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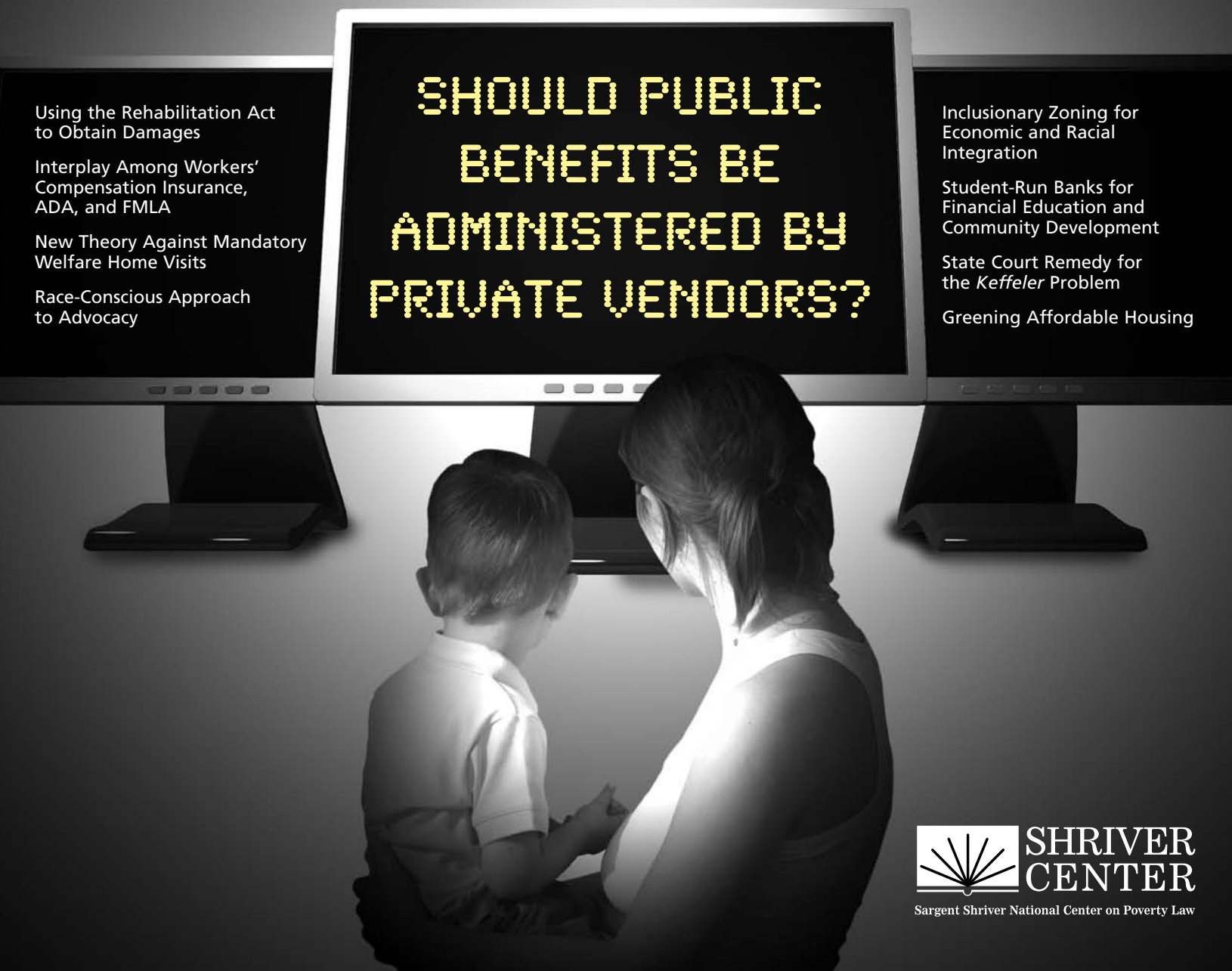
SHOULD PUBLIC BENEFITS BE ADMINISTERED BY PRIVATE VENDORS?



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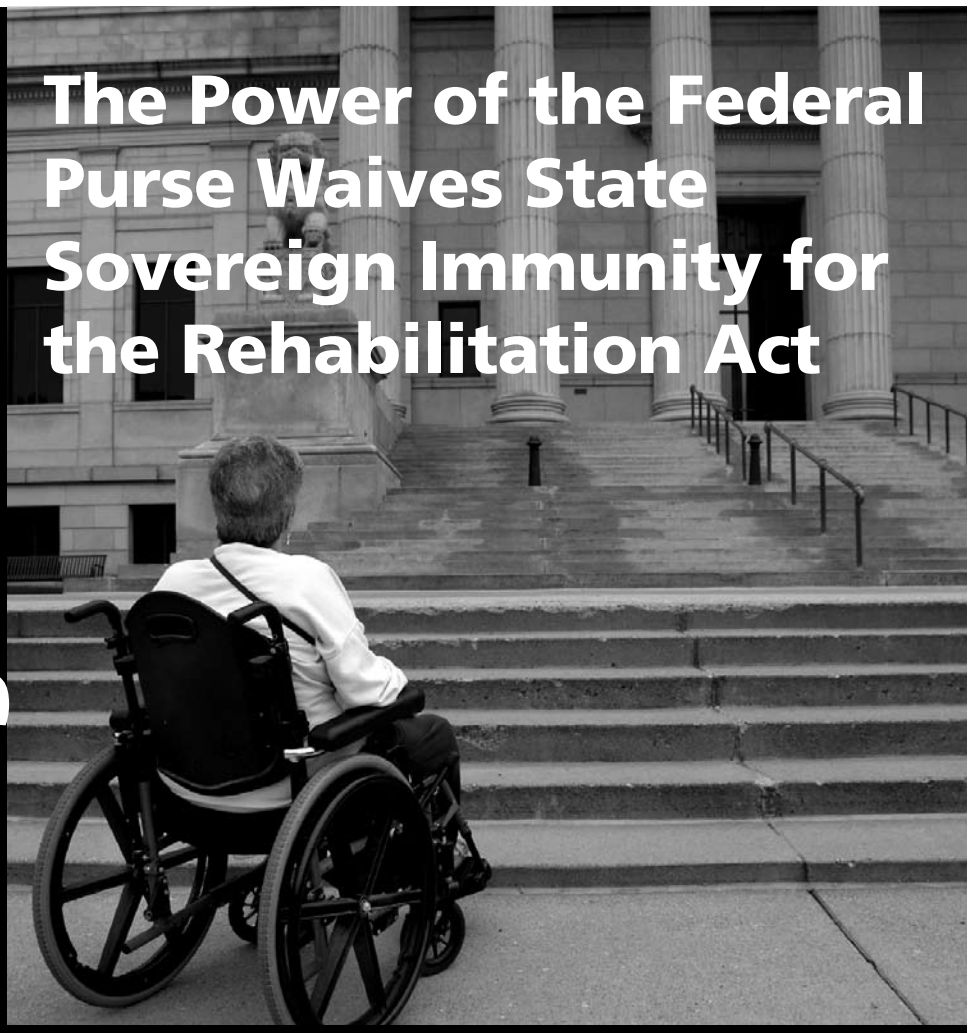
Strings Attached:

The Power of the Federal Purse Waives State Sovereign Immunity for the Rehabilitation Act



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The Rehabilitation Act of 1973 was the first civil rights statute to empower people with disabilities to sue for damages and injunctive relief when they are harmed by discrimination based on their disabilities. Section 504 of the Rehabilitation Act prohibits disability discrimination "under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service."[1] Yet the Act's coverage is limited to federally funded entities, leaving most of the private sector untouched. As a result, disability advocates worked hard in the succeeding years to pass a broader law, the Americans with Disabilities Act of 1990 (ADA).[2] After its passage, the ADA, with its extensive coverage of both the private sector and government agencies, quickly overshadowed the Rehabilitation Act as the vehicle for most disability-discrimination claims.[3]

However, the ADA's scope was drastically curtailed in 2001 when the U.S. Supreme Court held in *Board of Trustees of the University of Alabama v. Garrett* that the Eleventh Amendment insulated state employers from damage claims under the ADA.[4] *Garrett* established that states' sovereign immunity barred state employees' claims under Title

[1]Rehabilitation Act of 1973, 29 U.S.C.A. § 794(a) (West, Westlaw through Feb. 2008). The Herbert Semmel Federal Rights Project of the National Senior Citizens Law Center hosts for public interest advocates an e-mail list of timely summaries of cases pertaining to court access. To join the list, e-mail rbobroff@nsclc.org.

[2]Americans with Disabilities Act (ADA), 42 U.S.C.A. §§ 12101 *et seq.* (West, Westlaw through Feb. 2008).

[3]Courts routinely stated that "claims brought under both statutes may be analyzed together" but framed that analysis around the ADA. E.g., *Thompson v. Williamson County, Tennessee*, 219 F.3d 555, 557 n.3 (6th Cir. 2000).

[4]*Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001).

I of the ADA for damages to remedy employment discrimination based on disability.[5]

Injunctive relief remains available under the ADA to remedy future state-sponsored employment discrimination and can be a powerful tool to halt ongoing wrongs, such as discriminatory policies.[6] However, a prospective injunction cannot provide monetary relief for wrongs already committed or compensate people whom the state no longer employs.[7] Because the ADA may not be used to obtain damages against state employers who fire, demote, or harass employees based on their disabilities, an alternative method for obtaining damages has become imperative.

Several alternative approaches to obtaining damages for employment discrimination based on disabilities have been unsuccessful. Courts uniformly have rejected attempts to recast employment claims under the self-care provisions of the Family and Medical Leave Act.[8] Likewise, most courts have rejected employment-discrimination claims when brought under Title II of the ADA, which covers public services and programs.[9] The Supreme Court asserted in *Garrett* that state disability laws provided significant relief for plaintiffs.[10] In fact, state laws vary widely in their coverage and in the relief they offer; some do not cover state entities at all.[11]

After years as, essentially, a sidekick to the ADA, the Rehabilitation Act has begun to assume tremendous importance as the sole avenue for obtaining damages from state employers for employment discrimination based on disabilities.

Moreover, the Rehabilitation Act is valuable for bringing claims for damages against state actors in contexts other than employment, such as education and prison cases. Title II of the ADA also covers claims other than employment. Although the Supreme Court has held in two narrow decisions that damage claims against states were permissible under Title II in certain circumstances, sovereign immunity might bar some Title II claims.[12] Thus the Rehabilitation Act is valuable for obtaining damages from states in the context of public programs and services as well as employment discrimination.

Section 504 of the Rehabilitation Act is largely coextensive with the ADA in coverage and remedies. Recent post-*Garrett*

[5]For a full discussion of the issue of sovereign immunity and the ADA since *Garrett*, see Rochelle Bobroff, *Scorched Earth and Fertile Ground: The Landscape of Suits Against the States to Enforce the ADA*, 41 Clearinghouse Review 298 (Sept.–Oct. 2007).

[6]See *Missouri Protection and Advocacy Service v. Carnahan*, 499 F.3d 803 (8th Cir. 2007) (injunction to provide wheelchair access); *Chaffin v. Kansas State Fair Board*, 348 F.3d 850 (10th Cir. 2003) (Clearinghouse No. 55,496) (injunctive relief from voting restriction); *Koslow v. Pennsylvania*, 302 F.3d 161, 179 (3d Cir. 2002) (Clearinghouse No. 54,890) (reinstatement is appropriate injunctive relief for discriminatory discharge); see also Bobroff, *supra* note 5, at 301–4 (discussing uses of injunctive relief).

[7]See, e.g., *Leverette v. Alabama Revenue Department*, 453 F. Supp. 2d 1340, 1343–44 (M.D. Ala. 2006); *Allen v. College of William and Mary*, 245 F. Supp. 2d 777, 791 (E.D. Va. 2003).

[8]Family and Medical Leave Act, 29 U.S.C.A. § 2612(a)(1)(d) (West, Westlaw through Feb. 2008); see *Miles v. Bellfontaine Habilitation Center*, 481 F.3d 1106, 1107 (8th Cir. 2007) (citing cases); *Wampler v. Pennsylvania Department of Labor and Industry*, W.C.A.B., 508 F. Supp. 2d 416 (M.D. Pa. 2007) (same); see also Bobroff, *supra* note 5, at 301 n.31 (same).

[9]See, e.g., *Clifton v. Georgia Merit System*, 478 F. Supp. 2d 1356, 1365–68 (N.D. Ga. 2007); *Canfield v. Isaacs*, 523 F. Supp. 2d 885 (N.D. Ind. 2007); *Fleming v. State University of New York*, 502 F. Supp. 2d 324, 332, 334 (E.D.N.Y. 2007); *Leverette*, 453 F. Supp. 2d at 1345; but see *Olson v. New York*, No. 04-00419, 2007 WL 1029021 (E.D.N.Y. March 30, 2007); *Transport Workers Union v. New York Transit Authority*, 342 F. Supp. 2d 160 (S.D.N.Y. 2004).

[10]*Garrett*, 531 U.S. at 374 n.9.

[11]See Ruth Colker & Adam Milani, *The Post-*Garrett *World: Insufficient State Protection Against Disability Discrimination*, 53 Alabama Law Review 1075 (2002); see also *Tennessee v. Lane*, 541 U.S. 509, 526 (2004) (Clearinghouse No. 55,480) (citing Colker & Milani).

[12]*United States v. Georgia*, 546 U.S. 151 (2006) (Clearinghouse No 55,981); *Tennessee v. Lane*, 541 U.S. 509. For a discussion of post-*Georgia* cases under Title II, see Bobroff, *supra* note 5, at 300–304; see also *Chase v. Baskerville*, 508 F. Supp. 2d 492, 500–501 (E.D. Va. 2007) (abrogation not valid in prison context); *Hale v. Mississippi*, No. 06-245, 2007 WL 3357562, *7–8 (S.D. Miss. Nov. 9, 2007) (same); *Zied-Campbell v. Richman*, No. 04- 0026, 2007 WL 1031399, at *19–25 (M.D. Pa. March 30, 2007) (same for welfare benefits); *Frank v. University* of Toledo, No. 06-1442, 2007 WL 4590982, at *3–4 (N.D. Ohio Dec. 28, 2007) (abrogation valid in education context).

court-of-appeals cases unanimously hold that state sovereign immunity does not limit the Rehabilitation Act. Here we assess recent Rehabilitation Act cases addressing sovereign immunity and explore the advantages and disadvantages of using the Rehabilitation Act to sue state entities.

I. Why the Rehabilitation Act Is Different: Waiver of Sovereign Immunity as a Condition for Federal Funds

In the aftermath of *Garrett*, sovereign immunity first appeared possible to restrict the Rehabilitation Act in the same manner as it restricted the ADA. The *Garrett* case itself included parallel claims under the Rehabilitation Act and the ADA, and the Eleventh Circuit had rejected sovereign-immunity defenses for both claims on identical grounds.[13] While the Supreme Court's opinion made no mention of the Rehabilitation Act, the Eleventh Circuit panel on remand initially dismissed the Rehabilitation Act claim as barred by sovereign immunity.[14] In a contemporaneous prisoner class action suit under both the ADA Title II and the Rehabilitation Act, the Fifth Circuit panel reasoned that, "[s]ince the two statutes offer virtually identical protections, the abrogation analysis is the same" and held that sovereign immunity barred both claims.[15]

Both the Eleventh and Fifth Circuits soon abandoned these holdings, however, because both failed to address a crucial difference regarding sovereign immunity under the two statutes.[16] For the ADA, Congress invoked its power to enforce the Fourteenth Amendment as a basis for abrogating states' sovereign immunity.[17] In contrast, the Rehabilitation Act is grounded in the Constitution's spending clause, which authorizes Congress to collect and spend funds for the "general Welfare."[18] By its terms, the Rehabilitation Act applies only to those state entities that receive federal financial assistance. And, as a condition of this federal largesse, federal law requires state entities to accept that they "shall not be immune under the Eleventh Amendment … from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 … or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance."[19] Rather than seeking to abrogate states' immunity, then, the Rehabilitation Act creates a waiver of states' sovereign immunity by their having accepted federal funding.

The Supreme Court, in an opinion by Chief Justice Rehnquist, made clear two decades ago in *South Dakota v. Dole* that imposing conditions on federal funding for states is generally permissible.[20] Applying *Dole*, the Seventh and Eighth Circuits had already recognized shortly before *Garrett* that the spending clause nature of the Rehabilitation Act provides a route around the sovereign-immunity defense.[21] Other circuits soon followed.

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[13]*Garrett v. University of Alabama at Birmingham Board of Trustees*, 193 F.3d 1214, 1218 (11th Cir. 1999).

[14]*Garrett v. University of Alabama at Birmingham Board of Trustrees*, 261 F.3d 1242 (11th Cir. 2001) (per curiam).

[15]*Reickenbacker v. Foster*, 274 F.3d 974, 977 n.17 (5th Cir. 2001) (Clearinghouse No. 54,370).

[16]The Eleventh Circuit reversed its earlier *Garrett* decision in response to a Petition for Rehearing. *Garrett v. University of Alabama at Birmingham Board of Trustrees*, 276 F.3d 1227, 1228 (11th Cir. 2001) (en banc). The Fifth Circuit decision in *Reickenbacker* was never overruled but became irrelevant when the en banc court accepted the waiver theory in *Miller v. Texas Tech University Health Sciences Center*, 421 F.3d 342, 349 (5th Cir. 2005) (en banc).

[17]ADA, 42 U.S.C.A. §§ 12101 (invoking Fourteenth Amendment guarantee of equality), 12202 (states shall not have sovereign immunity under ADA) (West, Westlaw through Feb. 2008).

[18]U.S. Const. art. I, § 8, cl. 1.

[19]Rehabilitation Act, 42 U.S.C.A. § 2000d-7(a)(1) (West, Westlaw through Feb. 2008).

[20]*South Dakota v. Dole*, 483 U.S. 203 (1987) (upholding condition on federal highway funds that states enact minimum drinking age of 21).

[21]See *Stanley v. Litscher,* 213 F.3d 340, 344 (7th Cir. 2000); *Jim C. v. United States*, 235 F.3d 1079, 1081–82 (8th Cir. 2000) (en banc) (Clearinghouse No. 53,607).

On reconsideration after remand in *Garrett*, the en banc Eleventh Circuit held that federal law "unambiguously conditions the receipt of federal funds on a waiver of Eleventh Amendment immunity to claims under section 504 of the Rehabilitation Act. By continuing to accept federal funds, the state agencies have waived their immunity."[22]

To date, every circuit except the Second (discussed below) and the Federal Circuit (which, due to its limited jurisdiction, has not had occasion to address the issue) has held that states waive their sovereign immunity under the Rehabilitation Act by accepting federal funds.[23]

Before we discuss how the courts of appeals have analyzed waiver under the Rehabilitation Act, however, one caveat is necessary. Because the Rehabilitation Act mentions federal executive agencies and the U.S. Postal Service in its prohibitory language but not in its remedies provision, the Supreme Court—before *Garrett*—held that the waiver of immunity under the Rehabilitation Act did not extend to federal agencies.[24] Thus, although the Rehabilitation Act is binding on federal entities, they may not be subjected to claims for damages.[25]

A. Analysis of the Rehabilitation Act Under *South Dakota v. Dole*

Dole articulated a five-part test for the validity of spending conditions, which circuit courts have uniformly held is met by the Rehabilitation Act. As the First Circuit aptly summarized, the *Dole* factors are that

> (1) [spending conditions] must be in pursuit of the "general welfare," (2) conditions of funding must be imposed unambiguously, so states are cognizant of the consequences of their participation, (3) conditions must not be "unrelated to the federal interest in particular national projects or programs" funded under the challenged legislation, (4) the legislation must not be barred by other constitutional provisions, and (5) the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion.[26]

The Rehabilitation Act easily meets the first factor because the prevention of discrimination against people with disabilities clearly promotes the "general welfare."[27] The fourth factor, that other

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[22]*Garrett v. University of Alabama at Birmingham Board of Trustees*, 344 F.3d 1288, 1293 (11th Cir. 2003) (per curiam).

[23]See *Nieves-Márquez v. Puerto Rico*, 353 F.3d 108, 127–29 (1st Cir. 2003); *Koslow*, 302 F.3d at 167–76 (3d Cir.); *Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 491–96 (4th Cir. 2005); *Nihiser v. Ohio Environmental Protection Agency*, 269 F.3d 626 (6th Cir. 2001) (Clearinghouse No. 54,231); *Lovell v. Chandler*, 303 F.3d 1039, 1050–52 (9th Cir. 2002) (Clearinghouse No. 54,886); *Brockman v. Wyoming Department of Family Services*, 342 F.3d 1159, 1167–68 (10th Cir. 2003) (Clearinghouse No. 55,387); *Barbour v. Washington Metropolitan Area Transit Authority*, 374 F.3d 1161 (D.C. Cir. 2004).

[24]*Lane v. Peña*, 518 U.S. 187 (1996).

[25]Section 501 of the Rehabilitation Act, through its regulations, 29 C.F.R. § 1614.203(b) (2008), covers discrimination in federal employment, and the circuits split over whether such claims must be brought under Section 501 instead of Section 504. See, e.g., *Taylor v. Small*, 350 F.3d 1286, 1291 (D.C. Cir. 2003) (citing cases). In contrast to the Section 504 causation cases discussed *infra* II.B.2, the only published court of appeals decision addressing the issue held that Section 501's causation standard was equivalent to the ADA's causation standard. See *Sutton v. Lader*, 185 F.3d 1203, 1207–8 (11th Cir. 1999). (A Fifth Circuit decision in 2007 held the same but was later withdrawn from the federal reporter. See *Pinkerton v. U.S. Department of Education*, 508 F.3d 207 (5th Cir. 2007).) As in ADA Title I, the remedies and procedures under Section 501 are borrowed from Title VII of the Civil Rights Act. 29 U.S.C.A. § 794a(a)(1) (West, Westlaw through Feb. 2008). Courts generally hold that these provisions apply to claims against federal employers even if those claims are asserted under Section 504. See, e.g., *Small*, 350 F.3d at 1292. Under *Peña*, however, monetary relief is available only under Section 501. *Peña*, 518 U.S. at 193–94.

[26]*Nieves-Márquez*, 353 F.3d at 128, quoting *Dole*, 483 U.S. at 207–8.

[27]*Id.* (this factor is "clearly satisfied"). A footnote in *Dole* observed on this point that "[t]he level of deference to the congressional decision is such that the Court has … questioned whether 'general welfare' is a judicially enforceable restriction at all." *Dole*, 483 U.S. at 207 n.2.

constitutional provisions not bar the spending condition, has not been problematic for the Rehabilitation Act because the Eleventh Amendment does not prohibit states from waiving their sovereign immunity.[28]

In 1985 the Supreme Court found that the Rehabilitation Act as originally drafted failed the second factor by not providing unambiguous notice to the states of the waiver of sovereign immunity.[29] Yet, responding forthwith in 1986, Congress eliminated this problem by making explicit the waiver of state sovereign immunity under this and other antidiscrimination laws tied to federal spending.[30] The Supreme Court recognized this amendment as an "unambiguous waiver of the State's Eleventh Amendment immunity," and, as noted below, the circuit courts have, with the exception of the Second Circuit, rejected arguments that states lacked clear notice of this condition.[31]

Thus states' arguments against Rehabilitation Act claims have focused on the remaining factors: relatedness and coercion. The Supreme Court has said little about the relatedness requirement beyond its broad statement that a spending condition "might be illegitimate if [it is] unrelated 'to the federal interest in particular national projects or programs.'"[32] The Court declined the invitation of amici in *Dole* to adopt a rule that any condition must "relate[ ] directly to the purpose of the expenditure to which it is attached," even though the condition in that case would have met such a test.[33]

Noting the Court's refusal to set forth a strict test, the Third Circuit interpreted *Dole* as requiring only a "discernible relationship" between a spending condition and the purposes of the funded programs.[34] Applying that principle to a suit by a state corrections officer, the Third Circuit found that,

> [t]hrough the Rehabilitation Act, Congress has expressed a clear interest in eliminating disability-based discrimination in state departments or agencies. That interest, which is undeniably significant and clearly reflected in the legislative history, flows with every dollar spent by a department or agency receiving federal funds. The waiver of the Commonwealth's immunity from Rehabilitation Act claims by Department of Corrections employees furthers that interest directly.[35]

The Fourth Circuit also addressed the "relatedness" factor in the case of a law student who sued over an alleged failure to accommodate her during exams.[36] The school argued that under *Dole* a spending condition must be related to some particular spending program rather than to federal funding in general.[37] The Fourth Circuit, citing decisions upholding the ban on race discrimination in federally funded programs under Title VI of the Civil Rights Act, rejected this argument because "the Supreme Court has upheld other spending conditions equally broad."[38] The court went on to state that

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[28]See *Litman v. George Mason University*, 186 F.3d 544, 556 (4th Cir. 1999) ("principles of federalism do not pose an independent constitutional bar" to waiver condition under Title IX of Education Amendments).

[29]*Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242–46 (1985).

[30]Rehabilitation Act, 42 U.S.C.A. § 2000d-7(a)(1) (West, Westlaw through Feb. 2008).

[31]*Peña*, 518 U.S. at 200; see discussion *infra* at notes 51–54.

[32]*Dole*, 483 U.S. at 207, quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion).

[33]*Id.* at 209 n.3.

[34]*Koslow*, 302 F.3d at 175.

[35]*Id.*

[36]*Constantine*, 411 F.3d at 478–89.

[37]*Id.* at 492.

[38]*Id.*

"this waiver condition is sufficiently related to the purpose of the nondiscrimination rule stated in § 504 of the Rehabilitation Act, i.e., to ensure that federal funds are not used to facilitate disability discrimination."[39] Other circuits have rejected relatedness arguments in a summary fashion.[40]

With regard to the coercion factor, the *Dole* Court offered only the cryptic statement that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[41]

In 1997 a plurality of the en banc Fourth Circuit in *Department of Education v. Riley* concluded that the Individuals with Disabilities in Education Act did not require the provision of tutors for students expelled for reasons unrelated to their disability but further opined that if the Act did set such a condition, it was unduly coercive.[42] Yet in 2002 the Fourth Circuit stated in *West Virginia v. U.S. Department of Health and Human Services* that *Riley's* finding of undue coercion

> cannot be viewed as the holding of the court in *Riley* given that [the coercion] analysis was not necessary to the disposition of the case, and [it] represented the views of only six judges. Nonetheless, we believe that *Riley* strongly indicates that the coercion theory remains viable in this circuit, and that federal statutes that threaten the loss of an entire block of federal funds upon a relatively minor failing by a state are constitutionally suspect.[43]

In *West Virginia* the Fourth Circuit joined other circuits in upholding requirements attached to federal Medicaid funds.[44] This result is particularly significant because few, if any, grants of federal funding have a larger overall budgetary impact for states than Medicaid.[45] Indeed, as the Fourth Circuit recognized in considering the Rehabilitation Act, "[a]lthough there might be a federal funding condition that is unconstitutionally coercive, neither the Supreme Court nor any federal court of appeals has yet identified one."[46]

Several circuit courts have expressed "strong doubts" that the coercion factor constitutes a judicially enforceable limitation.[47] In accord with this trend, the spending conditions of Section 504 of the Rehabilitation Act are, the circuit courts have uniformly held, not unduly coercive, irrespective of the sums of money involved. As the First Circuit noted, because Section 504 applies on an agency-by-agency basis, a state "has the choice of accepting federal funding" in one department "while declining federal funding" in another department.[48]

The Eighth Circuit first addressed the coercion question under the Rehabilitation Act—before *Garrett*—in a suit by parents over the educational needs of their disabled children and concluded

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[39]*Id.* at 493.

[40]See *Miller*, 421 F.3d at 349; *Barbour*, 374 F.3d at 1168–69; *Nieves-Márquez*, 353 F.3d at 128–29; *Lovell*, 303 F.3d 1039; *Jim C.*, 235 F.3d 1079.

[41]*Dole*, 483 U.S. at 211, quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937).

[42]*Virginia Department of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc) (plurality).

[43]*West Virginia v. U.S. Department of Health and Human Services*, 289 F.3d 281, 291 (4th Cir. 2002).

[44]*Id.* at 297.

[45]Cf. Herbert Semmel, *Enforcing Federal Rights Against States*, 35 Clearinghouse Review 309, 313 (Sept.–Oct. 2001) (significance of upholding waiver based on acceptance of education funds in *Jim C.*, discussed *infra*, because, "with the exception of the Medicaid program, few, if any, federal grant programs are likely to exceed the amount of aid to education").

[46]*Constantine*, 411 F.3d at 493.

[47]See *West Virginia*, 289 F.3d at 288 (citing and quoting cases).

[48]*Nieves-Márquez*, 353 F.3d at 129; accord *Koslow*, 302 F.3d at 174; *Constantine*, 411 F.3d at 494.

that, although the potential loss of $250 million, or 12 percent of Arkansas's education budget, "would be politically painful ... we cannot say that it compels Arkansas's choice."[49] Post-*Garrett*, that court reached the same conclusion in the context of Arkansas's exclusion of a couple from its foster care and adoption program because of one member's HIV (human immunodeficiency virus) status when the spending in question was $557 million, or 60 percent of Nebraska's social services budget.[50] These cases exemplify the numerous cases holding that the waiver of sovereign immunity in the Rehabilitation Act is not unduly coercive.

B. Waiver in the Second Circuit

Alone among federal appeals courts that have considered sovereign immunity under the Rehabilitation Act, the Second Circuit has yet to uphold explicitly the validity of the Act's condition that states waive their sovereign immunity. Yet neither has the Second Circuit invalidated this condition wholesale. Rather, this circuit held in *Garcia v. SUNY Health Sciences Center of Brooklyn* that the defendant university had not knowingly waived its immunity because, when the plaintiff's cause of action arose in the mid-1990s—before *Garrett* and other key sovereign-immunity decisions that preceded it—the state was treated as having lost its immunity for essentially identical claims under the ADA.[51] The *Garcia* court reasoned:

> Since ... the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, since by all reasonable appearances state sovereign immunity had already been lost.[52]

Thus the reasoning of the *Garcia* decision applies only to the time during which Supreme Court precedent gave no indication that the ADA's abrogation of sovereign immunity might violate the Eleventh Amendment.

Every other court of appeals presented with *Garcia*'s approach has rejected it.[53] Moreover, *Garcia*'s relevance continues to shrink with each passing year because of the increasing unlikelihood that Rehabilitation Act claims will be predicated solely on the acceptance of federal funds before the 2001 *Garrett* decision.

Surprisingly the Second Circuit has not yet ruled on the viability of Rehabilitation Act claims predicated on post-*Garrett* events. Although the district courts in the Second Circuit disagree over whether the date by which to measure states' knowing waiver is the date of *Garrett* or *Garcia*, all agree that by the end of 2001 state agencies had sufficient notice and waived their immunity by continuing to accept federal funds.[54]

In sum, the Rehabilitation Act's waiver of state sovereign immunity is, numerous courts of appeals have ruled, valid. The Second Circuit's narrow holding applicable only to a brief period should not have any lasting impact. Although the many denials of certiorari of circuit court decisions inspire hope that the Supreme Court would not rule to the contrary, the issue should not be considered conclusively resolved in the absence of a Supreme Court ruling. Advocates should maintain vigilance in briefing the sovereign-immunity issue in Rehabilitation Act cases.

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[49]*Jim C.*, 235 F.3d at 1082.

[50]*Doe v. Nebraska*, 345 F.3d 593, 599 (8th Cir. 2003).

[51]*Garcia v. SUNY Health Sciences Center of Brooklyn*, 280 F.3d 98, 113–15 (2d Cir. 2001) (Clearinghouse No. 54,225).

[52]*Id.* at 114.

[53]See *Koslow*, 302 F.3d at 172 n.12 (3d Cir.); *Pace v. Bogalusa City School Board*, 403 F.3d 272, 284 (5th Cir. 2005) (en banc) (Clearinghouse No. 55,218); *Douglas v. California Department of Youth Authority*, 285 F.3d 1226 (9th Cir. 2002) (denial of rehearing over dissent); *Garrett*, 344 F.3d at 1292–93 (11th Cir.) (Clearinghouse No. 54,300); *Barbour*, 374 F.3d at 1166–68 (D.C. Cir.).

[54]See, e.g., *Warren v. Goord*, 81 F.App'x 400 (2d Cir. 2003) (remanding for determination whether events fell within *Garcia*); *Brown v. DeFrank*, No. 06-2235, 2006 WL 3313821, at *27–28 (S.D.N.Y. Nov. 15, 2006).

II. Advantages and Disadvantages of the Rehabilitation Act Compared to the ADA

Aside from the immunity issue, suing under the Rehabilitation Act is very similar to litigating an ADA claim because the two statutes share both substantive and procedural provisions.[55] As one commentator noted, "While there are, in some instances, textual differences between the Acts or their regulations, these distinctions are relatively minor, and tend in most instances to be minimized in application by the courts."[56]

Multiple provisions in the two statutes make clear that Congress intended that the laws should be interpreted consistently with each other. The Rehabilitation Act states that the same standards for proving employment discrimination shall apply under both laws, while the ADA states that nothing in it "shall be construed to apply a lesser standard" than under the Rehabilitation Act and states more specifically that all regulations under Title II of the ADA must be consistent with the Rehabilitation Act.[57] The courts of appeals frequently refer to the two statutes as "nearly," "virtually," or "essentially identical" in their protections and remedies.[58]

A. Advantages of the Rehabilitation Act

In the employment context, the Rehabilitation Act actually provides some significant advantages over Title I of the ADA for employment-discrimination plaintiffs. Title I of the ADA incorporates the procedural and remedial provisions of Title VII of the Civil Rights Act (covering race, sex, and religion discrimination in employment), which include an exhaustion requirement and damages caps.[59] The Rehabilitation Act, by contrast, incorporates the more favorable provisions of Title VI of the Civil Rights Act (covering race, sex, and religion discrimination in federally funded programs).[60] One benefit of this difference between the two statutes is that, in contrast to claims under the ADA, employees proceeding under the Rehabilitation Act need not exhaust administrative remedies before filing suit.[61] Another benefit is that, unlike the ADA, the Rehabilitation Act has no cap on damages.[62] Also in contrast to Title I—but like Title II of the ADA—the Rehabilitation Act specifies no statute of limitations. Accordingly courts have applied the most appropriate state limitations period—often the one for personal

[55]See Drew Days, *"Feedback Loop": The Civil Rights Act of 1964 and Its Progeny*, 49 St. Louis University Law Journal 981, 992 (2005).

[56]Katie Eyer, *Rehabilitation Act Redux*, 23 Yale Law and Policy Review 271, 282 (2005); see also *id.* at 305–9 (textual differences in regulations under ADA and Rehabilitation Act are unlikely to create meaningful differences in application).

[57]Rehabilitation Act, 29 U.S.C.A. § 794(d) (West, Westlaw through Feb. 2008); ADA, 42 U.S.C.A. §§ 12201(a), 121341(b) (West, Westlaw through Feb. 2008).

[58]See, e.g., *Bowers v. National Collegiate Athletic Association*, 475 F.3d 524, 550 (3d Cir. 2007); *Lovell*, 303 F.3d at 1051 n.5; *Garcia*, 280 F.3d at 114. E.g., courts have treated the duty to provide services in the most integrated setting appropriate as coextensive under the Rehabilitation Act and Title II of the ADA. See, e.g., *Sanchez v. Johnson*, 416 F.3d 1051, 1063 (9th Cir. 2005) (Clearinghouse No. 53,167); *Frederick L. v. Department of Public Welfare*, 364 F.3d 487, 490 n.2 (3d Cir. 2004) (Clearinghouse No. 54,458); *Radaszewski v. Maram*, 383 F.3d 599, 607 (7th Cir. 2004) (Clearinghouse No. 55,873); *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1179 n.3 (10th Cir. 2003).

[59]See ADA, 42 U.S.C.A. § 12117(a) (West, Westlaw through Feb. 2008).

[60]See Rehabilitation Act, 29 U.S.C.A. § 794a(a)(2) (West, Westlaw through Feb. 2008).

[61]See *Freed v. Consolidated Rail Corporation*, 201 F.3d 188 (3d Cir. 2000) (citing six other circuits). An exception is that plaintiffs suing under the Rehabilitation Act are required to exhaust administrative remedies in cases where such remedies are available through the Individuals with Disabilities in Education Act. See *Polera v. Board of Education of Newburgh Enlarged City School District*, 288 F.3d 478, 487–88 (2d Cir. 2002).

[62]See *Roberts v. Progressive Independence Incorporated*, 183 F.3d 1215, 1223–24 (10th Cir. 1999) (refusing to apply ADA cap to Rehabilitation Act claim). Neither Title I nor Section 504 permits punitive damages. 42 U.S.C.A. § 1981a(b)(1) (West, Westlaw through Feb. 2008) (Title I); *Barnes v. Gorman*, 536 U.S. 181 (2002) (Clearinghouse No. 53,970) (as spending clause statute, Rehabilitation Act fails to provide unambiguously for punitive damages).

injury actions—which is generally longer than the 180-day period under Title I.[63] Employees of a business with fifteen or fewer employees are barred from suit under the ADA.[64] The Rehabilitation Act contains no such limitation, and the only court to address the issue squarely has declined to import the fifteen-worker threshold into Rehabilitation Act claims.[65]

B. Disadvantages of the Rehabilitation Act

While the ADA and the Rehabilitation Act are very similar in both scope and effect, they have some significant differences. The coverage of the Rehabilitation Act is more limited, and most courts have applied a stricter causation test to Rehabilitation Act claims.

1. Who May Be Sued

As noted above, the primary impetus for passing the ADA was the limited reach of the Rehabilitation Act. The chief substantive difference between the ADA and the Rehabilitation Act lies in who may be sued under each statute. The coverage of the ADA is broad—it includes all employers with more than fifteen employees and essentially all public services, programs, and accommodations.[66] By contrast, the Rehabilitation Act covers only programs or activities receiving federal financial assistance.[67] This means that if a state employer or agency engages in discrimination but does not receive federal funds, it is not subject to suit under the Rehabilitation Act.

How big a difference does this constraint make for plaintiffs? Federal funding is a huge and growing part of state budgets, and most state entities likely receive federal assistance, either directly or through a parent agency.[68] Thus, in most cases, the necessity of establishing federal assistance is not a bar to suit under the Rehabilitation Act. Nevertheless, plaintiffs must carefully lay the groundwork for their claims by making sufficient allegations with regard to federal funding and generating evidence of that funding.

Although coverage under the Rehabilitation Act requires only "a sufficient nexus between the federal funds and the discriminatory practice," that nexus may not always be immediately obvious to the court.[69] The Rehabilitation Act covers "all of the operations" of a federally funded program or activity, such that if one part of a department or agency receives federal financial assistance, the whole entity is considered to receive federal assistance.[70] By the same token, subsidiary agencies are generally covered because of their parent agencies' having received federal assistance.[71]

The federal funding requirement may be satisfied even where the connection is not a direct one. For example, the Re-

[63]See *Everett v. Cobb County School District*, 138 F.3d 1407, 1409 (11th Cir. 1998); *Southerland v. Hardaway Management Company*, 41 F.3d 250, 253–55 (6th Cir. 1994); *Baker v. Board of Regents of Kansas*, 991 F.2d 628, 632 (10th Cir. 1993); *Morse v. University of Vermont*, 973 F.2d 122, 127 (2d Cir. 1992); *Hickey v. Irving Independent School District*, 976 F.2d 980, 982–83 (5th Cir. 1992); but see *J.S. v. Isle of Wight County School Board*, 402 F.3d 468, 474 (4th Cir. 2005) (borrowing one-year period from state disability law). In some states, because of work-sharing agreements with the Equal Employment Opportunity Commission, the period for ADA claims is effectively 300 days. See ADA, 42 U.S.C.A. §§ 12117(a), 2000e-5(e)(1) (West, Westlaw through Feb. 2008).

[64]ADA, 42 U.S.C.A. § 12111(5)(A) (West, Westlaw through Feb. 2008).

[65]*Schrader v. Ray*, 296 F.3d 968, 971–75 (10th Cir. 2002) (Clearinghouse No. 54,796).

[66]ADA, 42 U.S.C. §§ 12111(5)(A) (employers); 12131(1) (public services); 12181(7) (public accommodations) (West, Westlaw through Feb. 2008).

[67]29 U.S.C.A. § 794 (West, Westlaw through Feb. 2008).

[68]See Eyer, *supra* note 56, at 286–87; National Association of State Budget Officers, State Expenditure Report: Fiscal Year 2006, at 2 (2007), www.nasbo.org/Publications/PDFs/fy2006er.pdf.

[69]*Bentley v. Cleveland County Board of County Commissioners*, 41 F.3d 600, 604 (10th Cir. 1994).

[70]29 U.S.C.A. § 794(b) (West, Westlaw through Feb. 2008); see, e.g., *Schroeder v. City of Chicago*, 927 F.2d 957, 962 (7th Cir. 1991).

[71]See, e.g., *Thomlison v. City of Omaha*, 63 F.3d 786, 789 (8th Cir. 1995) (city Fire Division covered where Public Safety Department received federal assistance).

habilitation Act covers a local government that receives federal funds indirectly through the state's department of transportation.[72] Federal funds also may pass to the state through individual beneficiaries, as when a state school receives financial aid dollars through its students or when a county hospital receives payments under Medicaid and Medicare.[73] In a recent district court decision, the court based Rehabilitation Act coverage on funding of agencies that were not subsidiaries of the defendant but were "administratively attached" to it and on the defendant's role in expending federal funds in conjunction with another funded agency.[74] The Rehabilitation Act's definition of "program or activity" explicitly includes a state agency "that distributes such [federal] assistance."[75]

That an entity receiving funds is subordinate to or interacts with the defendant does not, however, necessarily mean that the defendant is covered. One district court refused to find that the Rehabilitation Act covered the Wisconsin Supreme Court because, while it had administrative authority over the federally funded Office of State Courts, the two entities were funded separately and had "independent control over their staff."[76] The court reasoned that "[i]f mere control of one entity by another were enough" to establish coverage, the Act could "'sweep in the whole state or local government.'"[77] Another court found the link between a state public offender's office and federal assistance too "attenuated" where that agency received transcripts from federally funded state courts, referred cases to contract attorneys through the courts, and accepted state vocational-rehabilitation placements.[78]

In sum, although the federal-funding requirement is the most obvious difference between the ADA and the Rehabilitation Act, this requirement is unlikely to bar recovery in most cases. Even so, advocates should be prepared to demonstrate, through evidence and precedent, why a given defendant is covered.

2. The "Sole Causation" Test

Although courts routinely state that the substantive standards of the ADA and the Rehabilitation Act are (nearly) identical, many courts have found a significant distinction between the two in the area of causation. Title I of the ADA prohibits employment discrimination against an individual with a disability "because of the disability of such individual" and Title II contains identical language with respect to discrimination in public services.[79] As with sex and race discrimination, most circuit courts have interpreted this language in the ADA to forbid consideration of a person's disability when making an adverse decision, even if the disability was one of two or more reasons for the decision.[80]

By contrast, the Rehabilitation Act refers to discrimination "solely by reason of" an individual's disability.[81] Because of this textual distinction, all courts addressing

[72] *Id.*

[73] See *Bennett-Nelson v. Louisiana Board of Regents*, 431 F.3d 448, 452–53 (5th Cir. 2005); *Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center*, 765 F.2d 1278, 1289 (5th Cir. 1985).

[74] *Starr v. Hawaii*, No. 05-00665, 2007 WL 3254831, at *5 (D. Haw. Nov. 2, 2007).

[75] *Id.*; Rehabilitation Act, 29 U.S.C.A. § 794(b)(1)(B) (West, Westlaw through Feb. 2008).

[76] *Brewer v. Wisconsin Board of Bar Examiners*, No. 04-C-0694, 2006 WL 752922, at *4 (E.D. Wis. March 22, 2006).

[77] *Id.*, quoting *Schroeder*, 927 F.2d at 962.

[78] *Sharer v. Oregon*, No. 04-1690, 2006 WL 1805956, at *4–5 (D. Or. June 28, 2006).

[79] ADA, 42 U.S.C.A. §§ 12112(a) (Title I), 12132(a) (Title II) (West, Westlaw through Feb. 2008).

[80] See, e.g., *Head v. Glacier Northwest Incorporated*, 413 F.3d 1053, 1064 (9th Cir. 2005) (citing seven other circuits); see also *Price-Waterhouse v. Hopkins*, 490 U.S. 228, 252–55 (1989) (describing motivating factor test), superseded in part by 42 U.S.C.A. § 2000e-2(m) (West, Westlaw through Feb. 2008) (eliminating defense when employer would have made same decision based on nondiscriminatory factors alone).

[81] Rehabilitation Act, 29 U.S.C.A. § 794(a) (West, Westlaw through Feb. 2008); see also *Parker v. Columbia Pictures Industries*, 204 F.3d 326, 337 (2d Cir. 2000) (Clearinghouse No. 52,960) (ADA mixed-motive claim available under ADA based on contrast with language of Rehabilitation Act).

the issue thus far have rejected mixed-motive claims in cases regarding public services and programs.[82] Those courts of appeal squarely addressing the issue in employment cases similarly hold that the term "solely" forecloses the possibility of mixed-motive claims.[83] Nevertheless, some federal district court employment cases from the First Circuit hold that the term "solely" is not determinative, particularly in light of the amendments dictating uniformity of standards between the two statutes.[84]

Although the weight of opinion presently supports the stricter causation test, this issue is not decisive, or even relevant, in many cases. Frequently causation is either clear or cannot be established under either standard.[85] Moreover, numerous disability cases concern requests for accommodations, and, as the Eighth Circuit noted, the sole-causation question "is irrelevant to (and unlikely to accompany) the employer's failure to accommodate the employee's disability."[86] Similarly the Fifth Circuit observed in the context of parallel Title II and Rehabilitation Act claims that the difference in causation between the two laws "is not implicated" in challenges to building accessibility.[87]

Thus, although there are some disadvantages to using the Rehabilitation Act in lieu of the ADA, the differences between the two laws are not substantial.

III. Conclusion

Even though the Supreme Court's expansive interpretation of sovereign immunity has dealt a heavy blow to the ADA, people with disabilities can take solace in the availability of relief under the Rehabilitation Act. For most cases, the Rehabilitation Act provides an adequate mechanism for obtaining damages for discrimination by the state against its employees and in its administration of public services. Many claims remain available under the ADA, such as cases involving state services and programs under Title II. However, because sovereign immunity is still likely to be raised in these cases and may in some cases be successful, bringing ADA and Rehabilitation Act claims together remains advantageous.[88]

Advocates should remain alert for fresh "federalism-based attacks" on spending conditions.[89] For example, the Roberts Court, strictly applying *Dole*'s requirement that such conditions be "unambiguous," holds that prevailing parents in disputes under the Individuals with Disabilities in Education Act may not obtain attorney fees because that Act does not

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[82]See *New Directions Treatment Services v. City of Reading*, 490 F.3d 293, 300 n.4 (3d Cir. 2007); *Constantine*, 411 F.3d at 498 n.17; *Regional Economic Community Action Program v. City of Middletown*, 294 F.3d 35, 49 (2d Cir. 2002) (Clearinghouse No. 54,470); see also *Walley v. Department of Veterans Affairs*, 279 F.3d 1010, 1018 (Fed. Cir. 2002) (relying on sole causation test under Section 504 in interpreting regulations on injured federal workers); *Grzan v. Charter Hospital of Northwest Indiana*, 104 F.3d 116, 121 (7th Cir. 1997) (sole causation test is among other reasons for dismissal, but whether result would be different under ADA is not addressed); *Johnson v. Thompson*, 971 F.2d 1487, 1493 (10th Cir. 1992) (same).

[83]*Soledad v. U.S. Department of Treasury*, 304 F.3d 500, 503–5 (5th Cir. 2002); *Amir v. Saint Louis University*, 184 F.3d 1017, 1029 n.5 (8th Cir. 1999); *Severino v. North Fort Myers Fire Control District*, 935 F.2d 1179, 1183 (11th Cir. 1991); accord *Tressler v. Pyramid Healthcare Incorporated*, 422 F. Supp. 2d 514 (W.D. Pa. 2006).

[84]See, e.g., *Powell v. City of Pittsfield*, 221 F. Supp. 2d 119, 148–50 (D. Mass. 2002) ("amendments to the Rehabilitation Act appear to suggest that the ADA standard should now apply"), aff'd, 391 F.3d 1 (1st Cir. 2004); see also Eyer, *supra* note 56, at 295 ("it is plausible that the weight of judicial opinion could ultimately cut against" imposing different standards, in light of apparent congressional intent and paucity of analysis in current precedents).

[85]See, e.g., *Betts v. Rector and Visitors of University of Virginia*. 145 F.App'x 7, 10 n.2 (4th Cir. 2005) (there are different tests, but plaintiff "failed to show causation under the more lenient ADA standard"); *Thompson v. Virginia Department of Game and Inland Fisheries*, No. 06-00065, 2007 WL 984225, *3 n.6 (W.D. Va. March 30, 2007) (same).

[86]*Peebles v. Potter*, 354 F.3d 761, 767 n.5 (8th Cir. 2004).

[87]*Pace*, 403 F.3d at 288–89.

[88]See, e.g., *Chase*, 508 F. Supp. 2d 492 (dismissing prisoner's Title II claim on sovereign immunity grounds but allowing Rehabilitation Act claim to go forward).

[89]Eyer, *supra* note 56, at 311.

"unambiguously" set out such fees as a form of relief available.[90] Some scholars have speculated that the Court might also embrace much stricter versions of *Dole*'s relatedness and coercion factors.[91] There have even been calls to revise *Dole*'s permissive approach radically on the ground that it constitutes a pernicious "loophole" in the Court's federalism doctrines.[92]

Nevertheless, the doctrine of *South Dakota v. Dole* appears secure at present. The Roberts Court has reaffirmed that "Congress has broad power to set the terms on which it disburses federal money to the States."[93] Moreover, the use of federal spending conditions to achieve substantive policy goals is firmly ingrained in the American body politic.[94] Accordingly spending clause statutes such as the Rehabilitation Act will continue to provide a haven from the onslaught of the Court's sovereign-immunity doctrines. Indeed, spending conditions may be an essential tool for any new civil rights measures to ensure that victims of discrimination by state entities are not left without an effective remedy.

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[90]See *Arlington Central School District Board of Education v. Murphy*, 126 S. Ct. 2455, 2459 (2006) (Clearinghouse No. 54,797).

[91]See Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 Indiana Law Journal 459, 512–21 (2003); Roger C. Hartley, *Enforcing Federal Civil Rights Against Public Entities After* Garrett, 28 Journal of College and University Law 41, 90–92 (2001); but see Baker & Berman, *supra*, at 521 (stricter versions of the coercion prong "are just too amorphous to be judicially administrable").

[92]See, e.g., Baker & Berman, *supra* note 91, at 470–85.

[93]*Arlington*, 126 S. Ct. at 2458.

[94]Indeed, any major departure from *Dole* would seem to necessitate far-reaching changes in the modern regulatory state; this no doubt accounts for why lower courts have been reluctant to find violations of *Dole*'s requirements and prefer to leave such judgments to the political branches. See, e.g., Mark Tushnet, The New Constitutional Order 83 (2004) ("invoking federalism principles to limit the conditional spending power might be particularly awkward" given the "strong bipartisan support" for its use in areas such as educational policy); see also Baker & Berman, *supra* note 91, at 487 ("the Court is unlikely to change or abandon *Dole* in the near future").

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