub. Sch.*,[43] where the Supreme Court considered the issue of whether Title IX supports claims for monetary damages.[44] Previously, the Court in *Cannon v. Univ. of Chi.*[45] determined that an implied right of action exists under Title IX for intentional violations of its provisions and that a "full panoply of legal remedies were available."[46] The similarities between Title IX and Section 504 of the RA made the Court's determination immediately relevant to the debate. In holding that monetary damages were available under Title IX, the Court stated: "the general rule . . . is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief on a cognizable cause of action brought pursuant to a federal statute."[47]

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40. *Guardians Ass'n,* 463 U.S. at 602.

41. *Franklin,* 503 U.S. at 74. Justice White in the majority opinion in *Guardians* reasoned that the Supreme Court's presumption in *Pennhurst* that a court should only award limited injunctive relief for unintended violations of statutes enacted pursuant to Congress's Spending Clause power applied to Title VI. 463 U.S. at 602 (citing *Pennhurst,* 451 U.S. at 15).

42. Title IX provides in pertinent part that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

43. 503 U.S. 60 (1991).

44. *Id.* at 62.

45. 441 U.S. 677 (1979).

46. *Id.* at 680.

47. *Franklin* , 503 U.S. at 70-71.

The Court in *Franklin* began its analysis by observing that when considering an implied right of action under a statute, "the usual recourse to statutory text and legislative history" may not be particularly enlightening, nor will the period prior to the court's decision finding such a right to exist be helpful.[48] Instead, the *Franklin* Court focused its examination on "the state of the law when the legislation passed,"[49] in order to identify the background against which Congress acted and is presumably aware.[50]

Examining the decade before Congress enacted Title IX, the Court in *Franklin* found implied rights of action in six instances,[51] three times approving a damages remedy[52] because Congress was aware of the background in which private rights of action were being declared and legal remedies provided. The Court deemed Congressional omission of any discussion of the matter of damages as an implicit approval of the availability of a broad spectrum of damages.[53] When a court "implies" a cause of action it does not "create" it, but rather "discovers" it through the judicial exercise of statutory construction.[54] The first step in the analysis requires a determination of what remedies a statutory cause of action were afforded at its enactment. The second step is to examine subsequent amendments to determine whether Congress later altered its initial understanding.

Using this approach, the Court in *Franklin* focused on the amendments to Title IX following the Court's decision in *Cannon v. Univ. of Chi.*[55] In *Cannon*, the Court found that an implied private right of action existed within Title IX. The *Franklin* Court looked to its own past decision for guidance "since Congress was legislating

48. *Franklin* , 503 U.S. at 71 (noting that because the right is implied, it is "hardly surprising that Congress also said nothing about the applicable remedies.")

49. *Id.*

50. *Id.* at 72.

51. *Id.* at 71-72 & n.7 (examining J.I. Case Co. v. Borak, 377 U.S. 426 (1964); Wyandotte Transp. Co. v. U.S., 389 U.S. 191 (1967); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Allen v. State Bd. of Elections, 393 U.S. 544 (1969); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); and Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co., 404 U.S. 6 (1971)).

52. *Id.* at 72.

53. *Id.*

54. *Franklin* , 503 U.S. at 71-72; J.I. Caseco v. Borak, 377 U.S. 426, 430-31 (1964).

55. *Cannon*, 441 U.S. 677.

with full cognizance of that decision."[56] The *Franklin* Court also looked to Congress's enactment of the Civil Rights Remedies Equalization Amendment of 1986[57] ("CRREA") which overruled the Court's decision in *Atascadero State Hospital v. Scanlon*.[58] In *Atascadero* the Supreme Court examined the unamended version of Section 504 of the RA then in effect and found that the RA did not contain a clear statement of Congress's intent to require states receiving federal funds to waive their sovereign immunity as to Section 504 claims.[59] Congress overruled the Eleventh Amendment's application, not only as to Section 504 of the RA, but also as to Title IX, Title VI, the Age Discrimination in Employment Act of 1975, 29 U.S.C. § 621-634 "or any other federal statute prohibiting discrimination by recipients of federal financial assistance."[60] One section of the curative amendment purportedly went beyond overruling *Atascadero* and stated:

> In a suit against a state for a violation of a statute referred to in paragraph (1) remedies, (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in a suit against any public or private entity other than a state.[61]

Although the Court in *Franklin* acknowledged that the above clause "says nothing about the nature of those other available remedies," the Court concluded that "absent any contrary indication in the text or history of [a] statute, we presume Congress enacted the statute with the prevailing traditional rule in mind."[62] Three members of the Court concurred in the result in *Franklin*.[63] Disagreeing with the majority view that any action has a presumption of full remedies available, those in concurrence found that "when rights of action are judicially implied, categorical limitations upon their re-

56. *Franklin*, 503 U.S. at 72.
57. 42 U.S.C. § 2000d-7 (Supp. 1993).
58. 473 U.S. 234 (1985).
59. 473 U.S. at 247.
60. 42 U.S.C. § 2000d-7(a)(1).
61. 42 U.S.C. § 2000d-7(a)(2) (1993).
62. *Franklin*, 503 U.S. at 73.
63. *Id.* at 76 (Scalia, J., Rehnquist, C.J., and Thomas, J. concurring).

medial scope may be judicially implied as well."[64] "Where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[65] The *Franklin* Court noted that this long-standing rule is jurisdictional and permits the exercise of a federal court's power to award appropriate relief in situations where a cause of action exists under the constitutional laws of the United States.[66] Thus, the relevant question is not whether a statute demonstrates Congressional intent to authorize a specific remedy, but whether the statute demonstrates Congressional intent to limit the traditional presumption in favor of any available remedy.[67]

B. Circuit Court Analysis.

Before *Franklin* but after the 1978 amendments to the RA, those circuit courts that initially analyzed the damages issue found an implied cause of action under Section 504.[68] The Fourth Circuit held that the "full panoply" of damages is available under Section 504.[69] The Ninth Circuit reached the same conclusion.[70] The

64. *Franklin*, 503 U.S. at 77 (Scalia, J. concurring).

65. Bell v. Hood, 327 U.S. 678, 684 (1947).

66. *Franklin*, 503 U.S. at 66.

67. *Id.* at 1030; *See also* Hernandez v. City of Hartford, 959 F. Supp. 125 (D. Conn. 1997); Miller v. Spicer, 822 F. Supp. 158, 167 (D. Del. 1993).

68. *See e.g.*, Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980); Camenisch v. University of Texas, 616 F.2d 127 (5th Cir. 1980); NAACP v. Medical Center, Inc., 599 F.2d 1247 (3rd Cir. 1979).

In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 328 (1978), a case decided before the 1978 amendment adding Section 505 to the RA, a majority of the Supreme Court refused to reach the issue of whether there was a private right of action under Title VI. However, in 1979, the Court decided Cannon v. University of Chicago, 441 U.S. 677 (1979). In *Cannon*, the Court observed that a private right of action might exist under Title IX. *Id.* at 705-07. The Court assumed, however, that the beneficiaries of federal assistance come under Title VI, and that a private right of action to satisfy the second objective of Title VI, the termination of the offending discriminatory activity itself by declaration or injunctive relief. *Id.* at 702 n.3; *Bakke*, 438 U.S. at 419 n.28 (Stephens, J. concurring in part and dissenting in part).

69. *See* Pandazides v. Virginia Bd. of Educ., 13 F.3d 823 (4th Cir. 1994).

70. *See* Kling v. Los Angeles, 769 F.2d 532, 534 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 936 (1985). *See also* Great Los Angeles Council of Deafness, Inc. v. Zolen, 812 F.2d 1103 (9th Cir. 1987); Smith v. Barton, 914 F.2d 1330, 1338 (9th Cir. 1990).

Eighth[71], Eleventh[72], and arguably, the Third[73] Circuits have held that the "full spectrum" of remedies is available under Section 504. Nearly every court that has addressed the damages issue following *Franklin* has determined that compensatory damages are available under Section 504.[74]

Initially, a majority of courts held that punitive damages were not available under Section 504.[75] This majority started to change following *Franklin.* However, courts remained split on the issue. Two cases exemplify this split in analysis and result: *Moreno v. Consolidated Rail Corp.*[76] (punitive damages not available) and *Burns-Vidlik v. Chandler*[77] *(punitives damages are available).*

1. The Unavailability of Punitive Damages as Discussed in *Moreno v. Consolidated Rail Corp.*

The Sixth Circuit in *Moreno v. Consolidated Rail Corp.,* addressed the issue of whether punitive damages were available as a remedy under Section 504 of the RA.[78] A starting point for the court's analysis was the recognition that pre-*Franklin* there was virtual unanimity that Section 504 did not allow any recovery of punitive damages.[79] The court noted that prior to the decision in *Franklin,* Congress enacted the Civil Rights Act of 1991,[80] making punitive

71. *See e.g.,* Rogers v. Magnet Cove Pub. Sch., 34 F.3d 642 (8th Cir. 1994).

72. *See e.g.,* Waldrop v. Southern Co. Serv., Inc., 24 F.3d 152 (11th Cir. 1994).

73. *See* W.B. v Matula, 67 F.3d 484 (3rd Cir. 1995).

74. *See e.g.,* Ali v. City of Clearwater, 807 F. Supp. 701, 704-05 (N.D. Fla. 1992); Craft v. Memorial Med. Ctr., Inc., 807 F. Supp. 785, 791 (S.D. Ga. 1992); Doe v. District of Columbia, 796 F. Supp. 559, 571-73 (D. D.C. 1992); Tanberg v. Weld County Sheriff, 787 F. Supp. 970, 972-74 (D. Colo. 1992); Deleo v. City of Stamford, 919 F. Supp. 70 (D. Conn. 1995).

75. *See* Moreno v. Consolidated Rail Corp., 99 F.3d 782, 790 (6th Cir. 1996) (collecting cases); *see also* Americans Disabled for Assessable Pub. Trans. v. Skywest Airlines, Inc., 762 F.Supp. 320 (D. Utah 1991) (finding no punitive damages under Section 504); Doe v. South Eastern Univ., 732 F. Supp. 7 (D. D.C. 1990) (limiting Section 504 to equitable remedies).

76. 99 F.3d 782 (6th Cir. 1996).

77. 980 F. Supp. 1144 (D. Haw. 1997).

78. The Sixth Circuit had already concluded that a private cause of action to redress violations of Section 504 existed by implication. *See e.g.* Hall v. United States Postal Serv., 857 F.2d 1073, 1077-78 (6th Cir. 1988).

79. *Moreno,* 99 F.3d at 790.

80. Pub. L. No. 102-166, 195 Stat. 1071.

damages available, for the first time, under Section 501 of the RA.[81] Section 501 applies to "malicious" or "reckless" discrimination by the government in its role as employer.[82] Punitive damages awarded under Section 501 are subject to a statutory cap of not more than $300,000.00.[83] However, the 1991 Act did not extend the new punitive damage provision to Section 504.

The court in *Moreno* could find no legislative reason for Congress to have considered limiting the availability of punitive damages in 1986 (Civil Rights Equalization Act),[84] 1987 (Civil Rights Restoration Act),[85] and 1991 (Civil Rights Act of 1991) because of prior judicial determinations.[86] The court found that the only inference of congressional intent that could be properly drawn from these enactments was that Congress intended Section 504 remedies to remain *in statu quo* – i.e., no punitive damages.[87]

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81. *Moreno*, 99 F.3d at 790.

82. 29 U.S.C. § 791.

83. *See* 42 U.S.C. § 1981(a). Under Section 505, Title VII remedies apply to Section 501. The new Act also made the punitive damage remedy available under Title VII of the Civil Rights Act of 1964 and the ADA. *See* 42 U.S.C. §§ 12101-12213.

84. The Civil Rights Equalization Act, 42 U.S.C. § 2000d-7(a), makes States subject to Section 504 as well as Title IX, Title VI, and the ADEA to the same extent as private parties.

85. Pub. L. No. 100-259, 102 Stat. 28.

86. *Moreno*, 99 F.3d at 791.

87. *Id.* at 791 n.5. The court observed:

> We note that at the time Congress passed the 1991 Civil Rights Act, the majority view among the Circuits was that a person who had been discriminated against in employment by the federal government could proceed under either Section 504 or 501. [Citations omitted] We must assume that Congress was aware of these decisions. If congress had believed punitive damages were allowed under Section 504, it would have made little sense for Congress to cap punitive damages under Section 501, but leave Section 504 unaltered. A party against whom the federal government had discriminated in employment could have circumvented Congress's intent to limit punitive damages in such cases by pursuing his claim under Section 504 rather than 501. We doubt that Congress would have placed a limit on punitive damages that could so easily be avoided. The prevailing view in the Circuit Courts in 1991 when the Civil Rights Act was passed was that a person who had been discriminated against in employment by the federal government could proceed under either Section 504 or 501. See e.g., *Gardner v. Morris*, 752 F.2d 1271, 1277-78 (8th Cir. 1985); *Smith v. United States Postal Service*, 742 F.2d 257 (6th Cir. 1984); *Treadwell v. Alexander*, 707 F.2d 473, 475 (Eleventh Cir. 1983); *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981).

The court in *Moreno* observed that "[i]t would be highly anomalous to let a plaintiff asserting an implied right of action under Section 504 recover more in punitive damages than could be recovered by plaintiff asserting a statutory remedy created for Section 501."[88]

Next, the court in *Moreno* found that punitive damages were not "appropriate relief" as required by *Franklin* because Congress had chosen other ways to "punish" those in violation of Section 504.[89] As an example, federal spending can be terminated for failure to comply with Section 504.[90] Relying upon the Supreme Court's decision in *Middlesex County Sewerage Authority v. National Sea Clammers Association,*[91] and the so-called "Sea Clammers" doctrine[92]

88. *Moreno*, 99 F.3d at 791. This same analysis could be used through a comparison with the ADA. Punitive damages are not available against a governmental entity under the ADA. *See* 42 U.S.C. § 1981a(b)(1) ("a complaining party may recover punitive damages under this section against respondent (other than a government, a government agency, or political subdivision. . .").

89. *Moreno*, 99 F.3d. at 791.

90. *Id.* Section 505 (29 U.S.C. § 794a) makes available under Section 504 "the remedies, procedures and rights set forth in Title VI of the Civil Rights Act of 1964. . ." Title VI (42 U.S.C. § 2000d-1) directs federal departments and agencies extending "federal financial assistance" to promulgate rules under which funding will be terminated for those entities that discriminate on prohibited grounds. Administrative procedures have been created to terminate federal funding of recipients who fail to comply with Section 504. *See e.g.*, 49 CFR § 27-125 (providing for the "suspension of, or termination of, or refusal to grant or to continue federal financial assistance" to entities that fail to comply with Section 504 under programs administered by the Secretary of Transportation). Instructive is Doe v. Oster River Co-op Sch. Dist., 992 F.Supp 467, 483 (D. N.H. 1997) where the court found that instead of punitive damages, Congress provided a "punitive-like sanction of terminating federal funding."

91. 453 U.S. 1 (1981).

92. In Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981), the Supreme Court held for the first time that "when the remedial devices provided in a particular act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Id.* at 20 (ruling section 1983 action precluded under Maritime Protection, Research and Sanctuaries Act and Federal Water Pollution Control Act, both of which permit private rights of action against "any person"). This doctrine has been criticized. *See* Robert L. Glicksman, *Federal Preemption & Private Legal Remedies for Pollution*, 134 U. PA L. REV. 121, 223 n.135 (1985) (describing the Supreme Court's analysis in *Sea Clammers* as "not fully persuasive"); Myron Rumeld, *No Preclusion of § 1983 Causes of Action by Comprehensive Statutory Remedial Schemes*, 83 COLUM. L. REV. 1183, 1183 (1982) (criticizing the *Sea Clammers* decision as too restrictive); Richard B. Steward & Cass R. Sunstein, *Public Programs & Private Rights*, 95 HARV. L. REV. 1193, 1322 n.463 (1982) (criticizing the *Sea Clammers* decision for barring damages actions that might promote efficiency under a statutory

— "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it"[93] – the court in *Moreno* found that the remedies under Section 504 were sufficiently comprehensive to demonstrate congressional intent to preclude punitive damages as an available remedy.[94]

More significant, the court in *Moreno* observed that the Supreme Court in *Alexander v. Choate*[95] had determined that most discrimination against the handicapped is due to apathy, not animus.[96] The primary objective of Section 504 is the prevention of

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tort approach); Cass R. Sunstein, *Section 1983 & the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394, 395-96 (1982) ("carried to its logical limit, *Sea Clammers* could lead to a rule that the creation of an explicit enforcement mechanism invariably extinguishes the private right of action under § 1983."); Eric H. Zagrans, *Under Color of" What Law: A Reconstructed Model of § 1983 Liability*, 71 VA. L. REV. 499, 598 n.67 (1985) ("*Sea Clammers* represents yet another effort by the court to restrict the scope of 1983 liability in order to limit the number of actions which can be brought in federal court."). It has commonly been called the *Sea Clammers* preclusion doctrine.

In a federal system of government the supremacy clause of the Constitution, *see* U.S. CONST., art. VI, necessarily has required development of a doctrine of preemption of state laws wherever necessary to permit the proper functioning of federal enactments. The proper scope of federal preemption is one of the most important often-litigated issues across the entire spectrum of litigation. *See e.g.*, El Al Israeli Airlines Limited v. Tsui Yuan Tseng, 525 U.S. 155 (1999) (airline tort litigation); Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) (medical devices product liability litigation); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) (tobacco litigation); Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988) (automobile products liability litigation). The problem with the *Sea Clammers* doctrine is that a very detailed subsequent enactment by Congress places earlier statutes at risk of "preclusion," should a court deem such a result warranted. Prior to *Sea Clammers* no court could impede enforcement of a duly enacted federal statute short of taking the considered step of declaring the statute unconstitutional. Under *Sea Clammers*, enforcement of older federal statutes may be precluded by newer, more detailed statutes all without reference to specific legislative history. Remember that the decision to "preclude" enforcement of an earlier statute is made upon a review of the comprehensiveness of the latest statutory scheme on its face. No review of legislative history is required or, apparently, encouraged. Some commentators have labeled this as grading and "imperial judiciary."

93. *See also* Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19 (1979).

94. *Moreno*, 99 F.3d at 791-92.

95. 469 U.S. 287 (1985).

96. *Id.* at 296. Allegations of discrimination against the handicapped ordinarily encompass activity other than discriminatory treatment caused by prejudices. Commentators have identified four types of discriminatory barriers that handicapped persons may confront when seeking employment: (1) intentional discrimination for reasons of social bias; (2) neutral standards with disparate impact; (3) surmountable barriers to the impaired; and (4) insurmountable barriers to the impaired. Mark E. Martin, *Accommodating the Handicapped: The Meaning of Discrimination Under Section 504 of*

discrimination against the handicapped which "was perceived by Congress to be most often the product, not of individual animus, but rather of thoughtlessness and indifference – or benign neglect."[97] Punitive damages are not necessary to punish "thoughtlessness."[98] Finally, the court in *Moreno*, without significant elaboration, concluded that allowing punitive damages would expand application of Section 504 liability beyond all "manageable bounds."[99]

2. The Availability of Punitive Damages as Discussed in *Burns-Vidlik v. Chandler.*

The district court in *Burns-Vidlik v. Chandler*, observed that the task of determining whether punitive damages were permitted under Section 504, with an implied cause of action as its foundation, "resemble[d] the plight of a prodigal son without a home."[100] The court held that punitive damages were available under Section 504.[101] The court supported this holding on two principle grounds: (1) the general rule that courts had the power to award all appropriate relief, including punitive damages, in a cause of action brought pursuant to a federal statute;[102] and (2) a clear message from Congress in the CRREA which abrogated states' Eleventh Amendment immunity in Section 504 cases.[103]

The court acknowledged its authority under *Franklin* to presume the availability of the "full panoply" of remedies for Section

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the Rehabilitation Act, 55 N.Y.U. L. REV. 881, 883-84 (1980); *see also*, Prewitt v. U. S. Postal Serv., 662 F.2d 292, 305, n.19 (5th Cir. 1981).

97. *Choate*, 469 U.S. at 295.

98. *Moreno*, 99 F.3d at 791. Additionally, the *Moreno* court expressed its hesitancy in finding punitive damages as a remedy for Section 504 violations because of the pronouncements of the Supreme Court regarding the constitutionality of punitive damages. *Id.* The Supreme Court has struggled with the constitutionality of punitive damage awards in recent years. *See e.g.*, BMW of North Am., Inc. v. Gore, 517 U.S. 559 (1996); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 454 (1993); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991).

99. *Moreno*, 99 F.3d at 791.

100. *Burns-Vidlik v. Chandler*, 980 F. Supp. 1144 (D.C. Hawaii 1997).

101. *Id.* at 1152.

102. *Id.*

103. *Id.* The court bolstered its holding by observing that the majority of courts which had considered the issue found that punitive damages were available in Section 504 actions. *Id.* at 1147.

504 unless Congress has expressly indicated otherwise.[104] A common understanding of the phrase "full panoply" involved *all* possible remedies, including punitive damages.[105]

Next, the court in *Burns-Vidlik* focused on whether the phrase "appropriate relief" used by the court in *Franklin*[106] encompassed punitive damages.[107] The *Burns-Vidlik* court found that "appropriate relief" as a phrase could not be subject to blanket rules such as "no punitive damages" because what may be appropriate was fact dependent and had to be determined on a case by case basis.[108]

Relying upon *Franklin*, the court in *Burns-Vidlik* held that Section 504 gives courts the power to award punitive damages if: (1) there is no clear direction to the contrary by Congress; and (2) such relief would be appropriate.[109] The court concluded that Congress had not given a "clear direction" that it did not want courts to award punitive damages to litigants in Section 504 cases.[110] To support this observation, the court noted that in 1985 the Supreme Court decided that money damages for a Section 504 violation

104. *Franklin*, 503 U.S. at 66.

105. *Burns-Vidlik*, 980 F. Supp at 1147-48. The court also concluded that the phrase "full spectrum" of remedies included punitive damages. *Id.* at 1148. This understanding was expressed by the Supreme Court in *International Bhd of Elec. Workers v. Foust*, 442 U.S. 42, 53 (1979) (J. Brennan, concurring) (noting that the general rule that permits courts to award the "full panoply" of remedies and stating that "punitive damages, being one of these tools, thus are presumptively available for use in an appropriate case."). In previous decisions, the court had indicated that punitive damages might be awarded in appropriate circumstances in order to punish violations of constitutional rights. *See* Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978).

106. *See Franklin*, 503 U.S. at 66.

107. *Burns-Vidlik*, 980 F. Supp. at 1148.

108. *Id.* at 1148. *See* Reich v. Cambridge Port Air Sys., Inc., 26 F.3d 1187, 1190-91 (1st Cir. 1994) ("appropriate relief" includes punitive damages); Waid v. Merrill Area Pub. Sch., 91 F.3d 857 (7th Cir. 1996) (same).

As part of its analysis, the court in *Burns-Vidlik* criticized the Sixth Circuit's analysis of "appropriate relief" in *Moreno*. The *Moreno* court found that punitive damages were not necessary to combat thoughtlessness. 99 F.3d at 792. The court in *Burns-Vidlik* found no causal connection between the assumption that discrimination against the handicapped occurred mostly out of thoughtlessness and the conclusion that the availability of punitive damages would make Section 504 unmanageable. 980 F. Supp. at 1151. The *Burns-Vidlik* court observed that punitive damages would not be awarded in case involving thoughtlessness and, therefore, the court's concern in *Moreno* was unjustified. *Id.*

109. *Burns-Vidlik*, 980 F. Supp. at 1149.

110. *Id.* at 1150.

could not be collected against a state because of the Eleventh Amendment.[111] In an atypical show of unity, in the following year, Congress passed the CRREA[112] which: (1) abrogated states' Eleventh Amendment immunity in Section 504 actions; and (2) held that litigants shall have the same remedies against the state that they would have against a private party.[113] The court in *Burns-Vidlik* saw this process as a clear message from Congress that money damages were vital to the workings of Section 504.[114]

Finally, the court in *Burns-Vidlik* found the analysis of the *Moreno* court unpersuasive. Addressing the apparent anomalous situation under Section 501 where punitive damages are allowed and Section 504 where they are not expressly allowed,[115] the court noted that the cap on punitive damages in Section 501 did not apply to actions brought against the state.[116] Any inconsistency between Section 501 and Section 504 is "akin to the norm, and is not anomalous."[117] As an example, under the CRREA, Congress explicitly abrogated sovereign immunity in a Section 504 case but did not abrogate sovereign immunity under Section 501.[118]

Dismissing the *Moreno* court's statement that other means existed to punish violators of Section 504, the court in *Burns-Vidlik* indicated that such options do "nothing for the person who suffered the indignities of discrimination. Thus, the court held that

111. Referencing Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

112. 42 U.S.C. § 2000d-7.

113. *Burns-Vidlik*, 980 F. Supp. at 1150.

114. *Id.* A contrary "clear direction" was found by the *Moreno* court. The court in *Burns-Vidlik* challenged this finding by the *Moreno* court. Specifically, the court in *Burns-Vidlik* disputed the conclusion that because punitive damages under Section 504 or Title VI "had never been awarded" before 1992, Congress's failure to remedy the situation was the equivalent of sending a "clear direction" that punitive damages should not be allowed under Section 504. *Moreno*, 99 F.3d at 789-90. Some of the authorities relied upon by the *Moreno* court were unclear on the issue. *See e.g.*, Fitzgerald v. Green Valley Area Educ. Agency, 589 F. Supp. 1130, 1138 (D.C. Iowa 1984) ("although punitive damages are presumably available under Section 504, the court finds that the assessment of such damages against defendant is not justified under the facts of this case."); Nelson v. Thornburgh, 567 F. Supp. 369, 383 (E.D. Pa. 1983) (full panoply of remedies under Section 504 are available but could not be imposed against the state because of the Eleventh Amendment).

115. *See* Moreno, 99 F.3d at 791-92.

116. *Burns-Vidlik*, 980 F. Supp. at 1150.

117. *Id.* at 1151.

118. *Id.*

punitive damages should not be rejected because of other options already available, but should be seen as another weapon in the fight against discrimination."[119]

III. PUNITIVE DAMAGES AND DISABILITY LEGISLATION.

In June 2002, the Supreme Court resolved the damages issue in *Barnes v. Gorman*,[120] and held that punitive damages are not "appropriate relief" under the ADA and RA.[121] In reaching this result, the Court clarified, generally, the scope of remedies that had created a split amongst the circuit courts. First, the Court observed that Section 202 of the ADA and Section 504 of the RA are enforceable through private causes of action.[122] Accordingly, the Court found that the remedies for violations of these sections of the ADA and RA are "coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of

119. *Burns-Vidlik*, 980 F. Supp. at 1150.

120. 536 U.S. 181 (2002).

121. *Id.* at 189 ("Because punitive damages may not be awarded in private suits brought under Title VI of the 1964 Civil Rights Act, it follows that they may not be awarded in suits brought under Section 202 of the ADA and Section 504 of the Rehabilitation Act.").

Punitive damages had not been awarded under Section 504 and were widely believed to be unavailable under that section. *See e.g.*, Cortes v. Bd. of Governors, 766 F. Supp. 623, 626 (N.D. Ill. 1991) ("there is insufficient reason to imply a punitive damage remedy when Congress has given no indication whatsoever that it intended to authorize such relief"); Glanz v. Vernick, 750 F. Supp. 39, 45 (D. Mass. 1990) ("it is quite unlikely . . . that Congress intended Section 504 to provide a windfall to plaintiffs in the form of punitive damages"); Martin v. Cardinal Glennon Mem'l Hosp. for Children, 599 F.Supp. 284 (E.D. Mont. 1984) ("punitive damages are clearly not available in an action under Section 504"); Gelman v. Dep't. of Educ., 544 F. Supp. 651, 654 (D. Co. 1982) (compensatory, but not punitive damages are available under Section 504). It was not until 1994 that a court awarded punitive damages under Section 504. *See* Kedra v. Nazareth Hosp., 868 F. Supp. 733 (E.D. Pa. 1994). Indeed, neither where punitive damages thought to be available under Title VI of the Civil Rights Act of 1964, the remedies of which had been made available under Section 504. *See e.g.*, Robinson v. English Dep't of the Univ. of Pa., 1988 WL 120738 at *6 (E.D. Pa. 1988) ("the prevailing view expressed in case law is that a private action under Title VI does not entitle a prevailing plaintiff to general or punitive damages"); Singh v. Superintending Sch. Comm'n of the City of Portland, 601 F. Supp. 865, 867 (D. Maine 1985) (allowing general, but not punitive damages); Rendon v. Utah State Dep't of Employment Sec. Job Serv., 454 F. Supp. 534 (D. Utah 1978) (no cause of action for general or punitive damages).

122. *Gorman*, 536 U.S. at 184.

1964."[123] Second, the Court implicitly acknowledged that "the traditional presumption in favor of *any appropriate relief* for violation of a federal right" was applicable in the ADA and RA context.[124] Having set this foundation, the issue before the Court in *Gorman* was the proper scope of "appropriate relief" under the ADA and the RA.[125]

Analyzing Title VI as a springboard for resolving the scope of remedies issue under the ADA and RA, the Court in *Gorman* began its analysis by indicating that Title VI invokes Congress's Spending Clause powers by placing conditions on the grant of federal funds.[126] Title VI and other Spending Clause legislation is "in the nature of a contract" because "in return for federal funds the [recipients] agree to comply with federally imposed conditions."[127] Building on this premise, the Court stated:

> Just as a valid contract requires offer and acceptance of its terms, "the legitimacy of Congress's power to legislate under the spending power. . .rests on whether the [recipient] voluntarily and knowingly accepts the terms of the "contract".[128]

Under this contract-law analogy, the Court found that Congress must unambiguously state each of the conditions that it has placed on the grant of federal monies.[129]

Under the contract-law approach, a recipient of federal grants "may be held liable to third-party beneficiaries for intentional con-

123. *Gorman*, 536 U.S. at 184. Although Title VI does not explicitly provide for a private right of action, such a right of action had previously been held to be implied. *See Cannon*, 441 U.S. at 703. The court in *Gorman* found that Congress acknowledged this implied right of action in amendments to the statute, leaving it "beyond dispute that private individuals may sue to enforce" Title VI. 122 S.Ct. at 2100 (citing *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001)).

124. *See Gorman*, 536 U.S. at 184 (the court reiterated the application of this traditional presumption in Title VI cases and, therefore, by direct implication to ADA and RA cases. Prior to *Gorman* the courts had relied on *Franklin*).

125. *Id.*

126. *Gorman*, 536 U.S. at 184 (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (Title IX)).

127. *Gorman*, 536 U.S. at 186 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984)).

128. *Id.*

129. *Id. See Pennhurst*, 451 U.S. at 17; *see also, Davis*, 526 U.S. at 640; Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998).

duct that violates the clear terms of the relevant statute."[130] However, the recipient will not be held liable for failing to comply with vague and imprecise statutory language describing legislative objectives.[131] The Court in *Gorman* found this contract-law analogy applicable in determining the scope of damages remedies.[132]

The contractual nature of the ADA and RA "has implications for [a court's] construction of the scope of available remedies."[133] One such implication, according to the Court in *Gorman*, "is that a remedy is 'appropriate relief . . . only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature.'"[134] The Court in *Gorman* explained that "[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for breach of contract."[135] Where a statute contains no express remedies, a recipient of federal funds could be "subject to suit for compensatory damages[136] and injunction,[137] [which are] forms of relief traditionally available in suits for breach of contract."[138] However, "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract."[139]

The Court in *Gorman* concluded that because an implied punitive damages provision could not reasonably be found in Title VI, it logically followed that punitive damages could not be awarded in suits brought under Section 202 of the ADA and Section 504 of the RA.[140] The Court stated:

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130. *Gorman*, 536 U.S. at 187.

131. *Id.*

132. *Id.*

133. *Id.* (quoting *Gebser*, 524 U.S. 274 at 287).

134. *Gorman*, 536 U.S. at 187 (quoting *Franklin* 503 U.S. 60 at 73) (emphasis in original).

135. *Gorman*, 536 U.S. at 187.

136. *Id.* (citing *Franklin*, 503 U.S. at 76).

137. *Gorman*, 536 U.S. at 187; (citing *Cannon*, 441 U.S. at 711-712).

138. *Gorman*, 536 U.S. at 187 (citing RESTATEMENT (SECOND) OF CONTRACTS § 357 (1981), 3 S. WILLISTON, LAW OF CONTRACTS §§ 1445-1450 (1920) and J. POMEROY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS 1-5 (1879)).

139. *Gorman*, 536 U.S. at 187 (citing 3 E. FARNSWORTH, CONTRACTS § 12.8, 192-201 (2d ed. 1998), RESTATEMENT (SECOND) OF CONTRACTS § 355, and 1 T. SEDGWICK, MEASURE OF DAMAGES § 370 (8th ed. 1891)).

140. *Id.* at 189.

> Our conclusion is consistent with the "well settled" rule that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." (citations omitted) When a federal-funds recipient violates conditions of Spending Clause legislation, the wrong done is the failure to provide what the contractual obligation requires; and that wrong is "made good" when the recipient *compensates* the federal government or a third-party beneficiary . . . for the loss caused by that failure. . ..Punitive damages are not compensatory, and are therefore not embraced within the rule described in *Bell.*[141]

The Court in *Gorman* observed that reasonably implied contractual terms are those that "comport with community standards of fairness."[142] The Court then noted that under some legislative enactments, compensatory damages alone "might well exceed a recipient's level of federal funding."[143] Therefore, allowing "punitive damages on top of that could well be disastrous."[144] Indeed, this contract-law approach was a marked departure from the lower Courts' varying approaches to the scope of remedies available under the RA.[145]

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141. *Gorman*, 536 U.S. at 189 (citing *Bell v. Hood* 327 U.S. 678, 684 (1946)).

142. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d.)

143. *Gorman*, 536 U.S. at 188 (citing *Gebser*, 524 U.S. at 290).

144. *Gorman*, 536 U.S. at 188. ("Not only is it doubtful that funding recipients would have agreed to exposure to such unorthodox and indeterminate liability; it is doubtful whether they would even have *accepted the funding* if punitive damages was a required condition. . . . [I]t can hardly be said that community standards of fairness support such an implication.")

145. *Newport v. Facts Concerts, Inc.*, 453 U.S. 247 (1981).

Because the *Gorman* Court based its decision on a contract-law approach, it did not address the traditional presumption against imposition of punitive damages on government entities as addressed in the seminal *Newport* case. *Id.*at 261. Applying *Newport* to the facts of *Gorman* may not have garnered a similar result. In concluding that punitive damages were not available against a municipality, the Court in *Newport* noted that municipal immunity from punitive damages was well established at common law by 1871. *Id.* at 263-64. Futher, the court stated that Congress never intended on abolishing municipality immunity when enacting 42 U.S.C. § 1983. *Id.* at 263-264.

However, in enacting the Civil Rights Act of 1991, Congress specifically provided that punitive damages were not available against a government, a government agency or political subdivision for Section 501 violations and was silent on Section 504 violations. 42 U.S.C.S. § 1981a(b)(1). Thus, Congress clearly indicated that it had no intent in

If Congress disagrees with *Gorman*'s holding that punitive damages are not available under the ADA and RA, it can rectify the situation by amending both the ADA and RA so that there is an unequivocal waiver of state sovereign immunity from punitive damages. Congress's failure to amend these twin statutes may be interpreted by courts as acquiescing to the *Gorman* decision regarding the scope of available remedies.[146]

IV. THE RA AND ELEVENTH AMENDMENT IMMUNITY.

A. *Abrogating Eleventh Amendment Immunity.*

Congress enacted the Eleventh Amendment[147] to delineate the scope of sovereign immunity reserved by the states.[148] The Eleventh Amendment guarantees that "non-consenting states may not

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abolishing state sovereign immunity as to punitive damages in the context of the Civil Rights Act of 1964. As explained by the *Gorman* court, because the remedies under the ADA and RA are coextensive to Title VI of the Civil Rights Act, it stands to reason based upon a *Newport* analysis that punitive damages are not available against a state or its political subdivisions for ADA and RA violations because Congress similarly did not intend on abrogating a state's sovereign immunity from punitive damages by its vague references to appropriate remedies. *See Gorman*, 536 U.S. at 187.

146. Similarly, Congress can, if it so chooses, override the *Garrett* decision by reaffirming the enactment of both the ADA and the RA with specific findings that states have particularly discriminated against the disabled. Whether there is evidence of such state discrimination is a subject of another discussion reserved for a later date.

147. The Eleventh 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." U.S. CONST., amend. XI.

148. *Alden v. Maine*, 527 U.S. 706, 720 (1999) (referring to the history of the amendment as described in 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 96 (rev. ed. 1926)). The United States is founded upon the concept of dual sovereignty. Gregory v. Ashcroft, 501 U.S. 452, 457 (1991). States hold sovereignty concurrently with the federal government subject only to those limitations imposed by the supremacy clause of the United States Constitution. Tafflin v.Levitt, 493 U.S. 455, 458 (1990).

Congress did not explicitly memorialize the full breadth of the sovereign immunity retained by the states when the United States Constitution was ratified. *Alden*, 527 U.S. at 723 (1999). Instead, in ratifying the Eleventh Amendment, Congress chose to address only the specific historical concerns it faced in 1793 when the United States Supreme Court erroneously held that Article III of the Constitution authorized citizens of one state to sue another state in Federal Court. *Id* at 719-20. Consequently, the Supreme Court has concluded that the language contained in the Eleventh Amendment is only one particular exemplification of the states' sovereign immunity. Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991) ("[W]e have understood the Elev-

be sued by private individuals in federal court."[149] Thus, states are immune from suits brought in federal court by their own citizens as well as citizens of other states.[150]

Congress may lawfully abrogate state sovereign immunity pursuant to its enforcement powers provided for in Section 5 of the Fourteenth Amendment, but must: (1) act "pursuant to a valid exercise of power"; and (2) "unequivocally express its intent to abrogate the immunity."[151] The Supreme Court in *City of Boerne v. Flores*[152] formulated the "congruence and proportionality" test to determine whether Congress's exercise of its enforcement power was remedial and appropriate or definitional and not appropriate.[153] The Court stated that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[154]

Applying the "congruency and proportionality test," the Supreme Court recently held in *Board of Trustees of the University of Alabama v. Garrett*[155] that suits against states by citizens seeking damages under the ADA are barred by the Eleventh Amendment.[156] The Court concluded that the enactment of the ADA was

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enth Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms").

149. Board of Tr. of the Univ. of Alabama v. Garrett, 531 U.S. 356, 363 (2001). *See also, Alden*, 527 U.S. 706 (1999) (applying Eleventh Amendment to lawsuits by private individuals in state courts based upon federal causes of action); *Blatchford*, 501 U.S. 775 (1991) (applying Eleventh Amendment to lawsuits by Indian tribes); Principality of Monaco v. Mississippi, 292 U.S. 313 (1934) (applying Eleventh Amendment to lawsuits by foreign nations); Ex Parte New York, 256 U.S. 490 (1921) (applying Eleventh Amendment to admiralty proceedings); Smith v. Reeves, 178 U.S. 436 (1900) (applying Eleventh Amendment to lawsuits by federal corporations); Hans v. Louisiana, 134 U.S. 1 (1890) (applying Eleventh Amendment to lawsuits by citizens of the state under federal-question jurisdiction).

150. Edelman v. Jordan, 415 U.S. 651, 662-6 (1974). *See also, Garrett*, 531 U.S. 356; Kimel v. Florida Bd. of Regents, 528 U.S. 62, 72–73 (2000); Hans v. Louisiana, 134 U.S. 1, 15 (1890).

151. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996) (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)).

152. 521 U.S. 507 (1997).

153. *Id.* at 520.

154. *Id.* at 520, 530 ("The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.")

155. 531 U.S. 356 (2001).

156. *Garrett*, 531 U.S. at 358-59.

not a proper exercise of Congress's authority under Section 5 of the Fourteenth Amendment and, therefore, Congress did not properly abrogate the states' Eleventh Amendment immunity under the ADA.[157]

The *Garrett* Court first began its analysis by observing that the disabled are an unprotected class under the Equal Protection Clause of the Fourteenth Amendment[158] and that any legislation affecting such individuals would receive only the minimum "rational basis" review applicable to general, social and economic legislation.[159] "[I]f there is a rational relationship between the disparity of treatment and some legitimate governmental purpose," then the selected classification "cannot run afoul of the Equal Protection clause."[160]

The *Garrett* Court next examined whether the congressional record demonstrated a history and pattern of unconstitutional employment discrimination by the states against the disabled.[161] The Court concluded that the congressional record supporting the enactment of the ADA failed to identify a pattern of irrational state discrimination and employment practices targeted against the dis-

157. *Garrett*, 531 U.S. at 358-59.

158. The Equal Protection Clause provides that "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protections of the law." U.S. CONST., amend. XIV, § 1.

159. *Garrett*, 531 U.S. at 363; *See* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-42 (1985) (Rationale basis review is the least demanding review for the courts. Courts apply a different level of scrutiny based upon whether the state classification involves a fundamental right or is based upon a suspect or quasi-suspect classification. Suspect classifications include classifications based upon race, national origin, and, for some purposes, alienage. Courts will utilize a higher standard of review ("strict scrutiny") when the state classification is based upon a suspect classification. The state classification will only be upheld under the strict scrutiny standard if the classification is necessary to promote a compelling governmental interest. Courts will utilize a middle level standard of review when the state classification is based upon a quasi-suspect classification; for example, gender, mental retardation, or illegitimacy. The state classification will only be upheld if the means chosen by the state is substantially related to an important governmental objective. The ordinary standard of review applies when the state classification is not based upon a "suspect" or "quasi-suspect" classification and does not impair a fundamental right. Under this ordinary standard of review, a court will uphold the classification if it bears a rational relationship to a legitimate governmental objection.).

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

161. *Id.*

abled.[162] The *Garret* Court noted that Congress only made a "general finding" that "historically, society has tended to isolate and separate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem."[163] Because Congress assembled only minimal evidence of unconstitutional state discrimination in employment against the disabled, the Court concluded that the rights and remedies created by the ADA were greater than those justified by application of the rational basis standard.[164] Consequently, the *Garrett* Court held that enactment of the ADA was not an appropriate exercise of congressional authority under Section 5 of the Fourteenth Amendment and that Congress's abrogation of states' Eleventh Amendment immunity was ineffective.[165]

The Supreme Court's analysis in *Garrett* should also apply to Section 504 because the ADA and the RA are twin statutes.[166] The RA's congressional record is significantly smaller and contains substantially less evidence and fewer findings than the ADA's congressional record.[167] Therefore, the same legislative findings and analysis that supported the Supreme Court's conclusion in *Garrett* should also support a similar conclusion that Congress exceeded its authority in abrogating the states' Eleventh Amendment sovereign immunity under the RA.[168]

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162. Garrett, 531 U.S. at 366. *See also, Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 89 (2000) ("Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.").

163. 531 U.S. at 369 (citing 42 U.S.C. § 12101(a)(2)). The congressional record revealed that "some 43,000,000 Americans have one or more physical or mental disabilities," and that states employed more than 4,500,000 Americans when the ADA was enacted. *Id.* at 370.

164. *Id.* at 373-4.

165. *Id.*

166. *See* Maull v. Division of State Police, 141 F. Supp.2d 463, 471-72 (D. Del. 2001) (declining to dismiss plaintiff's Section 504 claims under *Garrett*, because *Garrett* did not address the RA).

167. Pugliese v. Arizona Dep't of Health and Human Services, 147 F. Supp. 2d 985, 988-89.

168. Lower courts applying the *Garrett* analysis have concluded that congressional abrogation of the Eleventh Amendment under the RA was ineffective. *See, e.g.*, Crocker v. Lewiston Police Dept., 2001 WL 114977 (D. ME. Feb. 9, 2001) ("the substantive standards for determining liability under the ADA [and] the Rehabilitation Act . . . are the

B. *The Spending Clause and the RA.*

Notwithstanding the *Garrett* Court's conclusion that Congress can not directly abrogate a state's sovereign immunity pursuant to its Section 5 powers, an interesting conundrum exits: can Congress create a waiver of sovereign immunity through the Spending Clause after *Garrett*?[169] The Spending Clause gives Congress the power to "lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and welfare of the United States."[170] Congress is under no obligation to use its Spending Clause power to disburse funds to the states. Thus, disbursements of federal funds to states are considered gifts.[171] In addition, Congress may attach conditions on the receipt of federal funds and may require that a state waive its Eleventh Amendment immunity when the state participates in federal spending programs.[172]

However, Congress does not have unlimited use of its Spending Clause power.[173] Courts have imposed at least four general restrictions.[174] First, the exercise Congress's Spending Clause power

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same and . . . case law interpreting either federal statute is applicable to [both]."); Allison v. Department of Corrections, 94 F.3d 494, 497 (8th Cir. 1996) ("because the same basic standards and definitions are used under both Acts, cases interpreting either are applicable and interchangeable for purposes of our discussion."). *See also,* Ortiz v. Fajardo, 133 F. Supp.2d 143, 150 n.6 (D.P.R. 2001) (holding that "plaintiff's claims under the Rehabilitation Act, although barred under motion to dismiss standard because of lack of exhaustion of administrative remedies, on the merits would have suffered the same treatment of dismissal as to monetary damages based on the cases of *Board of Trustees of the University of Alabama v. Garrett,* [citation omitted] and *Kimel v. Board of Regents,* 528 U.S. 62, (2000)"); Koslow v. Pennsylvania, 158 F. Supp.2d 539 (E.D. Pa. May 31, 2001) *as amended by order* (June 5, 2001), *reconsideration denied,* (July 31, 2001) ("Congress did not validly abrogate the state's Eleventh Amendment immunity under the RA – Congress failed to identify a pattern of discrimination by the states which violates the Fourteenth Amendment and failed to establish that the remedy imposed by the RA is congruent and proportional to the targeted violation.").

169. For a more in-depth discussion of this issue: see generally, Steven Plitt, Valerie Fasolo, & Daniel Maldonado, *Board of Trustees of the University of Alabama v. Garrett: Is Constitutional Authority for Sale and Is State Sovereign Immunity the Purchase Price?* 13 GEO. MASON. U. CIV. RTS. L.J. 151 (Spring 2003).

170. U.S. CONST., art. I, § 8, cl. 1.

171. College Savings Bank. v. Fla. Prepaid Postsec. Ed. Exp. Bd., 527 U.S. 666, 686-87 (1999).

172. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985).

173. *Pennhurst,* 451 U.S. at 17 & n.13 .

174. Helvering v. Davis, 301 U.S. 619, 640-41 (1937); United States v. Butler, 297 U.S. 1, 65 (1936).

must be in pursuit of "the general welfare."[175] Second, Congress must unambiguously condition a state's receipt of federal funds in order for the state to exercise its choice knowingly; cognizant of the consequences of its participation in a federal spending program.[176] Third, a condition imposed on the receipt of federal funds may be illegitimate if the condition is unrelated "to the federal interest in particular national projects or programs."[177] Finally, other provisions in the Constitution may provide an independent bar to conditioning the receipt of federal funds.[178]

The Spending Clause could unreasonably expand congressional power while correspondingly diminishing the states' sovereignty.[179] Justice O'Connor expressed such concerns in *South Dakota v. Dole*:

> If the spending power is to be limited only by Congress's notion of the general welfare, the reality, given the vast financial resources of the federal government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the state's jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed." This, of course, . . . was not the Framer's plan and it is not the meaning of the Spending Clause.[180]

Because "financial inducements" offered by Congress can be so coercive as to cross the point where pressure turns the condition into compulsion, scholars have posited that the use of the Spending

175. *Butler*, 297 U.S. 1, 65.

176. *Halderman*, 451 U.S. at 17.

177. Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion); Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958) ("[T]he Federal Government may establish and impose reasonable conditions relevant to federal interest in the project and to the over-all objectives thereof").

178. Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985); Buckley v. Valeo, 424 U.S. 1, 91 (1976); King v. Smith, 392 U.S. 309, 333, n.34 (1968); South Dakota v. Dole, 483 U.S. 203, 207-08 (1987).

179. New York v. United States, 505 U.S. 144, 159 (1992) ("As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted.").

180. *Dole*, 483 U.S. at 217 (O'Connor, J. dissenting) (quoting *Butler*, 297 U.S. at 78).

Clause power is limited to imposing constitutional conditions.[181] Consequently, Congress should not be able to impose a condition on the receipt of federal funds that either: (1) directly violates a constitutional right or (2) disrupts concepts of federalism.[182] This idea is known as the doctrine of "unconstitutional conditions."[183] If Congress imposes a condition upon the receipt of federal funds that violates the doctrine of "unconstitutional conditions," then the condition is unconstitutional regardless of the state's consent.[184]

As previously discussed, the Supreme Court in *Garrett* concluded that Congress exceeded its authority under the Fourteenth Amendment when it abrogated the states' Eleventh Amendment immunity under the ADA. However, the Supreme Court has not addressed the issue of whether a state waives its right to assert Eleventh Amendment immunity by accepting federal funds in the context of the RA. Because the ADA has no federal funding requirement, the *Garrett* Court did not need to address the issue of whether Congress can achieve a waiver indirectly through its Spending Clause power when Congress cannot constitutionally achieve it directly.[185] Lower courts, however, are divided on the issue.[186]

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181. *See* Albert J. Rosenthal, *Conditional Federal Spending & the Constitution*, 39 STAN. L. REV. 1103 (1987).

182. *See Dole*, 483 U.S. at 207.

183. Koslow v.Pennsylvania, 302 F.3d 161, 174 (3rd Cir. 2002) ("The 'unconstitutional conditions' doctrine is based on the proposition that government incentives may be inherently coercive.").

184. *Id.*

185. The United States Supreme Court has recognized that Congress has used the coercive power of the purse to limit state's historic powers. City of Columbus v. Ours Garage & Wreckerservice, Inc., 536 U.S. 424, 449 at n.2 (2002) ("But in any event, a siphoning off of the States' 'historic powers' to delegate has equally been achieved, whether it has come about through the coercion of deprivation of Spending Clause funds or through other means.")

186. *Compare*, Jim C. v. United States, 235 F.3d 1079, 1081 (8th Cir. 2000) (holding that Arkansas Board of Education waived immunity to Section 504 claims and affirming that Congress may require states to waive sovereign immunity in exchange for receiving federal funds); *and* In Re Innes, 184 F.3d 1275, 1281 (10th Cir. 1999) ("[A] waiver may be found in a state's acceptance of federal funds with conditions attached.") *with* Garcia v. S.U.N.Y. Health Serv. Ctr., 280 F.3d 98, 114 (2nd Cir. 2001) (S.U.N.Y. did not knowingly waive its sovereign immunity against suit under the RA when it accepted federal funds); *and* Koslow v. Commonwealth of Pennsylvania, 158 F. Supp.2d 539, 543-44 (E.D. Pa. 2001) (employee could not show that state employer validly waived its Eleventh Amendment immunity from suit under RA, even though employer received federal funds); *and* New Holland Village Condo. v. Destaso Enters. Ltd., 139 F. Supp.2d

Conditioning the receipt of federal funds on a state's waiver of its Eleventh Amendment immunity disrupts concepts of federalism because it unconstitutionally diminishes or impairs a state's sovereign powers. Federalism would become a hodge-podge quilt of unequal states that surrender their state sovereignty incrementally and differentially depending upon the federal monies they accept as a result of their dire financial straits.[187] As such, a conditioned waiver of a state's sovereign immunity is an unconstitutional condition and is unenforceable regardless of whether the state consents by accepting federal funds.

V. PURSUING RA VIOLATIONS AS A SECTION 1983 CLAIM.

In addition to bringing a private action for violations of Section 504, a victim of discrimination may be able to bring a claim under 42 U.S.C. § 1983 (2003) for a violation of the RA. Section 1983 provides a remedy for violations of rights secured by the United States Constitution or federal statutes, if the violations were committed under color of state law.[188] As a general rule, a Section 1983 claim can be predicated solely on a violation of a federal stat-

499 (S.D.N.Y. 2001) ("there is little, if any, room under this stringent standard . . . for the sort of 'constructive' waiver of immunity that plaintiff asks this court to apply based on [defendant's] receipt of federal funds under the Act.").

187. *See, e.g.*, Coyle v. Smith, 221 U.S. 559, 580 (1911) (holding that constitutional equality of the states is essential to the harmonious operation of the dual sovereignty system of the United States).

188. 42 U.S.C. § 1983 (2003) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The United States Supreme Court has held that there were three aims in enacting Section 1983: (1) to override certain state laws; (2) to provide a federal remedy when state law was inadequate; and (3) to provide a federal remedy when the state remedy, though adequate in theory was not available in practice. Monroe v. Pape, 365 U.S. 167, 173-5 (1961).

Section 1983 itself does not create substantive rights, but provides a "procedure of redress for the deprivation of rights established elsewhere." Thomas v. Roach, 165 F.3d 137, 142 (2d Cir. 1999). To establish a claim under Section 1983, a plaintiff must prove that: (1) the defendant deprived him of a right secured by the Constitution and laws of the United States and (2) the defendant deprived him of this constitutional right under color of State law. Adickes v. Kress & Co., 398 U.S. 144, 150 (1970).

ute.[189] However, there are two exceptions to the general rule.[190] The first exception provides that a Section 1983 claim based solely on violations of a federal statute is unavailable where Congress has foreclosed a Section 1983 remedy through a sufficiently comprehensive remedial and enforcement apparatus in the underlying federal statute.[191] A Section 1983 claim is also unavailable where the statute at issue is "the kind that created enforceable 'rights' under Section 1983."[192] Federal courts look to the statute's remedial measures to determine whether Congress intended to foreclose the Section 1983 remedy for rights created by a federal statute.[193] If a federal statute has extensive and expressed remedies, then it is likely that "Congress intended. . .to supplant any remedy that would otherwise be available under Section 1983."[194]

As discussed above, the Ninth Circuit has held that Section 504 has limited remedies for victims of discrimination and does not contain a remedial structure sufficiently comprehensive to evince a congressional intent to preclude Section 1983 claims.[195] Indeed, several courts in addition to the Ninth Circuit, have held that a

189. Maine v. Thiboutot, 448 U.S. 1, 4-8 (1980).

190. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19 (1981).

191. *Id.* at 19-20 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981)).

192. *Id.*

193. *See, e.g.*, Lakoski v. James, 66 F.3d 751, 754 (5th Cir. 1995); Alexander v. Chicago Park Dist., 773 F.2d 850, 856 (7th Cir. 1985) ("Since Title VI provides its own remedial scheme, we hold that private actions based on Title VI may not be brought under § 1983.").

194. *Middlesex*, 453 U.S. at 21. Some Circuit Courts, however, have declined to find that other similar statutes preclude a Section 1983 claim when the Section 1983 claim is based directly on a constitutional violation, and not a statutory violation. *See, e.g., Discovery House, Inc. v. Consolidated City of Indianapolis*, 319 F.3d 277 (7th Cir. 2003) (holding that ADA and RA did not preclude Section 1983 claim based upon a equal protection violation).

195. *See* Smith v. Barton, 914 F.2d 1330, 1335 (9th Cir. 1990) (holding the RA did not preclude Section 1983 claim based upon violation of First Amendment). *See also*, Philipp v. Carey, 517 F. Supp. 513, 520 (N.D.N.Y. 1981)(noting that Section 504 "confers substantive rights but provides no exclusive remedies"); Conlon v. City of Long Beach, 676 F. Supp. 1289, 1298 (E.D.N.Y. 1987)("§ 504 [is] not so comprehensive as to '[leave] no room for additional private remedies under § 1983.'" (citing *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418 (1987))).

claimant can bring both a Section 504 claim and a Section 1983 claim.[196] Other courts have held to the contrary.[197]

196. *See* Moore v. Warwick Public School Dist. No. 29, 794 F.2d 322 (8th Cir. 1986) (suggesting that claims can be brought under Section 504 and Section 1983); Lutz v. Weld County School Dist. No. 6, 784 F.2d 340, 341 (10th Cir. 1986) (noting that claims were brought under both provisions); Pushkin v. Regents of Univ. of Colorado, 658 F.2d 1372, 1382 (10th Cir. 1981) (permitting claims under both Section 504 and Section 1983); Rothschild v. Grottenthaler, 716 F. Supp. 796, 801 (S.D.N.Y. 1989) (holding that RA is not a comprehensive statute, but leaves room for additional private remedies under section 1983) (citations omitted); Shuttleworth v. Broward County, 639 F. Supp. 654, 659-60 (S.D. Fla. 1986) (holding that RA did not preclude Section 1983 claim).

In contrast, federal courts have held that Title VII's comprehensive remedial scheme precludes a Section 1983 claim based upon violations of Title VII. Day v. Wayne County Bd. of Auditors, 749 F.2d 1199, 1204-05 (6th Cir. 1984) ("However, we do not read this language as expressing an intent that where employer conduct violates only Title VII, which created new rights and remedies for public employees, an aggrieved employee may sue under both Title VII and § 1983."); Alexander v. Chicago Park Dist., 773 F.2d 850, 856 (7th Cir. 1985) ("Since Title VI provides its own remedial scheme, we hold that private actions based on Title VI may not be brought under § 1983."); Allen v. Denver Pub. Sch. Bd., 928 F.2d 978, 982 (10th Cir.1991) ("[S]ection 1983 cannot be used to assert the violation of rights created only by Title VII.").

The Fifth Circuit Court in *Lakowski* not only reviewed the remedial scheme of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, but also Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, in determining whether Congress intended to preclude a Section 1983 claim based upon a Title IX violation. Lakoski v. James, 66 F.3d 751 (5th Cir. 1995). Although the Fifth Circuit held that Title IX does not provide a remedial scheme sufficiently comprehensive to indicate by itself a congressional intent to foreclose a Section 1983 based upon Title IX violations, the court held that to focus exclusively on Title IX's remedies would ignore the larger federal scheme and the remedies provided by Title VII. *Id.* at 755. Instead, the court concluded that Title VII is the exclusive remedy for violations of the rights created by Title VII itself. *Id.* (relying upon *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979) (in which the court held that Title VII preempts § 1985 actions alleging violations of Title VII rights)). The court went on to hold that, in enacting Title IX, Congress intended to bolster the enforcement mechanism of Title VII's prohibition against sex discrimination in federally funded educational institutions, but that Congress did not intend Title IX to create a mechanism by which individuals could circumvent Title VII remedies. *Id.* at 757. Because there is compelling evidence that Title IX prohibits the same employment discrimination practices proscribed by Title VII, the Fifth Circuit held that discrimination victims may not assert Title IX violations either directly or derivatively through Section 1983. *Id.*

The reasoning in *Lawoski* stands in stark contrast to the Ninth Circuit court's reasoning in *Smith.* Smith v. Barton, 914 F.2d 1330. *Smith* involved a Section 1983 claim arising out of a First Amendment violation (right of association) and not a Section 504 based claim. *Id.* The Eighth Circuit has addressed a similar issue of whether the remedies created in the Americans with Disabilities Act combined with the remedies available in the RA preclude a Section 1983 claim based upon violations of those statutes. Davis v. Francis Howell Sch. Dist., 104 F.3d 204, 206 (8th Cir. 1997) ("Furthermore, the

VI. THE AVAILABILITY OF JURY TRIALS FOR RA VIOLATIONS.

Section 504 does not delineate the procedures involved in bringing an RA claim. As an example, Section 504 is silent with regard to the availability of a jury trial. An analysis of the statute itself must first be made to determine whether the statute expresses an intent to grant a jury trial.[198] An analysis of the statute's legislative history is also determined.[199] Several courts have held that the right to a jury trial does not explicitly exist under Section 504.[200] However, the "remedies, procedures, and rights" available under

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comprehensive enforcement mechanisms provided under § 504 and the ADA suggest Congress did not intend violations of those statutes to be also cognizable under § 1983.").

197. *Davis*, 104 F.3d at 206.

198. *See* Tull v. United States, 481 U.S. 412, 417 n.3 (1987)("Before initiating the inquiry into the applicability of the Seventh Amendment, '[w]e recognize, of course, the 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.'") (quoting Curtis v. Loether, 415 U.S. 189, 192 n.6 (1974)); *See generally* Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1285-86 (7th Cir. 1977).

199. Waldrop v. Southern Co. Serv., Inc., 24 F.3d 152, 157 (11th Cir. 1994).

200. Federal courts interpreting Section 504 have held that it does not provide a right to trial by jury. *See e.g., Smith*, 914 F.2d at 1336; Rivera Flores v. Puerto Rico Tele. Co., 776 F. Supp. 61, 71 (D.P.R. 1991); Jenkins v. Skinner, 771 F. Supp. 133, 135-36 (E.D. Va. 1991); Ahonen v. Frank, 769 F. Supp. 298, 299 (E.D. Wis. 1991); Shuttleworth v. Broward County, 639 F. Supp. 654, 661 (S.D. Fla. 1986). *But see*, Rivera-Flores v. Puerto Rico Tele. Co., 64 F.3d 742 (1st Cir. 1995)(noting right to jury trial in RA claim).

In *Lehman v. Nakshian*, 453 U.S. 156 (1981), the Supreme Court addressed a similar situation under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2003) ("ADEA"). Section 7(c) of the ADEA authorized lawsuits for age discrimination against private employers and also expressly provided the right to a jury trial. In 1974, Congress amended the ADEA and expanded its reach by adding state and local governments as potential defendants to Section 7(c). Congress subjected the state and local governments to the same enforcement procedures as private employers. Congress also broadened the ADEA by proscribing age discrimination by the federal government. Congress enacted Section 15 of the ADEA which was a distinct statutory scheme that did not expressly include the right to a jury trial. The difference in Congress's treatment of the federal government led to the Supreme Court's conclusion that Congress intended that enforcement against the federal government be distinct from enforcement against private employers and state and local governments. Specifically, the Supreme Court held that persons suing the federal government would not have the right to a jury trial. 453 U.S. at 162-68.

Title VI apply to violations of Section 504. Title VI also does not contain an express grant of a jury trial.[201]

The analysis of whether Section 504 permits a right to jury trial does not end, however, with a determination that Section 504 or Title VI do not expressly provide for jury trials. The next step in the analysis is to determine whether a jury trial is required by the Constitution itself. The Seventh Amendment guarantees a jury trial "in Suits at common law, where the value and controversy shall exceed twenty dollars . . . ."[202] The Seventh Amendment guarantees the right to a jury trial to all lawsuits where legal rights are involved, whether at common law or arising under federal legislation.[203]

In *Tull v. United States*, the Supreme Court observed that the Seventh Amendment also requires a jury trial in those actions that are "analogous to Suits at common law."[204] The *Tull* Court observed: "First, we compare the statutory action to eighteenth century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature."[205] A private action under Section 504 had been characterized as a type of tort or contract action for which suits at law were available, if the proper type of damages were requested.[206] The Supreme Court in

201. Doe v. Regional 13 Med. Health – Mental Retardation Comm'n, 704 F.2d 1402, 1407 n.3 (5th Cir. 1983) ("the remedies . . . and rights available under Title VI, like those under Title VII, are essentially equitable in nature and the 'procedures' available do not include juries.").

202. U.S. CONST., amend. VII.

203. *See, e.g.*, Curtis v. Loether, 415 U.S. 189, 194 (1974).

204. 481 U.S. at 417. A plaintiff is not entitled to a jury trial if defendants are sued in their official capacity as representatives of the United States. Crawford v. Runyon, 79 F.3d 743, 744 (8th Cir. 1996); *Lehman*, 453 U.S. at 160-61 (holding that Seventh Amendment right to jury trial does not apply to lawsuits against the federal government and holding that plaintiff has right to jury trial involving the federal government "only where Congress has affirmatively and unambiguously granted that right by statute").

205. *Curtis*, 481 U.S. at 417-18.

206. *See e.g., Smith*, 914 F.2d at 1337. The Ninth Circuit in *Smith* noted that there were no discrimination actions at common law and that a Section 504 claim is closely analogous either to an 18th-century tort action or an action brought to enforce an express or implied employment contract. Both 18th-century actions could have been brought in either courts of law or courts of equity, depending on the relief sought. *Id.* at 1337 (citing Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 MO. L. REV. 855, 858-62 (1983) (providing historical background of the employment-at-will doctrine, and the evolution of employee protection)). *See also Cur-*

Tull held that categorizing the relief sought is "more important" than finding a precisely analogous common law cause of action in determining whether the Seventh Amendment gurarantees a jury trial.[207]

"Money damages are the classic form of *legal* relief."[208] Equitable relief generally refers to injunctions, writs of mandamus, and writs of restitution.[209] Not all awards for monetary damages constitute legal relief.[210] The primary exception to the general rule that monetary damages are legal in nature are restitutionary damages, which are considered equitable in nature.[211] Courts originally considered back pay a form of restitution and, therefore, an equitable remedy.[212] The Supreme Court's recent trend, however, is to consider back pay a legal remedy.[213]

Therefore, if a plaintiff is seeking compensatory damages, the right to a jury trial arises from the Seventh Amendment and not Section 504 because the relief sought is legal in nature.[214] If a plaintiff is seeking only equitable relief, the right to a jury trial is not

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tis, 415 U.S. at 196 n.10 ("An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress.").

207. *Curtis*, 481 U.S. at 421.

208. Mertens v. Hewitt Assoc., 508 U.S. 248, 255 (1993) (citing DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 1.1 at 3 (1973)) (emphasis in original).

209. *Id.* at 258.

210. *Id.* Courts liberally construe whether a remedy is legal in nature. *Waldrop*, 24 F.3d at 157 (citing *Granfinanciera, S. A. v. Nordberg*, 492 U.S. 33, 49 n.7 (1989)).

211. *Waldrop*, 24 F.3d at 157. Restitution is as an equitable remedy designed to cure unjust enrichment. *See* RESTATEMENT OF RESTITUTION general scope note at 1 (1937) (rep. 1962); DOBBS, *supra* note 206, § 1.1, at 1-2.

212. *Waldrop*, 24 F.3d at 157 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-19 (1975), for proposition that Supreme Court characterized back pay awarded under Title VII as equitable in context of assessing whether judge erred in refusing to award such relief).

213. *Id.* (citing Wooddell v. IBEW, 502 U.S. 93 (1991), for proposition that Supreme Court characterized back pay as compensatory damages at law). *See also* DOBBS, *supra* note 206, § 2.6, at 69 n. 18 and § 12.25, at 924-27 (1973) (noting that back pay "is precisely the claim available as damages to any discharged employee" and discussing back pay as a legal remedy); 1 ARTHUR G. SEDGWICK & JOSEPH H. BEALE, A TREATISE ON THE MEASURE OF DAMAGES § 3, at 3 (1920) (noting that "[e]quity . . . gives specific relief by decreeing the very thing to be done which was agreed to be done. . . . But, as a general rule, it refrains from awarding pecuniary reparation for damage sustained.").

214. *Smith*, 914 F.2d at 1338.

available.[215] In addition, a jury trial is unavailable for equitable relief even in a lawsuit seeking monetary damages.[216]

VII. THE APPLICABLE STATUTE OF LIMITATIONS FOR RA VIOLATIONS.

A. Statue of Limitations Based Upon Forum State's Personal Injury Statute.

Section 504, like several civil rights statutes, does not set forth any applicable statute of limitations.[217] 42 U.S.C. § 1988(a) provides for the selection of an appropriate common-law statute of limitations which is most applicable to the federal action.[218] Section 1988 encompasses "a three-step process" in determining the statute of limitations applicable to civil rights claims.[219] First, courts must look to the laws of the United States "so far as such laws are suitable to carry [the civil and criminal civil rights statutes] into effect."[220] Second, if no suitable federal rule exists, then courts must consider application of state "common law, as modified and changed by the constitution and statutes" of the forum state.[221] Third, in asserting

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215. *Smith*, 914 F.2d at 1338.

216. *Id. But see Cortes*, 766 F. Supp. at 626 (right to jury trial under Seventh Amendment available even if plaintiff is seeking compensatory damages as well as equitable relief for intentional discrimination).

217. *See* Wilson v. Garcia, 471 U.S. 261, 266 (1985) (noting that Congress's failure to enact federal legislation with statute of limitations is commonplace).

218. 42 U.S.C. § 1988(a) provides in relevant part:

> The jurisdiction in civil and criminal matters conferred on the district courts. . . for the protection of all persons in the United States in their civil rights . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the States wherein the court having jurisdiction of such civil . . . case is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

219. *Wilson*, 471 U.S. at 267.

220. Burnett v. Grattan, 468 U.S. 42, 47-48 (1984). The Fourth Circuit Court of Appeals has held that 28 U.S.C. § 1658, the general federal statute of limitations, is not applicable to a Section 504 claim. Wolsky v. Medical College of Hampton Roads, 1 F.3d 222, 223 (4th Cir. 1993).

221. *Burnett*, 468 U.S. at 47-48.

the federal interest as predominant, courts can apply state law only if it is not "inconsistent with the Constitution and laws of the United States."[222]

In addressing this "three-step process" in a Section 1983 action, the Supreme Court held that the broad purposes underlying Section 1983 and the variety of claims encompassed under it closely resembled tort actions for the recovery of personal injuries.[223] The Supreme Court also held that "[t]he federal interests in uniformity, certainty, and the minimization of unnecessary litigation" require the selection of a single statute of limitations from each state to govern all Section 1983 claims.[224] The Supreme Court in *Wilson* upheld the Tenth Circuit's application of Section 1988 in determining that the forum's state statute of limitations governing personal injuries and injuries to reputation applied to a Section 1983 claim.[225]

Section 504 is an anti-discrimination statute similar to Section 1983.[226] In applying the "three-step process" contained in Section 1988 to Section 504 claims, lower courts have also applied the forum state's personal injury statute of limitations because Section 504 claims concern injuries to individuals, and are analogous to personal injury claims.[227] When the forum state has enacted a

222. Burnett, 468 U.S. at 47-48.

223. *Wilson*, 471 U.S. at 276. The Supreme Court also applied this rationale to Section 1981 claims. Goodman v. Lukens Steel Co., 482 U.S. 656, 660 (1987).

224. *Wilson*, 471 U.S. at 275.

225. *Id.* at 279. Courts have long held that the most closely analogous state statute of limitations will apply to determine the timeliness of claims made under statutes to which no prescribed limitation period exists. *See e.g.*, Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); Morse v. University of Vt., 973 F.2d 122, 125 (2nd Cir. 1992). As a general principle, the state statute of limitations applicable to personal injury actions is utilized. Kirk v. Cromvich, 629 F.2d 404, 405 (5th Cir. 1980); Piquard v. City of East Peoria, 887 F. Supp. 1106 (C.D. Ill. 1995); Noel v. Cornell Univ. Med. College, 853 F. Supp. 93 (S.D.N.Y. 1994). However, federal law determines accrual of the cause of action. Rubin v. O'Karen, 621 F.2d 114, 115 (5th Cir. 1980); Jackson v. Nicoletti, 875 F. Supp. 1107, 1109 (E.D. Pa. 1994); Long v. Board of Educ. of City of Phila., 812 F. Supp. 525, 531 (E.D. Pa.), *aff'd without opinion*, 8 F.3d 811 (3rd Cir. 1993).

226. Alexopulos v. San Francisco Unified Sch. Dist., 817 F.2d 551, 554 (9th Cir. 1987) (Section 504 is a "civil rights statute . . . closely analogous to section 1983."); *Morse*, 973 F.2d at 127 ("Like § 1983, § 504 may also be described as 'conferring a general remedy for injuries to personal rights.'") (quoting *Wilson*, 471 U.S. at 278).

227. *See, e.g.*, Everett v. Cobb County Sch. Dist., 138 F.3d 1407 (11th Cir. 1998); Southerland v. Hardaway Management Co., Inc., 41 F.3d 250 (6th Cir. 1994); Baker v. Board of Regents of State of Kansas, 991 F.2d 628, 631 (10th Cir. 1993); Bush v. Com-

counterpart to the RA, the statute of limitations of the forum's state counterpart, and not the personal injury statute, is the most analogous and, therefore, the most appropriate limitations period.[228]

Where a forum state's statute of limitations is borrowed, then the forum state's rules for tolling the statute are also borrowed.[229] For example, when a lawsuit alleges discrimination on grounds of a mental illness, the traditional rule that the mental illness tolls a statute of limitations applies only if the illness in fact prevents the claimant from managing his affairs and thus from understanding his legal rights and acting upon them.[230]

B. Statute of Limitations Based Upon the ADA's Administrative Requirements.

An interesting issue related to the appropriate statute of limitation arises because the ADA imposes an administrative filing requirement as a prerequisite to pursuing claims privately, but the RA does not.[231] A claimant alleging a violation of the ADA must file a

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monwealth Edison Co., 990 F.2d 928 (7th Cir. 1993); Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980, 983 (5th Cir. 1992); *Morse*, 973 F.2d at 127; Hall v. Knott County Bd. of Educ., 941 F.2d 402, 409-10 (6th Cir. 1991).

228. Wolsky v. Medical College of Hampton Roads, 1 F.3d 222, 224 (4th Cir. 1993) (applying analogous Virginia state statute modeled after RA for statute of limitations period and not personal injury statute). The District Court in *Wolsky* looked to the other circuits that had addressed the question and found that they had applied the local personal injury statute of limitations. Wolsky v. Easterm Virginia Med. Auth., 795 F. Supp. 171 (E.D.Va. 1992). In those cases, however, either the states in which the actions arose did not have parallel state statutes prohibiting discrimination on the basis of handicap or the statutes did not provide a limitations period so that the more general personal injury statute was the most closely analogous statute from which to borrow. *Id.* at 174. The circuit court in *Wolsky* agreed that the analytic process brought them to the conclusion that a RA claim is essentially a personal injury action in statutory form, but because Virginia had clearly enacted a parallel state statute and provided a statute of limitations for it, the court decided that the Virginia Act would be the most appropriate limitation. 1 F.3d at 224.

229. *See* Board of Regents v. Tomanio, 446 U.S. 478, 485 (1980) ("'[B]orrowing' [of statutes of limitations] logically included rules of tolling. . . .").

230. Miller v. Runyon, 77 F.3d 189, 191 (7th Cir. 1996); Lawson v. Glover, 957 F.2d 801, 805 (11th Cir. 1987); Helton v. Clements, 832 F.2d 332, 336 (5th Cir. 1987); Dautremont v. Broadlawns Hospital, 827 F.2d 291, 296 (8th Cir. 1987); Lopez v. Citibank, N.A., 808 F.2d 905, 906-07 (1st Cir. 1987); Langner v. Simpson, 533 N.W.2d 511, 523 (Iowa 1995).

231. *See* 42 U.S.C. § 2000(e)-5(e)(1). This statute "specifies with precision" the prerequisites that must be met before a private lawsuit can be filed. Alexander v. Gardner-

charge within the statutory time period and serve notice upon the person against whom the charge is made. Where a state agency has authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency has 300 days within which to file a charge with the Equal Employment Opportunity Commission ("EEOC") regarding the employment practice. In those states that do not have a state agency with concurrent employment responsibility, the charge must be filed within 180 days. In a state having an entity authorized to grant or seek relief regarding the unlawful discriminatory practice, an employee who initially files a grievance with that state agency must file the charge with the EEOC within 300 days of the employment practice.[232] In other states, the charge must be filed within 180 days.[233] Thus, a party must file a charge within either 180 or 300 days of the date that a discrete or discriminatory act "occurred" or lose the ability to recover for it.[234] There is a second administrative time barrier set forth in 42 U.S.C. § 2000(e)-5(f)(1). In order to bring a claim pursuant to the ADA, a plaintiff must file suit in district court within 90 days of receipt of his or her notice of right to sue from the EEOC. This 90 day requirement is mandatory and jurisdictional.[235] If the aggrieved party does not file an action within this prescribed time period, federal courts have no power to entertain the action.[236] In the absence of a recognized equitable consideration, the court cannot extend the limitation period by

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Denver Co., 415 U.S. 36, 47 (1974). The ADA incorporates the procedural requirements of Title 7. *See* 42 U.S.C. § 12117(a) which provides:

> The powers, remedies, and procedures set forth in § . . . 2000(e)-5 . . . of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability and violation of any provision of this chapter, or regulations promulgated under § 12116 of this title, concerning employment.

232. 42 U.S.C. § 2000(e)-5(e)(1).

233. *Id.*

234. *Morgan*, 536 U.S. at 110.

235. Mitchell v. Los Angeles Cmty Coll. Dist., 861 F.2d 198, 202 (9th Cir. 1988) (citation omitted); Millard v. La Pointe's Fashion Store, Inc., 736 F.2d 501, 502-03 (9th Cir. 1984).

236. *Millard*, 736 F.2d at 503; Scholar v. Pacific Bell, 963 F.2d 264, 266-67 (9th Cir. 1992).

even one day.[237] The 90 day period begins to run when the Right to Sue Notice is received.[238]

In *McCullough v. Branch Banking & Trust Co.*,[239] the Fourth Circuit Court of Appeals addressed the statute of limitations issue based upon the State of North Carolina's counterpart to the RA, and upheld the application of a 180-day statute of limitations based upon the state counterpart statutory scheme, concluding that it was not inconsistent with the federal policies behind the RA. The court noted that a short statute of limitations is not uncommon among federal civil rights statutes and serves the goals of prompt notification and swift resolution of the conflict.[240] The court also noted that both the Civil Rights Act of 1991[241] and the ADA require claimants to file a charge with the EEOC within 180 days of the alleged unlawful employment practice. The court stated that when a plaintiff fails to file a complaint with the EEOC within the 180 days, the claim is time-barred. Hence, the court reasoned that the filing requirement acts as a 180-day statute of limitations for many plaintiffs seeking relief under either the Civil Rights Act of 1991 or the

237. Wong v. Bon Marche, 508 F.2d 1249 (9th Cir. 1975) (complaint filed by pro se plaintiff one day after the 90 day period expired was properly dismissed by the District Court – the requirement for filing a complaint within 90 days is jurisdictional.); Peete v. American Standard Graphic, 885 F.2d 331 (6th Cir. 1989); Harvey v. City of New Bern Police Dep't, 813 F.2d 652 (4th Cir. 1987); Johnson v. Altech Specialties Steele Corp., 731 F.2d 143, 146 (2nd Cir. 1984) (holding that the 90-day requirement should be strictly enforced and not extended "by even one day."); Rice v. New England College, 676 F.2d 9, 11 (1st Cir. 1982); Melendez v. Singer-Friden Corp., 529 F.2d 321 (10th Cir. 1976) (dismissal proper where complaint filed 91 days after receipt of Notice of Right to Sue letter).

238. *See, e.g.*, Bell v. Eagle Motor Lines, 693 F.2d 1086 (11th Cir. 1982); *Harvey*, 813 F.2d at 653-54 (90 day period began when the EEOC's Right to Sue letter was received by claimant's wife even though claimant did not learn of letter until six days later); Espinoza v. Missouri Pac. R.R. Co., 754 F.2d 1247, 1248-50 (5th Cir. 1985) (90 day period began when EEOC's Right to Sue letter was received by claimant's wife even though claimant did not learn about the letter until he returned from out-of-town eight days later); Law v. Hercules, Inc., 713 F.2d 691, 692-93 (11th Cir. 1983) (90 day period began when claimant's 17-year-old son signed a return receipt for EEOC's Right to Sue letter in spite of claimant's contention he did not see the letter until one or two days later).

239. 35 F.3d 127 (4th Cir. 1994).

240. *Id.* at 131.

241. 42 U.S.C. § 2000e-5(e)(1).

ADA.[242] The court concluded that it was unlikely that Congress, while enacting a 180-day time-bar for an ADA claim, would not approve of the same limitations period under the RA.[243]

Although based upon the application of an analogous state statute, the Fourth Circuit Court's reasoning in *McCullough* is a more sound and accurate application of Congress's intent in enacting Section 1988. The first step in determining what is the applicable statute of limitations period is to look at the laws of the United States so far as such laws are suitable to carry the civil rights statutes into effect.[244] A court must look to the laws of the United States before it even looks to the laws of the forum state for an analogous state statute of limitations period. Because the RA and the ADA are twin statutes with identical purposes, it stands to reason that the administrative filing deadlines that apply to the ADA should apply to a private cause of action arising out of a Section 504 violation.[245] Courts should not have to look for an analogous state statute because the requirements and deadlines in the ADA are suitable to carry out the purposes of the RA. A contrary result may lead to inconsistencies between these twin civil rights legislations.

For example, assume that an employee works for a private entity that not only receives federal funding, but is also subject to the ADA. If the private entity discriminates against the employee because of the employee's disability, then the employee may sue the private entity for an RA violation and an ADA violation. As discussed in Section I *supra*, the ADA claim is subject to administrative prerequisites, but the RA claim is not. If the employee failed to file a complaint with the EEOC within the 180-day or 300-day requirement and/or failed to sue within the 90-day period after receiving the Notice of the Right to Sue letter, then the employee's ADA claim is time-barred. However, assuming that the statute of limitations period for a personal injury claim in the forum state has not

242. *McCullough*, 35 F.3d at 131 (citing *Jarrell v. U. S. Postal Serv.*, 753 F.2d 1088, 1091 (D.C. Cir. 1985) (holding that the EEOC filing requirements "are not jurisdictional prerequisites to suit, but are more 'like a statute of limitations'")).

243. *Id.* at 132.

244. *Burnett*, 468 U.S. at 47-48 (internal citations and quotations omitted).

245. *Cf.*, Allison v. Dep't of Corrections, 94 F.3d 494, 497 (8th Cir. 1996) (noting that the ADA has no federal funding requirement, but it is otherwise similar in substance to the RA, and "cases interpreting either are applicable and interchangeable").

expired, the employee still has a viable RA claim against the employer. Because the remedies available for an RA violation are nearly identical to the remedies available under ADA, the employee essentially has not sacrificed by failing to timely file a complaint or by otherwise following the administrative procedures for an ADA violation. Consequently, under this scenario, a claimant can avoid the administrative procedures of the EEOC and the accompanying administrative deadlines merely by pursuing an RA claim rather than an ADA claim.

Although this scenario may be favorable to a claimant who has inadvertently missed the administrative deadlines or who was unaware of the administrative prerequisites in the first instance, it does not allow the EEOC, as the agency with specialized knowledge and expertise in the area, to effectively eliminate unlawful employment practices before the necessity of instituting civil actions.[246] In enacting civil rights legislation, Congress placed great emphasis upon private settlement and the elimination of discriminatory practices without litigation.[247] Congress also believed that voluntary compliance with civil rights statutes is preferable to litigation.[248] If courts adopt a statute of limitations period for an RA violation based upon the forum state's personal injury statute, then not only do RA claimants have broader access to the courts than ADA claimants, ADA claimants who pursue a comparable RA claim can essentially circumvent the EEOC's mandate to voluntarily eliminate employment discrimination.

C. Continuing Violation and the Statue of Limitations.

Recently, the Supreme Court addressed these administrative sublimits in *National Railroad Passenger Corp. v. Morgan.*[249] In *Morgan,* plaintiff Morgan sued the National Railroad Passenger Corp.

246. *Cf.*, Edwards v. North Am. Rockwell Corp., 291 F. Supp. 199, 203 (C.D. Cal. 1968) ("The primary purpose in setting up the EEOC was to establish a method of eliminating unlawful employment practices, where actually found to exist, through conference, conciliation, and persuasion without the necessity of instituting civil actions."); Fekete v. United States Steel Corp., 424 F.2d 331, 334 (3rd Cir. 1970) (primary role of the EEOC is to eliminate unlawful employment practices by informal means leading to voluntary compliance).

247. Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968).

248. Dent v. St. Louis-San Francisco Railway Co., 406 F.2d 399, 402 (5th Cir. 1969).

249. 536 U.S. 101 (2002).

(Amtrak) under Title VII of the Civil Rights Act of 1964. Morgan alleged that Amtrak maintained a racially hostile work environment throughout his employment; that he was personally discriminated against; and that he was retaliated against.[250]

Morgan filed his EEOC charge, claiming discrimination and retaliation, on February 27, 1995.[251] His complaint stated that he had been "consistently harassed and disciplined more harshly than other employees on account of his race."[252] A "Notice of Right to Sue" letter was issued by the EEOC, and Morgan filed a lawsuit within 90 days of his receiving the Right to Sue letter.[253] He alleged that some of the discriminatory acts had occurred within 300 days of the EEOC filing, while many of the discriminatory acts occurred prior to that time period.[254]

The district court granted summary judgment in favor of Amtrak, excluding from Morgan's suit those incidents of discrimination that had taken place more than 300 days before the EEOC charge was filed.[255] The district court applied the test utilized by the Seventh Circuit Court of Appeals in *Galloway v. General Motors Service Parts Operations*:[256] a "[p]laintiff may not base [the] suit on conduct that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on that conduct, as in a case in which the conduct could constitute, or be recognized, as actionable harassment only in light of events that occurred later, within the period of the statute of limitations". Applying its "continuing violation doctrine,"[257] the Ninth Circuit Court of Appeals reversed.[258] Under the "continuing violation doctrine" courts will "'consider conduct that would ordinarily be barred' as long as the untimely incidents represent an

250. *Morgan*, 536 U.S. at 104.

251. *Id.* Morgan also cross-filed a charge with the California Department of Fair Employment and Housing. *Id.* This extended the 180 day statutory time period to 300 days.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. 78 F.3d 1164, 1167 (7th Cir. 1996).

257. *See* Anderson v. Reno, 190 F.3d 930 (9th Cir. 1999).

258. *Morgan v. Amtrack*, 232 F.3d 1008, 1014 (2000).

ongoing unlawful employment practice."[259] The "continuing violation doctrine" permits plaintiffs to provide evidence that a continuing violation has occurred which then permits a recovery for claims filed outside the statutory time period in one of two situations: 1) where there are a series of related acts (a serial violation), one or more of which are within the limitations period;[260] or 2) where there is a systemic discriminatory policy or practice (a systemic violation) that has been followed, in part, within the limitations period.[261] According to the Ninth Circuit, for a serial violation to occur, the alleged acts of discrimination occurring before the limitations period must be sufficiently similar to those that occurred during the limitations period.[262]

The Supreme Court granted *certiorari*[263] and ultimately reversed in part and affirmed in part the Ninth Circuit's decision.[264] The Court began its analysis by identifying the critical questions to be analyzed: "What constitutes an 'unlawful employment practice,'"[265] and when has that practice "occurred"?[266] Taking the "easier question" first, the Court held that discrete retaliatory, or discriminatory acts, occur on the day in which each act happens.[267] Therefore, a charge must be filed either within 180 or 300 days of the date of the discrete act in order to be actionable.[268] Where discrete acts are themselves time barred, they are not actionable "even when they are related to acts alleged in timely filed charges."[269] Similarly, the discrete acts that fall within the statutory

259. *Morgan*, 232 F.3d at 1014. (quoting *Anderson*, 190 F.3d 930).

260. *Id.* at 1015-16.

261. *Id.*

262. *Id.*

263. National R.R. Passenger Corp. v. Morgan, 533 U.S. 927 (2001).

264. *Morgan*, 536 U.S. at 106-07.

265. The term "practice" applies to a discrete act or single "occurrence" even when it is connected to other acts. *Morgan*, 563 U.S. at 111.

266. *Id.* at 112.

267. *Id.* Discrete acts include, for example, termination, failure to promote, denial of transfer or refusal to hire. *Id.* at 114.

268. *Id.* at 111.

269. *Id.* at 114. ("the existence of past acts and the employees prior knowledge of their occurrence, however, does not bar employees from filing charges about related discrete acts so long as the acts are independently discriminatory and charges addressing those acts are themselves timely filed. Nor does the statute bar an employee from using the prior acts as background evidence in support of a timely claim.").

time period do not make acts falling outside the time period actionable.[270]

The Court in *Morgan* next analyzed plaintiff's hostile work environment claim. The Court began this analysis with the following observation:

> Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct [citation omitted], the "unlawful employment practice therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. [Citations omitted] Such claims are based on the cumulative effect of individual acts.[271]

Thus, hostile work environment claims are comprised of a series of separate acts collectively constituting one unlawful employment practice.[272] The Court in *Morgan* held that a charge alleging a hostile work environment will not be time barred if all acts constituting the claim are part of the same unlawful discriminatory practice and if at least one act falls within the filing period.[273]

Many courts have recognized a hostile work environment claim under the RA and the ADA.[274] The Supreme Court's holding in *Morgan*, therefore, is applicable to a hostile working environment claim brought under the RA regardless of what statute of limitations period applies. In addition, although not discussed in detail in this Article, the authors believe that the analysis in *Morgan* may

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270. *Morgan*, 563 U.S. at 11 (citing *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977)).

271. *Id.* at 113.

272. *Id.* at 114; *see also* 42 U.S.C. § 2000e-5(e)(1).

273. *Morgan*, 563 U.S. at 114.

274. Soledad v. United States Dep't of Treasury, 304 F.3d 500 (5th Cir. 2002) (discussing without deciding disabilities-based hostile work environment claim under RA); Flowers v. Southern Reg'l Physician Serv., Inc., 247 F.3d 229 (5th Cir. 2001) (recognizing right to disabilities based hostile work environment claim under ADA); Keever v. City of Middletown, 145 F.3d 809, 813 (6th Cir. 1998) (ADA); Cody v. CIGNA Healthcare, 139 F.3d 595, 598 (8th Cir. 1998) (ADA).

also apply to an RA or ADA violation based upon the employer's failure to engage, in good faith, in the interactive process.[275]

VIII. INDIVIDUAL LIABILITY FOR RA VIOLATIONS.

When deciding whether a public official is immune from liability for acts performed in his official capacity, qualified immunity is the general rule and absolute immunity is the exceptional case.[276] An official claiming immunity has the burden of demonstrating that public policy requires absolute immunity.[277] The presence of immunity depends on the nature of the function that the official

275. When an employee needs a reasonable accommodation for a disability, it is the employee's responsibility to request that some accommodation be made. Once the employee makes the request for an accommodation, the parties must engage in an "interactive process" in order to identify the "precise limitations" due to the disability and to determine an appropriate reasonable accommodation. The "interactive process" requires: (1) direct communication between the employee and the employer to explore in good faith the possible accommodations; (2) consideration of the employee's request; and (3) offering an accommodation that is reasonable and effective. 42 U.S.C. § 12117(a); Delaware State Coll. v. Ricks, 449 U.S. 250, 256 (1980); *Morgan*, 536 U.S. 101; Zivkovic v. Southern California Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002). Once an accommodation has been properly requested, the responsibility for fashioning a reasonable accommodation is shared between the employer and the employee. Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir. 1996); Beck v. Univ. of Wisconsin Bd. of Regents, 75 F.3d 1130, 1135, 1137 (7th Cir. 1996). A party that obstructs or delays the interactive process is not acting in good faith. *Beck*, 75 F.3d at 1135. An employer can only be held liable for failure to provide a reasonable accommodation when the employer bears the responsibility for the breakdown of the interactive process. *Id.*; *see also*, Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278, 1287 (11th Cir. 1997). The employee's failure to participate in this interactive process will preclude any claim that the employer violated the ADA or the RA by failing to provide a reasonable accommodation. *Stewart*, 117 F.3d. at 1287; Steffes v. Stepan Co., 144 F.3d 1070 (7th Cir. 1998).

The very nature of the interactive process involves a process over time. If the employer does not engage in the interactive process in good faith at all, then that may constitute a discrete violation of the RA which immediately triggers the running of the statute of limitations period. The same is true of the ADA. Namely, the complete failure to engage in the interactive process will trigger the 300-day timeframe for filing a charge with the EEOC. The interesting issue arises when the employer does engage in the interactive process but some time during the process fails to act in good faith. Using the analysis in *Morgan*, courts should analogize the situation to a hostile working environment and should not consider a lawsuit time barred if at least one incident of the employer's bad faith engagement in the interactive process falls within the statute of limitations period for the RA or the filing period for the ADA.

276. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); Butz v. Economou, 438 U.S. 478, 506-07 (1978).

277. *Harlow*, 457 U.S. at 808; Butz, 438 U.S. at 406-07.

was performing when engaged in the activity that provoked the lawsuit and not on the official's title or agency relationship.[278]

The Supreme Court has not decided whether there can be individual liability of supervisors under the ADA or the RA.[279] In addressing the issue of individual liability in the non-Section 504 context, some federal courts have focused on the definition of the offender from whom the discrimination victim can recover. If the discrimination victim can only recover from an entity, then, by definition, the statute does not impose individual liability. For example, ADA enforces its prohibitions against employers, places of public accommodation, and other organizations.[280] The ADA does not enforce its prohibitions against the employees or managers of these organizations.[281] Consequently, circuit courts have held that the ADA does not impose individual liability.[282] In fact, the majority of circuits that have visited this issue have also held that no per-

278. *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511 (1985).

279. *See, e.g.*, Serapion v. Martinez, 119 F.3d 982, 992 (1st Cir. 1997) (circuit court did not resolve issue declining to address); Scarfo v. Cabletron Sys., Inc., 54 F.3d 931, 951-52 (1st Cir. 1995) (same).

280. Walker v. Snyder, 213 F.3d 344, 346 (7th Cir. 2000) (holding no personal liability under Title II of the ADA).

281. Key v. Grayson, 163 F.Supp.2d 697, 715 (E.D. Mich. 2001) ("Only 42 U.S.C. § 2000e-16(c) explicitly addresses the issue, providing in employment actions against the federal government, that the head of the department, agency, or unit, as appropriate, shall be the defendant. This statutory directive suggests that plaintiff's cannot assert claims against individuals in their individual capacities.")

282. *Snyder*, 213 F.3d at 346; Silk v. Chicago, 194 F.3d 788, 797 n.5 (7th Cir. 1999) (holding there is no personal liability under Title I of ADA); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279-81 (7th Cir. 1995) (collecting cases and finding the ADA does not impose individual liability); Alsbrook v. City of Maumelle, 184 F.3d 999, 1005 n.8 (8th Cir. 1999) (en banc) (Title II). *See also* Meara v. Bennett, 27 F. Supp.2d 288, 290 (D. Mass. 1998) (finding ADA does not impose individual liability); Miller v. CBC Companies, Inc., 908 F. Supp. 1054, 1065 (D.N.H. 1995) (same); *but see*, Niece v. Fitzner, 922 F. Supp. 1208 (E.D. Mich. 1996) (holding individual liability permissible under ADA).

As the Eighth Circuit reasoned:

> Title II provides disabled individuals redress for discrimination by a "public entity." That term, as it is defined within the statute, does not include individuals.

Alsbrook, 184 F.3d at 1005 n.8 (citations omitted).

The Third Circuit determined that individual liability may be available under Title III of the ADA if the individual owns, leases, or operates a place of public accommodation. Emerson v. Thiel Coll, 296 F.3d 184, 189 (3d Cir. 2002).

sonal liability can attach to agents or supervisors under Title VII or the ADEA.[283]

With regard to the RA, remedies available to a victim of discrimination alleging a Section 504 violation are for infractions by any "program" or "activity" receiving federal assistance.[284] Thus, Section 504's prohibitions, like those of the ADA, are addressed to an entity and are not addressed to the employees or managers of that entity. Consequently, a similar rationale applies and, therefore, Section 504 should not impose individual liability. In fact, some courts, with little analysis, have held that Section 504 does not impose individual liability.[285]

283. The definition of "employer" contained in the ADA is similar to definitions in Title VII of the 1994 Civil Rights Act, 42 U.S.C. § 2000e(b), and in the ADEA, 29 U.S.C. § 630(b). Circuit Courts have also held that there is no individual liability under either Title VII or the ADEA. *See, e.g.*, Wathen v. General Elec. Co., 115 F.3d 400, 405 (6th Cir. 1997) (finding individual liability prohibited under Title VII); Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (holding individuals "cannot be held liable under the ADEA or Title VII."); Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 511 (4th Cir. 1994) ("the ADEA limits civil liability to the employer. . . ."); Miller v. Maxwell's Int'l Inc., 991 F.2d 583 (9th Cir. 1993) (Title VII and ADEA); Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) ("The relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act."). *See also* Acevedo Vargas v. Colon, 2 F.Supp.2d 202, 206-07 (D.P.R. 1998) (Title VII).

284. 29 U.S.C. § 794a(a)(2).

285. Pritchard v. Southern Co. Servs., 102 F.3d 1118, 1119 (11th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997) (finding no personal liability for supervisors under either RA or ADA); Calloway v. Borough of Glassboro Dep't of Police, 89 F. Supp.2d 543, 557 (D.N.J. 2000) (Title II and Section 504) (collecting similar cases); Montez v. Romer, 32 F. Supp.2d 1235, 1240-41 (D. Colo. 1999) (Title II and Section 504); Neiberger v. Hawkins, 208 F.R.D. 301, 312 (D. Colo. 2002); Thomas v. Nakatani, 128 F.Supp.2d 684, 692 (D. Haw. 2000).

In contrast, liability under Section 1983 may not be imposed on a theory of *respondeat superior*. Monell v. Department of Social Serv., 436 U.S. 658, 691-95 (1976). A plaintiff may be entitled to damages under Section 1983 if he establishes that intentional discrimination was the official policy of the government. *Id.* at 691. To establish individual liability against a government official for a constitutional violation, a plaintiff must show that "the official, acting under color of state law, caused the deprivation of a federal right." Kentucky v. Graham, 473 U.S. 159, 166 (1985). "A supervisor is only liable for constitutional violations of his subordinates if the supervisor participated in or directed the violations, or knew of the violations and failed to act to prevent them." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

CONCLUSION

Congress in enacting the RA left various issues unclear and unresolved, including: (1) whether an individual has a private right of action under the RA; (2) whether a jury trial is available; (3) the applicable statute of limitations period; (4) whether there is individual liability for a RA violation; and (5) the availability and extent of remedies. Many courts have attempted to fill in the gaps and to clarify the statutory scheme. Congress should again revisit the RA and clearly resolve these issues.

As recognized by the Supreme Court in *Lane v. Pena*,[286] when Congress amended the RA in response to the *Atascadero* decision, Congress created an unequivocal waiver of sovereign immunity.[287] Congress did not, however, specifically abrogate a state's sovereign immunity from punitive damages. In their current state, these twin statutes are "unequal." Plaintiffs cannot assert an ADA violation against a state entity, neither can plaintiffs recover for punitive damages against a state for ADA violations. However, plaintiffs can assert an RA violation against a state, but still cannot recover punitive damages for such violations.

Short of Congressional action or inaction, the Supreme Court, utilizing a *Garrett* analysis as discussed in Section IV, *supra*, can conclude that although Congress may have unequivocally waived state sovereign immunity under the RA (as it did in *Seminole*), nevertheless, the waiver was not valid because Congress exceeded its authority under Section 5 of the Fourteenth Amendment. Moreover, under a Spending Clause analysis as discussed in Section IV., *supra*, the waiver should still be considered invalid because states would not have willingly abrogated their sovereignty absent the unconstitutional conditions imposed by Congress upon the receipt of federal funds. Given that Congress should not be able to unconstitutionally expand its limited authority through the "power of the purse", such conditions should be invalidated. If Congress's Spending Clause powers remain unchecked, then the nature of the dual sovereignty system in America is in jeopardy, with federalism becoming a hodge-podge quilt of unequal states that surrender

286. 518 U.S. 187 (1996).
287. *Id.* at 198.

their state sovereignty incrementally and differentially depending upon their dire financial straits and the federal monies they accept.

Because the ADA and RA are similar in purpose and application, the authors recommend that the concepts of abrogation and waiver or lack thereof of sovereign immunity be similarly interpreted regardless of how Congress or appellate courts achieve this equality. Because the *Garrett* decision has already concluded that Congress did not validly abrogate a state's sovereign immunity, despite the holding in *Lane v. Pena*, the Supreme Court should equalize the current disparity between these twin statutes and similarly conclude that Congress exceeded its Section 5 authority by waiving a state's sovereign immunity.