

CURBING STATE DISCRIMINATION AGAINST DISABLED DRIVERS: WHY THE DISABLED NEED NOT PAY THE STATES TO PARTICIPATE IN DISABLED PARKING PROGRAMS

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INTRODUCTION

Title II of the Americans with Disabilities Act¹ (“ADA”) prohibits public entities² from discriminating against disabled persons.³ Every state in the Union has a disabled parking program, but most states charge the disabled to recover the costs of implementing and maintaining these programs.⁴ A small percentage of states actually

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¹ 42 U.S.C. §§ 12131 *et seq.* (2003).

² Public entities include the states and a number of state and local organizations. 42 U.S.C. § 12131 (2003).

³ 42 U.S.C. §§ 12101, 12131 (2003). “No qualified individual with a disability shall, by reason of such disability be excluded from participation in or be denied the benefits of services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132 (2003).

⁴ Thirty-one states charge for parking placards, disabled designated license plates, or both disabled placards and license plates (no states require both placards and special license plates to participate in their disabled parking programs). *See* ALA. CODE § 32-6-131 (2001); ARIZ. REV. STAT. § 28-2409 (2001); COLO. REV. STAT. ANN. § 42-3-121 (2)(a)(III)(d) (West 2001); CONN. GEN. STAT. § 14-253(a) (2001); DEL. CODE ANN. tit. 21, § 2135(c) (2001); FLA. STAT. ANN. § 320.0848 (West 2001); GA. CODE ANN. § 40-2-74 (2001); 625 ILL. COMP. STAT. 5/3-616 (2001); IND. CODE § 9-14-5-8 (2001) (assessing a fee for temporary placards only); KAN. STAT. ANN. § 8-1,125 (2001); LA. REV. STAT. ANN. § 47:463:4 (West 2002); MASS. GEN. LAWS ch. 90, § 2 (2001); MICH. COMP. LAWS § 257.675 (2001); MINN. STAT. § 169.345 (2002); MO. ANN. STAT. § 301.142 (West 2001); NEV. REV. STAT. 482.384 (2001); N.H. REV. STAT. ANN. § 261:88 (2001) (assessing a fee for special license plates, but not for placards); N.J. STAT. ANN. § 39:4-206 (West 2001); N.M. STAT. ANN. § 66-3-16 (Michie 2001); N.C. GEN. STAT. § 20-37.6 (2001); N.D. CENT. CODE § 39-01-15 (2001); OHIO REV. CODE ANN. § 4503.44 (West 2001); OKLA. STAT. ANN. tit. 15, § 112 (West 2002); S.C. CODE ANN. § 56-3-1960 (Law. Co-op. 2001); TENN. CODE ANN. § 55-21-103 (2001); TEX. TRANSP. CODE ANN. § 681.003 (Vernon 2001); UTAH CODE ANN. §41-1a-408 (2001); VA. CODE ANN. § 46.2-1241 (Michie 2001); WIS. STAT. § 343.51 (2001). Nineteen states do not charge a fee for disabled parking placards, and charge no fee beyond normal licensing fees for disabled designated license plates. *See* ALASKA STAT. §

charge the disabled much more than the costs of the programs, effectively using the program as an additional source of state revenue.⁵ The policy issue in this debate is not over whether the states should enact disabled parking programs, but over who should be required to pay for them. Thus, while all fifty states enforce disabled parking programs that seem to comply with Title II's anti-discrimination mandate, most states do not comply with another provision of the ADA promulgated by the Department of Justice ("DOJ").⁶ 28 C.F.R. section 35.130(f)⁷ (the "Regulation") prohibits states from charging the disabled fees to recover the costs of Title II programs.⁸ State non-compliance with the Regulation has sparked a substantial amount of litigation over whether Title II validly prohibits the states and state officials from charging disabled individuals to participate in Title II programs.

A recent Supreme Court decision complicates this issue.⁹ In *Board of Trustees of the University of Alabama v. Garrett*,¹⁰ the Court held that Title I of the ADA¹¹ could not sustain a suit for damages against

28.10.181 (Michie 2001); ARK. CODE ANN. § 21-15-308 (Michie 2001); CAL. VEH. CODE § 5007 (West 2002); HAW. REV. STAT. § 291-52 (2001); IDAHO CODE § 49-410 (Michie 2001); IOWA CODE ANN. § 31L.2 (West 2001); KY. REV. STAT. ANN. § 186.042 (Banks-Baldwin 2001); ME. REV. STAT. ANN. tit. 29, § 521 (West 2001); MD. CODE ANN., TRANSP. II § 13-616 (2001); MISS. CODE ANN. § 27-19-56 (2002); MONT. CODE ANN. § 49-4-301 (2001); NEB. REV. STAT. § 18-1738 (2001); N.Y. VEH. & TRAF. LAW § 404-a (McKinney 2001); OR. REV. STAT. § 811.602 (2001); 75 PA. CONS. STAT. ANN. § 1388 (West 2001); R.I. GEN. LAWS § 31-28-7 (2001); S.D. CODIFIED LAWS § 32-5-76.1 (Michie 2001); 23 VT. STAT. ANN. tit. 23, § 304(a) (2001); WASH. REV. CODE § 46.16.381 (2001); W. VA. CODE § 17C-13-6 (2001); WYO. STAT. ANN. § 31-2-213 (Michie 2001).

⁵ See, e.g., FLA. STAT. ANN. § 320.0848 (West 2001) (charging \$15 for four-year permits and \$22.50 for six-year permits); MASS GEN. LAWS ch. 90, § 2 (2001) (charging a \$25 fee for placards); TENN. CODE ANN. § 55-21-103 (2001) (charging a \$20.50 initial fee and \$3 renewal fee every two years which was noted by the Sixth Circuit in, *Hedgepeth v. Tennessee*, 215 F.3d 608, 614 (2000), as over 1000% of the raw cost of disabled placards and license plates).

⁶ 42 U.S.C. section 12134 (2002) requires the Attorney General to develop regulations designed to implement Title II.

⁷ DOJ Nondiscrimination on the Basis of Disability in State and Local Governments, 28 C.F.R. § 35.130(f) (2003) is hereinafter referred to as the "Regulation."

⁸ The states are prohibited from placing, a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of such measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the non-discriminatory treatment required by the Act or this part.

28 C.F.R. § 35.130(f) (2001).

⁹ See *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001).

¹⁰ 531 U.S. 356 (2001).

¹¹ Title I prohibits discrimination against the disabled by employers. 42 U.S.C. §

the states as an exercise of Congress's Fourteenth Amendment enforcement power.¹² While the Court seemed to limit its holding to Title I of the ADA,¹³ lower courts have extended *Garrett's* to Title II.¹⁴ This unsettled state of the law creates a number of ongoing issues, including: (1) must the states comply with Title II; (2) does compliance include adherence to the prohibition on charging the disabled for the costs of Title II programs; (3) if compliance is required, can individuals sue for damages or injunctive relief; (4) if individuals cannot sue the states to enforce Title II, are the states free to ignore the Act; and (5) will the ADA, the most substantial civil rights legislation of the 1990's, survive upcoming judicial scrutiny?

While the Circuits are split on the issue of whether Title II is enforceable as an exercise of Fourteenth Amendment power, *Garrett* indicates that the Court will likely hold that it is not.¹⁵ If Title II is unsupported by the Fourteenth Amendment, it is unenforceable unless supported by another congressional power.¹⁶ Part I of this

12112 (a) (2003).

¹² 531 U.S. at 368. The fifth section of the Fourteenth Amendment gives Congress the power to enact legislation that enforces the other provisions of the Fourteenth Amendment. See *infra* note 18.

¹³ *Garrett*, 531 U.S. at 360 n.1.

¹⁴ See *Ass'n For Disabled Americans v. Fla. Int'l Univ.*, 178 F. Supp. 2d 1291 (S.D. Fla. 2001). Discussing the extension of *Garrett* to Title II, the Southern District Court of Florida stated the following:

The Court did explicitly limit its holding in *Garrett* to Title I of the ADA, and specifically declined to decide whether Eleventh Amendment immunity bars claims against a state under Title II of the ADA. *Garrett*, 531 U.S. at 360 n.1. Despite the Court's purportedly limited ruling, however, the analytical framework set forth in *Garrett* has led several lower courts to conclude that suits by individuals against states under Title II are also barred by the Eleventh Amendment.

Id. at 1293 (citing two circuit courts and seven district courts that have extended *Garrett*, finding Title II could not be enforced through private damage actions, and one circuit and five district courts that have allowed post-*Garrett* private damage actions seeking Title II enforcement to proceed against the states).

¹⁵ *Id.*

¹⁶ If not within congressional power, any act of Congress is void.

Early in this Nation's history, this Court established the sound proposition that constitutional government in a system of separated powers requires judges to regard as inoperative any legislative act, even of Congress itself, that is "repugnant to the Constitution . . ."

Dickerson v. United States, 530 U.S. 428, 446 (2000) (finding that *Miranda* announced a constitutional rule that Congress could not legislatively revoke) (Scalia, J., dissenting) (quoting *Marbury v. Madison*, 5 U.S. 137, 148 (1803)).

It has been the policy of the American states . . . and of the people of the United States . . . to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state,

Comment explores *Garrett* and its impact on the current circuit split within the Title II subset of disabled parking cases.

Congress invoked two of its powers¹⁷ when it enacted Title II: the Fourteenth Amendment¹⁸ and the Commerce Clause Power.¹⁹ Although the Commerce Clause power does not abrogate state immunity,²⁰ if Title II is a valid exercise of the Commerce Clause power, individuals should be able to prevent states from charging them to recover costs of Title II programs through *Ex Parte Young*²¹ suits for injunctive relief. *Ex Parte Young* allows an individual to sue a state official for injunctive relief²² when that official acts in violation of a federal law.²³ Under *Ex Parte Young* a state official acting in violation of federal law is acting illegally and cannot claim the state's immunity from suit because a state's power is insufficient to immunize state official activity that violates federal law.²⁴ The illegal acts of the state officer strip the officer of state authority making the suit one against him personally rather than one against the state.²⁵ *Ex Parte Young* is often referred to as a fiction²⁶ because even though the

violates those constitutional provisions, it is unquestionably void.

Seminole Tribe v. Florida, 517 U.S. 44, 168 (1996) (Souter, J., dissenting) (quoting *Calder v. Bull*, 3 U.S. 386, 398-99 (1798) (Iredell, J., dissenting)).

¹⁷ While the Constitution gives Congress many powers, not all of these powers can be used to support legislation. *Seminole Tribe*, 517 U.S. at 168 (Souter, J., dissenting).

¹⁸ "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

¹⁹ "Congress shall have Power. . . To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." U.S. CONST. art I, § 8. "It is the purpose of this act . . . to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101 (b)(4) (2002).

²⁰ The only congressional power that, if properly utilized by Congress, enables a private citizen to sue a state directly for money damages without that state's consent is Congress's Fourteenth Amendment enforcement power. *Coll. Sav. Bank v. Florida Prepaidpostsecondary Ed. Expense Bd.*, 527 U.S. 666, 670 (1999) (finding Florida could not be sued under the Lanham Act because such suit was unsupported by either state consent or valid Fourteenth Amendment waiver of sovereign immunity).

²¹ 209 U.S. 123 (1908).

²² An individual cannot recover money damages from a state official through an *Ex Parte Young* suit. See *Edelman v. Jordan*, 415 U.S. 651 (1974) (upholding a lower court's order for prospective injunctive relief but reversing the lower court's award of money damages where plaintiff sued under *Ex Parte Young* theory).

²³ *Id.*

²⁴ 209 U.S. at 160.

²⁵ *Id.*

²⁶ See *Idaho v. Coeur d'Alene Indian Tribe*, 521 U.S. 561, 570 (1997) (discussing *Ex Parte Young* as an "obvious fiction").

suit is nominally against the state official, the suit is seeking relief from state action and is therefore really a suit against the state.²⁷ If the Regulation is a valid federal law because it is within Congress's Commerce Clause power to enact, then the regulation is indirectly enforceable against the states.

Part II considers the validity of Title II under Congress's Commerce Power, an issue that remains unlitigated in the circuit courts.²⁸ This Part demonstrates that the Commerce Clause provides ample support for the Regulation. Therefore, individual plaintiffs should be able to sue state officials and enforce the Regulation through *Ex Parte Young* actions. Even if Title II is a valid exercise of the Commerce Power, Title II may still be unenforceable if it violates the Tenth Amendment.²⁹ The Tenth Amendment prohibits Congress from forcing the states or state officers to act.³⁰ Part III will explore this issue. This analysis indicates that Congress may not be able to force the states to enact disabled parking programs but can regulate such programs if they are voluntarily enacted by the states.

Even if Title II is a valid exercise of Commerce Power and the Tenth Amendment does not prevent Congress from regulating state disabled parking programs, another inquiry is necessary to determine whether the Regulation is enforceable because it was not enacted by Congress, but by the DOJ. Part IV will demonstrate, using the current *Chevron* test for analyzing whether an agency's exercise of congressionally granted power is valid, that the regulation is indeed enforceable.

A further inquiry is necessary to answer the question of where plaintiffs can bring enforcement actions because the Tax Injunction Act of 1937³¹ ("TIA") may bar plaintiffs from bringing these actions in federal court. Part V will focus on a second circuit split over whether

²⁷ Justice Powell's majority opinion in *Pennhurst State Sch. & Hosp. v. Halderman* endorses this view of *Ex Parte Young*. 465 U.S. 89, 144 n.25 (1984).

²⁸ Courts noting but not deciding this issue include the Tenth Circuit in *Thompson v. Colorado*, 278 F.3d 1020, 1025 (2001); the Second Circuit in *Garcia v. State Univ. of N.Y. Health Scis. Ctr.*, 280 F.3d 98, 108 (2001); the Eighth Circuit in *Randolph v. Rogers*, 253 F.3d 342, 348 n.12 (2001); the Seventh Circuit in *Walker v. Snyder*, 215 F.3d 344, 346 (2000) (assuming, without deciding, that the ADA is a valid exercise of Commerce Clause power); *Bowers v. NCAA*, 1717 F. Supp. 2d 389, 407 (D.N.J. 2001) (assuming without deciding that the ADA is a valid exercise of Commerce Clause power).

²⁹ The Tenth Amendment explicitly reserves some powers for the states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

³⁰ See *infra* PART III.

³¹ 28 U.S.C. § 1341 (2003).

the program fees collected by the states are properly considered taxes for the purposes of the TIA. This inquiry will demonstrate that while plaintiffs in a minority of states may be prohibited from bringing Regulation enforcement actions in federal court, the majority of plaintiffs will be able to bring these suits in both federal and state court. The circuit cases on this issue indicate that fees designed to generate revenue for the state beyond the costs of the disabled parking programs are taxes, and that fees designed to merely recover the costs of these programs are not.³²

Finally, this Comment concludes that all fifty states can be prevented from charging disabled drivers to participate in disabled parking programs because: (1) Title II of the ADA is a proper exercise of Commerce Clause power; (2) the States have voluntarily enacted disabled parking programs; (3) the Regulation is valid under the *Chevron* framework; and (4) while the TIA may impact federal court jurisdiction in a minority of cases, it will not prevent plaintiffs from obtaining relief for violations of the Regulation.

I. *GARRETT* AND THE SPLIT OVER THE VALIDITY AND METHODS OF ANALYSIS OF TITLE II AND 28 C.F.R. § 35.130(F) AS AN EXERCISE OF FOURTEENTH AMENDMENT ENFORCEMENT POWER

A. *Garrett v. Board of Trustees*³³

Of the five circuits to consider the Regulation, only the last of these decisions was handed down in the wake of *Garrett*.³⁴ *Garrett* holds that Title I of the ADA is an invalid exercise of Congress's Fourteenth Amendment enforcement power and, therefore, private individuals cannot sue the states directly for Title I violations.³⁵ While this decision is expressly limited to Title I, the Court may soon extend its *Garrett* holding to Title II, as it has granted *certiorari* on this issue before.³⁶

³² *Id.*

³³ 531 U.S. 356 (2001).

³⁴ See *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001).

³⁵ 531 U.S. at 374.

³⁶ The Tenth Circuit twice delayed its decision in *Thompson v. Colorado* to await the outcome of two Supreme Court cases.

After oral argument, this court formally abated the case following the Supreme Court's grant of *certiorari* in *Florida Dept. of Corr. v. Dickson*. The *Dickson* case settled, however, and this case was then reactivated. This court further delayed deciding this case, however, in order to await the outcome of *Bd. of Trustees of the Univ. of Alabama v. Garrett* and to allow the parties and the United States as intervenor to file

Analyzing whether Title I validly abrogates states' Eleventh Amendment immunity,³⁷ the Court first identified the Fourteenth Amendment right at issue.³⁸ The Court found that the disabled have the right to be free from irrational state discrimination and that the states can discriminate against the disabled as long as the discrimination is rationally linked to a legitimate governmental interest.³⁹ Therefore, the right in question is a negative right that protects against irrational state discrimination.⁴⁰

In *Garrett*, the Court found that Congress could only enact positive law to enforce this Fourteenth Amendment right if it identified a pattern of irrational state discrimination against the disabled.⁴¹ If Congress identified such a pattern in state employment practices, then Title I would be a valid exercise of Congress's enforcement power.⁴² The Court determined in *Garrett*, however, that Congress had not identified repeated irrational state discrimination

supplemental briefs; the Supreme Court decided *Garrett* on February 21, 2001.

Thompson, 278 F.3d at 1023 (citations omitted). *Dickson* held that the ADA, as a whole, was a valid abrogation of states' Eleventh Amendment immunity from private suits for damages, because the ADA is a valid exercise of Congress's Fourteenth Amendment enforcement power. See *Kimel v. Florida Bd. of Regents*, 139 F.3d 1426, 1429 (11th Cir. 1998).

³⁷ The Eleventh Amendment states that "[t]he 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.

Although by its terms the Amendment applies only to suits against a State by citizens of another State, our cases have extended the Amendment's applicability to suits by citizens against their own States. The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court. We have recognized, however, that Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority. The first of these requirements is not in dispute here. See 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter"). The question, then, is whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA.

Garrett, 531 U.S. at 363 (citations and quotations omitted).

³⁸ 531 U.S. at 365.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 368.

⁴² *Id.*

against the disabled in state employment practices.⁴³ The Court noted that the congressional record supporting Title I contains numerous examples of discrimination against the disabled in the employment context.⁴⁴ The Court held, however, that the majority of these examples do not count as part of a state pattern against the disabled that support Title I as an exercise of Fourteenth Amendment enforcement power that is binding against the states because the examples were not contemporaneous acts of discrimination by the “states themselves.”⁴⁵

The Court further noted in *dicta* that even if Congress developed a sufficient record of irrational employment discrimination, the remedy it developed for this discrimination would still have to be congruent and proportional to the pattern identified by Congress.⁴⁶ The Court found that the duties imposed on states by Title I went beyond what even a clear pattern of state discrimination could support.⁴⁷ A clear pattern of state discrimination, the Court suggested, would resemble that identified by Congress in support of the Voting Rights Act of 1965.⁴⁸ Although the Court determined that

⁴³ The Court noted the record contained only six examples of such discrimination. *Id.* at 369. Justice Breyer vigorously disagreed with the majority’s interpretation of what should count as an example of unconstitutional discrimination. 531 U.S. at 379 (Breyer, J., dissenting) (Justice Breyer, in contrast to the majority’s identification of six examples of state discrimination, found the record contained over 300 examples of state discrimination.) The majority’s reply to this assertion clarifies its position:

Only a small fraction of the anecdotes Justice Breyer identifies in his Appendix C relate to state discrimination against the disabled in employment. At most, somewhere around 50 of these allegations describe conduct that could conceivably amount to constitutional violations by the States, and most of them are so general and brief that no firm conclusion can be drawn. The overwhelming majority of these accounts pertain to alleged discrimination by the States in the provision of public services and public accommodations, which areas are addressed in Titles II and III of the ADA.

Id. at 371 n.7.

⁴⁴ *Garrett*, 531 U.S. at 368, 369 n.5.

⁴⁵ *Id.*

⁴⁶ *Id.* at 372.

⁴⁷ “The accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an ‘undue burden’ upon the employer.” *Id.*

⁴⁸ In that Act, Congress documented a marked pattern of unconstitutional action by the States. State officials, Congress found, routinely applied voting tests in order to exclude African-American citizens from registering to vote. [citing *South Carolina v. Katzenbach*, 383 U.S. 301, 312 (1966).] Congress also determined that litigation had proved ineffective and that there persisted an otherwise inexplicable 50-percentage-point gap in the registration of white and African-American

disabled individuals do have specific Fourteenth Amendment rights, it also held that the identified congressional record of state discrimination was insufficient to support an abrogation of state immunity, and suggested that even if the record was adequate, the remedies developed by Congress were not congruent and proportional to the pattern of violations.⁴⁹

The Court did not seem to think its holding would dramatically impact the enforceability of the ADA.⁵⁰ Rather, the Court noted in *dicta* that Title I should still be enforceable against the states through *Ex Parte Young* suits for injunctive relief and actions for money damages brought by the United States.⁵¹ This illustrates that the Court assumes that Title I, even if invalid as an exercise of Fourteenth Amendment enforcement power, is a valid exercise of another congressional power.⁵²

Although the Court's ruling in *Garrett* is limited to Title I, its method of analysis suggests that Title II may not be a valid exercise of Fourteenth Amendment enforcement power.⁵³ Courts considering

voters in some States. [citing 383 U.S. at 313.] Congress's response was to promulgate in the Voting Rights Act a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified.

Id. at 373.

⁴⁹ *Garrett*, 531 U.S. at 372.

⁵⁰ Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908). In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

Id. at 374 n.9.

⁵¹ *Id.*

⁵² Congress invoked its Fourteenth Amendment enforcement power and Commerce Clause power when it enacted the ADA. 42 U.S.C. § 12101 (b)(4) (2002). For the ADA to be valid and enforceable, it must be a legitimate exercise of one or both of these powers.

⁵³ See *supra* note 14 for a discussion of courts choosing whether or not to extend *Garrett*'s rationale and invalidate Title II of the ADA as an exercise of the Fourteenth Amendment enforcement power.

Like its decision in *Kimel* regarding the regulation of age discrimination under the ADEA, the Court in *Garrett* concluded that the ADA presented a broad restriction on disability discrimination, such that the ADA prohibited substantially more employment decisions by states than would be held unconstitutional under the Equal Protection Clause.

Joseph M. Pellicciotti, *Redefining the Relationship Between the State and the Federal Government: A Focus on the Supreme Court's Expansion of the Principle of State Sovereign Immunity*, 11 B.U. PUB. INT. L.J. 1, 25 (2001).

Title II after *Garrett* have found that *Garrett* requires them to consider whether Title II as a whole is a valid exercise of Fourteenth Amendment enforcement power.⁵⁴ Under the *Garrett* framework, rights provided to individuals by any Title of the ADA against the states may be unenforceable through private suits for damages if the states have not waived their Eleventh Amendment immunity from suit.⁵⁵

Garrett does not eliminate the possibility, however unlikely, that the Court may uphold Title II as a valid exercise of Congress's Fourteenth Amendment Enforcement Power.⁵⁶ The Court, in order to reach this result, would have to find that Title II's congressional record indicates that states actively excluded the disabled from participating in society. To support this finding, the record must demonstrate that Title II is congruent and proportional to the identified pattern of violations that may be contained in an extensive history of litigation against the states. While *Garrett* offers some clarity, the differing approaches to analyzing the validity of the Regulation among the circuits demonstrate that current analysis of these concerns is still unclear.

B. The Circuit Split

Four circuits are split⁵⁷ over the question of whether states may charge disabled drivers to recover the administrative costs of their

⁵⁴ The Sixth Circuit, for example, followed this approach in *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 812 n.4 (6th Cir. 2002).

[T]he majority of the Supreme Court in *Garrett* seems to have . . . established a clear rule that disability discrimination deserves only rational basis review and that Congress may not go beyond this standard under the Equal Protection Clause by imposing new liabilities on the states. This *Garrett* rule would appear to apply to both Title I and Title II, although the Court has not made this holding explicit as to Title II, and it is possible, though unlikely, that a majority of the Supreme Court might distinguish *Garrett* . . .

Id. The Second Circuit has also followed this whole title approach. See *Garcia v. State Univ. of N.Y. Health Scis. Ctr.*, 280 F.3d 98 (2d Cir. 2001).

⁵⁵ *Garrett*, 531 U.S. at 363.

⁵⁶ This issue will likely be definitively decided very soon. The Supreme Court has granted *certiorari* on a Title II case from the Ninth Circuit and indicated that it will decide whether Title II can be enforced directly against the states for money damages. *Hason v. Med. Bd. of California*, 294 F.3d 1156 (9th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3351 (U.S. Nov. 18, 2002) (No. 02-479).

⁵⁷ See *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001); see also *Hedgepeth v. Tennessee*, 215 F.3d 608 (6th Cir. 2000); *Neinast v. Texas*, 217 F.3d 275 (5th Cir. 2000); *Brown v. North Carolina DMV*, 166 F.3d 698 (4th Cir. 1999); *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999).

disabled parking programs.⁵⁸ The Regulation prohibits the states from placing:

a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of such measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the non-discriminatory treatment required by the Act or this part.⁵⁹

States charge these fees for parking placards and/or special license plates, which are required to park in disabled-designated parking areas.⁶⁰ The divided circuits approach the issue in three different ways.

The Ninth Circuit is the only circuit to hold that a private suit seeking money damages against a state is a valid method to enforce the Regulation.⁶¹ The court held that because Title II is a valid exercise of Congress's Fourteenth Amendment enforcement power when considered as a whole, the Regulation is also valid and directly enforceable against the states.⁶² The Fourth Circuit found that the Regulation, considered alone, exceeds congressional Fourteenth Amendment enforcement power.⁶³ The Fifth Circuit followed the Fourth Circuit in dismissing litigation against the state of Texas.⁶⁴ Most recently, the Tenth Circuit agreed with the Ninth Circuit that Title II should be considered as a whole.⁶⁵ Unlike the Ninth Circuit, however, the Tenth Circuit found Title II of the ADA invalid as an exercise of Fourteenth Amendment enforcement power.⁶⁶

Thus, the circuits are split over whether the Regulation is a valid exercise of Fourteenth Amendment enforcement power if Title II as a whole is a valid exercise of Fourteenth Amendment enforcement power, and whether the Regulation must be an independently valid exercise of congressional power to provide a right that is directly enforceable against the states. A review of the rationales employed by these circuits illustrates the approaches and provides the groundwork for a more thorough discussion of these issues.

⁵⁸ See *infra* PART I.B.

⁵⁹ 28 C.F.R. § 35.130(f) (2001).

⁶⁰ See *supra* note 4.

⁶¹ *Dare*, 191 F.3d at 1167.

⁶² *Id.* at 1175.

⁶³ *Brown*, 166 F.3d at 698.

⁶⁴ *Neinast*, 217 F.3d at 275.

⁶⁵ *Thompson*, 278 F.3d at 1020.

⁶⁶ *Id.* at 1031.

1. *Dare v. California*⁶⁷

In 1999, the Ninth Circuit held that Title II's prohibition on charging the disabled to participate in ADA programs could be enforced through private suits for damages because Title II of the ADA was a valid exercise of congressional power that properly abrogated state immunity.⁶⁸ The Court found that even though the DOJ—acting under congressionally delegated authority—enacted the Regulation, it must be treated as though Congress enacted it, because the Supreme Court's holding in *Olmstead v. ex rel Zimring*⁶⁹ requires courts to treat federal agencies as they would Congress.⁷⁰ Under this rationale, Title II regulations promulgated by the DOJ are directly enforceable against the states because Congress enacted the regulations through its delegated agent, the DOJ.⁷¹ As long as the DOJ's regulations are generally consistent with the purposes of the ADA, courts need not consider whether a regulation is valid.⁷² As long as the Title that a regulation is enacted under is valid, the regulation will also be valid.⁷³

The Ninth Circuit's analysis, because it did not have the benefit of the Supreme Court's *Garrett* holding, focused on the "congruence and proportionality" requirements articulated in *City of Boerne v. Flores*.⁷⁴ Under this test, Congress properly abrogates state immunity when it enacts legislation that uses means congruent to the scope of a well-identified pattern of unconstitutional activity.⁷⁵ The legislation must also be proportional in that it cannot do much more than is necessary to prevent the identified unconstitutional behavior from

⁶⁷ 191 F.3d 1167 (9th Cir. 1999).

⁶⁸ *Id.* at 1175.

⁶⁹ 527 U.S. 581 (1999).

⁷⁰ Courts must sometimes defer to the determinations of federal agencies the same way courts would defer to Congress.

As the Supreme Court stated in *Olmstead*: [b]ecause the Department [of Justice] is the agency directed by Congress to issue regulations implementing Title II, its views warrant respect. We need not inquire whether the degree of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, is in order; "it is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'"

191 F.3d at 1176 n.7 (quoting *Bragdon v. Abbott*, 524 U.S. 624 (1998)).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Dare*, 191 F.3d at 1174 (discussing the congruence and proportionality requirements set forth in *Boerne*).

⁷⁵ *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

occurring in the future.⁷⁶

The Ninth Circuit found that Title II satisfies *Boerne's* congruence requirement because Congress made “specific factual findings of arbitrary and invidious discrimination against the disabled” and enacted the ADA in response to those findings.⁷⁷ The court found that Congress’s Title II factual findings and remedies should be given deference.⁷⁸ The Ninth Circuit further noted that the Supreme Court previously found that “unjustified isolation . . . is properly regarded as discrimination based on disability.”⁷⁹ The court determined Title II also satisfies *Boerne's* proportionality requirement because “Congress’s findings were sufficiently extensive and related to the ADA’s provisions that [Title II] can be understood as responsive to or designed to prevent unconstitutional behavior.”⁸⁰ In sum, *Dare* prohibits all states within the Ninth Circuit from charging disabled drivers for participating in disabled parking programs.⁸¹

2. *Brown v. North Carolina DMV*⁸²

The Fourth Circuit also utilized a *Boerne* “congruence and proportionality” analysis to address the validity of the Regulation.⁸³ The circuit, considering the regulation alone, found the Regulation an invalid exercise of Fourteenth Amendment enforcement power.⁸⁴ Consequently, the court found that the Regulation does not provide private individuals with Fourteenth Amendment actions against the states.⁸⁵ The United States, as an intervenor, encouraged the court to consider the constitutionality of Title II as a whole, rather than the Regulation standing alone.⁸⁶ The court refused the government’s proposed analysis, finding such a consideration would force the court to “ratify unnecessarily the constitutionality of every provision in the title.”⁸⁷ To support its position, the court noted that courts have long sought to adjudge only unavoidable questions of constitutionality.⁸⁸

⁷⁶ *Id.* at 532.

⁷⁷ *Dare*, 191 F.3d at 1174.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1175 (quoting *Olmstead*, 527 U.S. at 595).

⁸⁰ *Id.* (internal quotations and citation omitted).

⁸¹ *See supra* note 4.

⁸² 166 F.3d 698 (4th Cir. 1999).

⁸³ *Id.* at 705.

⁸⁴ *Id.* at 707-08.

⁸⁵ *Id.*

⁸⁶ *Id.* at 703.

⁸⁷ *Id.*

⁸⁸ “If there is one doctrine more deeply rooted than any other in the process of

The Fourth Circuit also determined that the broad method of analysis would allow unconstitutional regulations to hide behind constitutional statutes.⁸⁹ The court postulated that this would allow unconstitutional regulations to be enforced against the states, a problem of particular importance in light of federalism and sovereign immunity concerns.⁹⁰

The Fourth Circuit's *Boerne* analysis included a discussion of the legislative record of the ADA that concluded the type of activity identified by Congress, while surely discriminatory, did not constitute *unconstitutional* discrimination by the states.⁹¹ More importantly, the court found that the Regulation's prohibition on charging disabled drivers could only be sustained if "many of those surcharges 'have a significant likelihood of being unconstitutional.'"⁹² The court looked to *City of Cleburne v. Cleburne Living Center*⁹³ as the benchmark for disabled individuals Fourteenth Amendment rights, and applied rational basis scrutiny to the fees.⁹⁴ In so doing, the court quickly determined the fees were rationally based to recover the cost of programs designed to help the disabled,⁹⁵ and because the fees were rational, the disabled did not have a Fourteenth Amendment right to be protected from them.⁹⁶ The court emphasized that, in its view, the Regulation went well beyond prophylactic action and instead attempted to do something that *Cleburne* prohibits: establish the

constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Brown*, 166 F.3d at 704 (quoting *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 104 (1944)).

⁸⁹ The court seemed particularly concerned that this approach would upset the balance of federalism in favor of the national government.

Looking broadly at an entire title would leave underprotected these important state interests in immunity. Ratifying an entire title and finding abrogation without examining the actual, specific legal basis for suit could subject a state to suit in federal court pursuant to an unconstitutional provision buried in the midst of an otherwise constitutional statutory scheme. Such a jurisprudence—one leading to sweeping validations of abrogation—would be completely discordant with the doctrine of dual sovereignty.

Id.

⁹⁰ *Id.*

⁹¹ *Id.* at 707.

⁹² *Id.* (quoting *Boerne*, 521 U.S. at 532).

⁹³ 473 U.S. 432 (1985) (holding that classifications of individuals with mental retardation are quasi-suspect and subject to rational review).

⁹⁴ A state violates the Equal Protection rights of the disabled when its actions towards the disabled are not rationally related to a legitimate governmental purpose. See *supra* PART I.A.

⁹⁵ *Brown*, 166 F.3d at 707.

⁹⁶ *Id.*

disabled as a “suspect or quasi-suspect equal protection classification.”⁹⁷

The close of the court’s opinion, emphasizing the amount of the yearly one dollar per driver fee, illustrates the court’s satisfaction that the fee was related to a legitimate governmental purpose and therefore survived rational basis review.⁹⁸ Affirming the plaintiff’s lack of standing to sue, the Fourth Circuit expressly noted that its opinion in no way adjudged the Regulation’s constitutionality as an exercise of Congress’s power under the Commerce Clause.⁹⁹

3. *Neinast v. Texas*¹⁰⁰

The Fifth Circuit’s analysis is similar to that of the Fourth Circuit. Moreover, its conclusion is the same—the Regulation is *not* a valid exercise of Fourteenth Amendment enforcement power.¹⁰¹ Like the Fourth Circuit, the Fifth considered *Boerne* of central import.¹⁰² Unlike the Fourth, however, the Fifth Circuit combined *Boerne* with a *Chevron*¹⁰³ analysis to determine the degree of deference, if any, it had to give the DOJ.¹⁰⁴

The court found, even under *Chevron*,¹⁰⁵ that it was not required to give the DOJ any deference regarding the Regulation because the Regulation went beyond Congress’s Fourteenth Amendment enforcement power¹⁰⁶ by attempting to create rights to protect against constitutional, rather than unconstitutional, discrimination.¹⁰⁷ The court implied that although Title II’s access requirements might be constitutionally permissible, anything beyond requiring the states to provide access, such as a prohibition on rational discrimination against the disabled, was beyond Congress’s power under the Fourteenth Amendment.¹⁰⁸

⁹⁷ *Id.* at 707-08.

⁹⁸ “To cover the cost of the placards, North Carolina introduced the most modest of all possible fees—one dollar a year.” *Id.* at 708.

⁹⁹ *Id.* at 708 n.1.

¹⁰⁰ 217 F.3d 275 (5th Cir. 2000).

¹⁰¹ *Id.*

¹⁰² *Id.* at 282.

¹⁰³ 467 U.S. 837 (1984). For a discussion of *Chevron*, see *infra* PART IV.

¹⁰⁴ *Neinast*, 217 F.3d at 281.

¹⁰⁵ See *infra* PART IV for a discussion of *Chevron*.

¹⁰⁶ “An agency, or as here, an executive office with delegated power to promulgate rules, cannot have greater power to regulate state conduct than does Congress.” *Neinast*, 217 F.3d at 281.

¹⁰⁷ *Id.* at 282.

¹⁰⁸ The regulation’s scope goes further than simply requiring states to provide access to their facilities and programs; it bars the sharing of *any*

4. *Thompson v. Colorado*¹⁰⁹

Thompson, a Tenth Circuit decision issued in 2001, illustrates the potential impact of *Garrett*.¹¹⁰ The plaintiffs in *Thompson*, disabled drivers suing the state to prevent it from charging fees to participate in the state's disabled parking program, were in an identical position to those in earlier cases.¹¹¹ Although the court's method of analysis resembles that of the *Dare* court, the *Thompson* court held, the opposite of *Dare*, that Title II exceeded Congress's Fourteenth Amendment enforcement power to enact.¹¹²

Both parties in *Dare* moved for summary judgment at the district court level.¹¹³ The district court granted the plaintiff's motion for summary judgment and denied Colorado's motion, holding that Title II was a valid abrogation of state immunity.¹¹⁴ The Tenth Circuit, attempting to determine whether the Eleventh Amendment barred the plaintiff's suit, focused its review on whether Title II was, in fact, a valid exercise of Congress's Fourteenth Amendment enforcement power.¹¹⁵

The Tenth Circuit's holding is broad: none of Title II validly abrogates states' Eleventh Amendment immunity because Congress did not identify a historical pattern of unconstitutional state

costs of such measures, a highly intrusive limit on the core state power to choose revenue sources. There is no plausible claim that banning any fees by the state corrects past discrimination against individuals with disabilities regarding access or that it seeks prophylactically to prevent the state from intentionally discouraging them from enjoying access. A requirement as to who bears minimal costs of accommodation relates back not to the relevant constitutional harm, but only to other prophylactic steps. We thus distinguish this situation from Congress's ban through the Voting Rights Act on literacy tests, whose use had been shown to be an effort to discriminate. (citing *Boerne*, 521 U.S. at 524-26.; *South Carolina v. Katzenbach*, 383 U.S. 301 (1996)). This degree of separation leaves the regulation unanchored to a constitutional purpose. It is an impermissible form of regulatory creep. The regulation bears such an attenuated relationship to the remedial goal that it cannot be understood as a remedial or prophylactic response to unconstitutional behavior. We hold that 28 C.F.R. § 35.130(f) exceeds the scope of Congress's power to abrogate the states' immunity under § 5 of the Fourteenth Amendment.

Id. (emphasis in original).

¹⁰⁹ 278 F.3d 1020 (10th Cir. 2001).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1022.

¹¹² *Id.* at 1034.

¹¹³ *Id.* at 1022.

¹¹⁴ *Id.*

¹¹⁵ *Thompson*, 278 F.3d at 1028-29.

discrimination against the disabled involving state “services, programs, and activities” when it enacted the ADA.¹¹⁶ The court’s rationale rested on its interpretation of the *Garrett* decision, beginning with the premise that each title of the ADA should be considered independently to determine if it is a valid exercise of Congress’s Fourteenth Amendment enforcement power.¹¹⁷ The Tenth Circuit found that, because of the doctrinal refinement in *Garrett*, it faced an issue of first impression as to the validity of Title II.¹¹⁸

The court’s second step followed *Garrett* by attempting to “identify with some precision the scope of the constitutional right at issue.”¹¹⁹ The court found that the accommodation requirements of Title II went beyond the general requirements of the Equal Protection Clause.¹²⁰ Instead, the court noted that the states are subject to three general Fourteenth Amendment principles governing the rights of the disabled.¹²¹ First, facial distinctions between the non-disabled and the disabled must be rationally related to a legitimate state interest.¹²² Second, invidious state action against the disabled is always unconstitutional.¹²³ Finally, in “certain limited circumstances such as those involving voting rights and prison conditions, states are required to make at least some accommodations for the disabled.”¹²⁴ Using these principles, the court determined that Congress improperly invoked the Fourteenth Amendment when it enacted Title II of the ADA because the Fourteenth Amendment cannot be used to create affirmative obligations on the states that are intended to benefit disabled individuals.¹²⁵

¹¹⁶ *Id.* at 1034.

¹¹⁷ *Id.* at 1027.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1030 (quoting *Garrett*, 531 U.S. at 365).

¹²⁰ The court goes further than this, suggesting that the Equal Protection Clause may not support *any* of the ADA.

While the basic premise of the Equal Protection Clause is that similarly situated citizens should be treated alike, the mandate of the ADA is that those who are not similarly situated should be treated differently. The Equal Protection Clause does not generally require accommodations on behalf of the disabled by the states.

Id. at 1031.

¹²¹ *Thompson*, 278 F.3d at 1032.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 1031.

The Tenth Circuit provided an additional rationale for finding that the Fourteenth Amendment does not provide Congress with the power to enact the ADA.¹²⁶ Here the court again turned to *Garrett*, considering whether or not Congress sufficiently established a legislative record of state violation of the rights of the disabled.¹²⁷ While the court noted that the vast majority of the legislative record supporting Title II involved the public entities refusing to ensure that disabled individuals had access to “programs, services and activities,” it found that these examples predominantly involved “local officials and not the states.”¹²⁸ The court suggested that the preponderance of positive state legislation for the disabled effectively prevents Congress from establishing a sufficient record to justify Title II by largely eliminating state discrimination against the disabled.¹²⁹

C. Future Analysis of Title II: What Courts Should do When Considering Title II as an Exercise of Fourteenth Amendment Enforcement Power

All fifty states have passed legislation protecting disabled citizens.¹³⁰ A number of these state laws do not protect the disabled as comprehensively as the ADA.¹³¹ Indeed, the circuit split over disabled parking placard fees offers a clear example of state legislation that does not reach as far as the ADA in protecting the rights of the disabled.¹³² Yet, state laws may provide minimal protection that is

¹²⁶ *Id.* at 1034.

¹²⁷ *Thompson*, 278 F.3d at 1034.

¹²⁸ *Id.* at 1033.

¹²⁹ *Id.* at 1033 n.8.

¹³⁰ In *Garrett*, the majority noted that state action may have effectively limited the need for federal intervention.

It is worth noting that by the time that Congress enacted the ADA in 1990, every State in the Union had enacted such measures. At least one Member of Congress remarked that “this is probably one of the few times where the States are so far out in front of the Federal Government, it’s not funny.” Hearing on Discrimination Against Cancer Victims and the Handicapped before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, 100th Cong., 1st Sess., 5 (1987). A number of these provisions, however, did not go as far as the ADA did in requiring accommodation.

Garrett, 531 U.S. at 368 n.5. With respect to employment laws, the Court is certainly correct. All fifty states have passed disabled employment legislation. See *Stevens v. Illinois Dep’t of Transp.*, 210 F.3d 732, 740 n.6 (7th Cir. 2000).

¹³¹ If all states enacted schemes as comprehensive as the ADA, the thirty-one states that charge for disabled parking placards would be barred from enacting the fee schemes discussed in this Comment by their own laws.

¹³² See *supra* PART I.B.

sufficient to keep Congress from ever developing the kind of record that would be adequate to support the affirmative obligations of the Regulation and Title II. While this is discouraging for ADA plaintiffs seeking money damages, the Supreme Court has not determined that the record of Title II is deficient, it has only indicated that the record of Title I was insufficient for a valid exercise of Fourteenth Amendment enforcement power and that the record of the Voting Rights Act was sufficient.¹³³ Courts considering Title II's validity will therefore have to consider whether the congressional record supporting Title II is adequate to meet the concerns the Court outlined in *Garrett*.¹³⁴ This will require courts to consider whether Title II's record is like Title I's, and therefore deficient, or enough like the Voting Rights Act's to be a valid exercise of Fourteenth Amendment power.

II. TITLE II IS A VALID EXERCISE OF CONGRESS'S COMMERCE CLAUSE POWER

Plaintiffs may lose their ability to sue the states directly for money damages for violating the Regulation if the Court finds Title II is an invalid exercise of Fourteenth Amendment enforcement power. Nonetheless, if Title II is a valid exercise of constitutional authority—other than that stemming from the Fourteenth Amendment—then plaintiffs should still be able to obtain injunctive relief and attorney's fees¹³⁵ by suing state officials under *Ex Parte Young*.¹³⁶ To support the ADA Congress invoked not only its Fourteenth Amendment enforcement power, but also its Commerce Clause power.¹³⁷

No court has yet determined whether the Commerce Clause provides an adequate source of power to support the Regulation. The attractiveness of the ADA's direct suit provision and its

¹³³ See *supra* note 48.

¹³⁴ See *supra* PART I.B.

¹³⁵ Like other civil rights statutes, the ADA provides that successful ADA plaintiffs are entitled to attorney's fees. 42 U.S.C. § 12205 (2002).

¹³⁶ 209 U.S. 123 (1908).

Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*.

Garrett, 531 U.S. at 374 n.9.

¹³⁷ 42 U.S.C. § 12101 (b)(4) (2002).

corresponding damages remedy is likely a factor that deters plaintiffs from suing under *Ex Parte Young*.¹³⁸ Decisions invalidating the Regulation as an exercise of Fourteenth Amendment enforcement power seem to have surprised many plaintiffs.¹³⁹ It is likely that plaintiffs litigating the parking issue would have included *Ex Parte Young* claims had they foreseen these holdings.¹⁴⁰ Some courts have resisted determining the ADA's constitutionality under the Commerce Clause because they found the ADA, as a whole, was a valid exercise of Fourteenth Amendment enforcement power.¹⁴¹ Given the number of circuits finding the Regulation and/or Title II unconstitutional as an exercise of Fourteenth Amendment enforcement power, it is probable that future Title II litigation brought against state officials will focus on the Title's validity under the Commerce Clause. Thus, a review of the Commerce Clause is in order.

A. *What Congress can Regulate under the Commerce Power: United States v. Lopez*¹⁴² & *United States v. Morrison*¹⁴³

For most of the twentieth century, the Commerce Clause served as a congressional catchall, affording Congress nearly limitless power to enact new laws.¹⁴⁴ This interpretation of the Commerce Clause was

¹³⁸ If [a] federal statute proves to be beyond Congress's power to enforce the Fourteenth Amendment—a prospect *Flores* makes more than speculative—then the remedies available in the federal forum shrink before the Eleventh Amendment bar. Monetary damages are precluded by the Eleventh Amendment and prospective injunctive relief against state officials, as permitted by *Ex parte Young*, is all that remains.

Joanne C. Brant, *The Ascent of Sovereign Immunity*, 83 IOWA L. REV. 767, 803 (1998).

¹³⁹ The plaintiffs in *Thompson* attempted to add an *Ex Parte Young* claim at the circuit level, anticipating the Court's decision after *Garrett*. The circuit court, however, denied the plaintiff's request. *Thompson*, 278 F.3d at 1025 n.2.

¹⁴⁰ *Id.*

¹⁴¹ See *Brown*, 166 F.3d at 708 n.1. "We need not decide whether Congress properly invoked its Commerce Clause power in enacting the ADA, for we have already held that the ADA is a valid exercise of congressional power under section 5 of the Fourteenth Amendment." *Botosan v. Paul McNally Realty*, 216 F.3d 827, 835-36 (9th Cir. 2000); see also *Amos v. Maryland Dep't of Pub. Safety & Corr. Servs.*, 178 F.3d 212, 223 (4th Cir. 1999).

¹⁴² 514 U.S. 549 (1995).

¹⁴³ 529 U.S. 598 (2000).

¹⁴⁴ *Lopez* is recognized as a severe step in the Court's Commerce Clause doctrine. "In *United States v. Lopez*, the Court held for the first time in recent years that the commerce power is not absolutely plenary and that some things are beyond Congress's reach under the commerce power." Martha A. Field, *The Seminole Case, Federalism, and the Indian Commerce Clause*, 29 ARIZ. ST. L. REV. 3, 12 (1997).

dramatically altered by the Supreme Court's decision in *Lopez*.¹⁴⁵ To determine if the Regulation and/or Title II may survive as a valid exercise of Congress's Commerce Power, three pivotal cases—*Lopez*, *Morrison*, and *Condon*—must be analyzed in turn.

1. *Lopez*: the Commerce Framework Redefined

In *Lopez*, the Supreme Court held that the Gun Free School Zone Act¹⁴⁶ (“GFSZA”) was not a valid exercise of Congress's Commerce Power.¹⁴⁷ The Court, reviewing Commerce Clause doctrine, found that the doctrine allows Congress to regulate: channels of commerce; persons, things, and instrumentalities in interstate commerce; and intrastate activities that substantially affect interstate commerce.¹⁴⁸ *Lopez* embodies the Court's restatement of congressional power under the Commerce Clause, after a long period during which the Clause was treated as a plenary power subject only to internal constitutional limitations.¹⁴⁹

The Court found that the possession of a gun in a school zone was neither a commercial activity nor one that was “connected in any way to interstate commerce.”¹⁵⁰ The Court linked each of the three acceptable categories of commerce regulation to precedent to support its interpretation of Congress's Commerce Power.¹⁵¹ The Court then developed the proposition that Congress had the power to regulate channels of interstate commerce¹⁵² from *United States v. Darby*¹⁵³ and *Heart of Atlanta Motel v. United States*.¹⁵⁴ The Court further noted that Congress might regulate “instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”¹⁵⁵ To support

¹⁴⁵ *Id.*

¹⁴⁶ 18 U.S.C. § 922 (q) (2002). The act made it a crime “for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922 (q) (1) (A) (2002).

¹⁴⁷ *Lopez*, 514 U.S. 549.

¹⁴⁸ *Id.* at 558-59.

¹⁴⁹ See *supra* note 144.

¹⁵⁰ *Lopez*, 514 U.S. at 551.

¹⁵¹ *Id.* at 558-59.

¹⁵² While the channel of commerce argument might conceivably be made by future litigants, it does not pertain to the type of activity regulated by 28 C.F.R. section 35.130(f), and consequently does not merit much discussion here.

¹⁵³ 312 U.S. 100 (1941) (upholding the Fair Labor Act of 1938 as an exercise of the Commerce Power).

¹⁵⁴ 379 U.S. 241 (1964) (upholding Title II of the Civil Rights Act of 1964 as a valid exercise of the Commerce Power).

¹⁵⁵ *Lopez*, 514 U.S. at 558.

this proposition, the Court cited the *Shreveport Rate Cases*,¹⁵⁶ *Southern Railroad Co. v. United States*,¹⁵⁷ and *Perez v. United States*.¹⁵⁸ Thus, Congress may regulate interstate rail lines and the fees that they charge,¹⁵⁹ invoke safety regulations that create standards applicable to intrastate traffic in order to maintain interstate safety,¹⁶⁰ and regulate activities like loan sharking that have a substantial affect on interstate crime and, therefore, interstate commerce as a whole.¹⁶¹

The final category the Court identified includes “those activities that substantially affect interstate commerce.”¹⁶² This type of activity is identified in *NLRB v. Jones & Laughlin Steel*¹⁶³ and in *Maryland v. Wirtz*.¹⁶⁴ This category permits Congress to regulate national labor practices,¹⁶⁵ as well as the minimum wage and maximum hours of employees engaged in commerce related activities.¹⁶⁶ Notably, the *Wirtz* Court found that:

while the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.¹⁶⁷

In *Lopez*, the Court also quoted from *Wickard v. Filburn*,¹⁶⁸ a case holding Congress has the power to regulate the production of home-grown wheat:

[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect

¹⁵⁶ 234 U.S. 342, 353 (1914) (holding that the Commerce Power allows Congress to regulate the “intrastate transactions of interstate carriers”).

¹⁵⁷ 222 U.S. 20 (1911) (noting that Congress has the power to regulate the interstate shipment of goods).

¹⁵⁸ 402 U.S. 146 (1971) (upholding Congress’s regulation of loansharking, an intrastate activity, because of loansharking’s interstate effects).

¹⁵⁹ *Shreveport*, 234 U.S. at 360.

¹⁶⁰ *Southern*, 220 U.S. at 26.

¹⁶¹ *Perez*, 402 U.S. at 156-57.

¹⁶² *Lopez*, 514 U.S. at 558.

¹⁶³ 301 U.S. 1 (1937) (upholding the National Labor Relations Act as a proper exercise of Congress’s Commerce Clause power).

¹⁶⁴ 392 U.S. 183 (1968) (finding the Commerce Power supported Congress’s amendments to the Fair Labor Standards Act of 1938).

¹⁶⁵ *Jones*, 301 U.S. at 37.

¹⁶⁶ *Wirtz*, 392 U.S. at 196 n.27.

¹⁶⁷ *Id.* at 196.

¹⁶⁸ 317 U.S. 111 (1942).

is what might at some earlier time have been defined as “direct” or “indirect.”¹⁶⁹

The Court applied the three-tiered framework to the GFSZA and determined that the Act fit into neither of the first two categories.¹⁷⁰ The Court then began its analysis of whether the GFZSA fit into the third category by restating that “where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.”¹⁷¹ The Court, considering whether the Act regulated activity that had a substantial affect on interstate commerce, determined that it did not.¹⁷² The Court noted the Act did not regulate activity that was *substantially* related to interstate commerce, and did not contain a jurisdictional analysis to determine whether the gun possession in question in a particular case actually affected interstate commerce.¹⁷³ Although Congress was not required to present congressional findings of an activity’s substantial effects on interstate commerce in the record of any act invoked under the Commerce Clause, the Court remarked that such “findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye.”¹⁷⁴

B. *Morrison: Further Constriction of the Commerce Power*

In *Morrison*, the Court invalidated another act enacted under Congress’s Commerce Power, the Violence Against Women Act¹⁷⁵ (“VAWA”).¹⁷⁶ VAWA is similar to the ADA, in that Congress utilized both its Commerce Power and its Enforcement Power under the Fourteenth Amendment.¹⁷⁷ The Court’s analysis of the Commerce Clause support for VAWA followed in the footsteps of *Lopez*.¹⁷⁸

The Court concluded that violent, gender-based crime was a non-economic activity and that Congress could not regulate it under

¹⁶⁹ *Lopez*, 514 U.S. at 556 (quoting *Wickard*, 317 U.S. at 125).

¹⁷⁰ *Id.* at 559.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 561.

¹⁷⁴ *Lopez*, 514 U.S. at 563.

¹⁷⁵ 42 U.S.C. § 13981 (2002).

¹⁷⁶ 529 U.S. 598 (2000).

¹⁷⁷ 42 U.S.C. § 13981 (2002).

¹⁷⁸ *Morrison*, 529 U.S. at 608. “*Lopez*’s review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.” *Id.* at 611.

the Commerce Power, despite the economic effects of the crime.¹⁷⁹ Even though VAWA was supported by specific legislative findings as to the economic effects of the activity it regulated, like the GFSZA, the Court found that VAWA contained “no jurisdictional element establishing that the federal cause of action is in pursuance of Congress’s power to regulate interstate commerce.”¹⁸⁰ The Court determined it could independently analyze evidence presented in the congressional record to determine whether the evidence supported the proposition that the activity substantially affected commerce¹⁸¹ and rejected the evidence presented by Congress to support VAWA.¹⁸² Thus, while VAWA was supported by congressional findings that gender-motivated violence had a substantial interstate impact, the Court found these examples were precisely the kind of congressional justification that the Court rejected in *Lopez*.¹⁸³ The Court held that this rationale, which would allow Congress to regulate any crime with a substantial but attenuated nationwide effect on commerce, went well beyond the scope of permissible regulation under Congress’s Commerce Power.¹⁸⁴

C. Applying the Commerce Clause Framework to Title II

At this point, it is worth inquiring how Title II is different from the legislation struck down by the Court in *Lopez* and *Morrison*. This inquiry addresses whether Title II properly regulates activity that falls within any of the *Lopez* categories.¹⁸⁵

While Title II does not seem to fit within either the first or

¹⁷⁹ *Id.* at 613.

¹⁸⁰ *Id.* at 613-14.

¹⁸¹ *Id.* at 614.

¹⁸² *Id.* at 616-17.

¹⁸³ *Morrison*, 529 U.S. at 616-17.

¹⁸⁴ “We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.” *Id.* at 617-18.

¹⁸⁵ Notably, two circuits adopted the principle that the Regulation must be valid if Title II is valid, see *Neinast v. Texas*, 217 F.3d 275 (5th Cir. 2000); *Brown v. North Carolina DMV*, 166 F.3d 698 (4th Cir. 1999), while another two circuits have held that the Regulation may be invalid even if Title II is valid, see *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001); *Dare v. California*, 191 F.3d 1167 (9th Cir. 1999).

This analysis may not be relevant for Commerce Clause analysis. The Regulation, standing alone, may regulate commerce in an acceptable way even if Title II as a whole does not. Indeed, if courts find that the Regulation is a valid exercise of Commerce Clause power they do not have to consider Title II as a whole, because to regulate under the Commerce Clause, Congress need not identify how the “thing” it is regulating affects interstate commerce.

second *Lopez* category, it does fit within the third. Title II's regulation of programs, activities, and services does not clearly regulate the channels of interstate commerce. Also, it does not seem to regulate typically economic activity, rather, it regulates an activity with a substantial impact interstate commerce. Therefore, Title II must be considered under the third prong of the *Lopez* framework. The rationale tying Title II to the Commerce Clause is that the disabled are capable of being economically productive members of American society, but have historically been prevented from engaging in productive commercial activity by widespread discrimination.¹⁸⁶ In *Bowers v. NAACP*, considering whether Title II regulated commercial activity, noted that Congress clearly thought it did:

Congress plainly considered the ADA generally, and Title II in particular, to be a very significant piece of commercial legislation The legislative history evinces a continuing focus on the economic impact of the public accommodations aspects of the bill. Congress noted, for instance, that lack of accommodations creates unemployment and underemployment reduces consumer spending . . . and undermines public health efforts to contain the spread of disease . . . all of which contribute to lower tax revenues and higher government spending, amounting to billions of dollars annually.¹⁸⁷

The activity regulated by Title II is not activity like that regulated in the GFSZA or VAWA, but is regulation of state activity that has a substantial affect on interstate commerce. Congress has the authority to decide that forcing the disabled to bear the costs of programs designed to benefit the disabled counteracts the positive effects of such state programs. Congress, through the DOJ, decided that the access barriers presented by fees for special placards and license plates are detrimental to commerce and has instructed the states, as actors in interstate commerce, that they may not charge the disabled such fees.¹⁸⁸ Therefore, a court considering this issue should find, considering the four *Lopez* factors,¹⁸⁹ that Title II is a valid exercise of

¹⁸⁶ 42 U.S.C. § 12101 (2002).

¹⁸⁷ *Bowers*, 171 F. Supp. 2d 406-07.

¹⁸⁸ 28 C.F.R. § 35.130(f) (2003).

¹⁸⁹ Because Title II falls within the third category and attempts to regulate intrastate activity that substantially affects interstate commerce, a court considering whether it is a valid exercise of Commerce Clause power must consider the following *Lopez* factors: (1) does the regulated activity *substantially* affect interstate commerce; (2) does the statute contain a jurisdictional element that suggests the statute is actually attempting to regulate interstate, rather than intrastate commerce; (3) does the Congressional record support the proposition that the regulated activity has a substantial relationship to interstate commerce; and (4) would upholding the

Congress's Commerce Clause power.

III. VOLUNTARILY ENACTED STATE DISABLED PARKING PROGRAMS MAY BE REGULATED BY CONGRESS

Although Congress can regulate activity properly considered commerce, the ways Congress can regulate the states as commercial actors are limited by the Tenth Amendment. Thus, even if a court finds Title II properly regulates commerce, it will still have to consider whether the method of regulation impermissibly violates the Tenth Amendment. Two cases are widely recognized as clearly establishing Tenth Amendment limitations on Congress's ability to regulate commerce: *New York v. United States*¹⁹⁰ and *Printz v. United States*.¹⁹¹ In these two cases, the Court established the proposition that the federal government may not force "the states to enact or enforce a federal regulatory program"¹⁹² under the Commerce Clause. In the aftermath of *New York* and *Printz*, the states can be required to enact new legislation or alter existing legislation in order to conform to federal law, so long as the law regulates state activities and does not seek "to control or influence the manner in which States regulate private parties."¹⁹³

In *Reno v. Condon*,¹⁹⁴ the Court applied these principles to the Driver Privacy Protection Act of 1994 ("DPPA").¹⁹⁵ The DPPA prohibits states from selling the information they require drivers to provide in order to obtain a driver's license.¹⁹⁶ Because the Court found that the regulated databases were "things" in interstate commerce, it held that the databases could be regulated under the Commerce Clause.¹⁹⁷ Relying heavily on the principles it articulated in *South Carolina v. Baker*,¹⁹⁸ the Court held that the DPPA did not

regulation require the Court to "pile inference upon inference?" *Lopez*, 514 U.S. at 567. None of these factors is determinative. *Id.*

¹⁹⁰ 505 U.S. 144 (1992) (holding that Congress can use the Commerce Clause power to encourage states to act, but not to force the states to act).

¹⁹¹ 521 U.S. 898, 934 (1997) ("Congress cannot compel the States to enact or enforce a federal regulatory program. . . . Congress cannot circumvent that prohibition by conscripting the State's officers directly.").

¹⁹² *Condon*, 528 U.S. at 149.

¹⁹³ *Id.* at 150 (quoting *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988)).

¹⁹⁴ 528 U.S. 141 (2000).

¹⁹⁵ 18 U.S.C. §§ 2721-25 (2002).

¹⁹⁶ The states can still distribute the information if they obtain the driver's consent. *Condon*, 528 U.S. at 144.

¹⁹⁷ *Id.* at 148.

¹⁹⁸ 485 U.S. 505, 514-15 (1988) ("That a State wishing to engage in certain activity must take administrative and sometimes legislative action to comply with federal

require the states to enact new legislation nor assist with federal enforcement.¹⁹⁹ In so holding, the Court reasoned the DPPA was similar to the statute in *Baker*, because it did not require the states to regulate their own citizens, rather it regulated the way in which the states conducted their own activities.²⁰⁰ Although the DPPA prohibits the sale of the information that states collect from drivers, requires the legislature to alter existing statutes, and requires state officials to learn the mandate of the DPPA in order to comply with it,²⁰¹ the Court stated that none of these factors were sufficient to support the proposition that the DPPA unconstitutionally “commandeered” the states.²⁰²

While this analysis suggests that states could escape the requirements of the Regulation by revoking their disabled parking programs, the states are unlikely to take such action. Disabled parking programs are established programs in every state. Because the Regulation is likely to be upheld as valid under Congress’s Commerce Power, it should provide disabled plaintiffs with an enforceable right to participate in disabled parking programs without paying a fee beyond ordinary licensing costs. Although the Commerce Power could not be used to force states to enact and pay for disabled parking programs because this would violate the anti-commandeering principles outlined above, once states enact such programs²⁰³ Congress can regulate them.

IV. THE REGULATION IS A PERMISSIBLE INTERPRETATION OF TITLE II OF THE ADA

Even if a court walks through the steps discussed above and finds that Title II is a valid exercise of Commerce Clause power that does

standards regulating that activity is a commonplace that presents no constitutional defect.”).

¹⁹⁹ *Condon*, 528 U.S. at 150.

²⁰⁰ Regulation of the states is more likely to be upheld when it does not pertain to uniquely state activity.

The DPPA regulates the States as the owners of databases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.

Id. at 151.

²⁰¹ 18 U.S.C. §§ 2721-25 (2002).

²⁰² *Condon*, 528 U.S. at 151.

²⁰³ Many states passed such programs, even prior to the passage of the ADA. See *supra* note 5.

not commandeer the states it will not uphold the Regulation unless it finds that the Regulation is based on a permissible interpretation of Title II.²⁰⁴ The Regulation was not enacted by Congress, but by the DOJ, and is therefore subject to this further review. This review, however, is limited to two factors.²⁰⁵ A court considering a regulation must first ask if Congress specifically approved or disapproved of a regulation. If Congress's intent is clear it is determinative.²⁰⁶ If Congress's intent is not clear but Congress delegated rulemaking authority to a federal agency, then the agency's regulation must be upheld unless it is "arbitrary, capricious, or manifestly contrary to the statute."²⁰⁷

The Supreme Court has indicated that this deference to agency rulemaking is necessary because "the resolution of ambiguity in a statutory text is often more a question of policy than of law."²⁰⁸ Although court review of agency policymaking is limited²⁰⁹ courts are able to invalidate actions clearly outside of the scope of the statute.²¹⁰ This might seem to severely hamper court review of agency action, however, courts still have the power, as the above discussion of Fourteenth Amendment and Commerce Clause power indicate, to invalidate the statute upon which the delegation of authority is based and thereby negate the agency's rulemaking ability under the statute. Thus, this type of deference to agency rulemaking, commonly known as "*Chevron* deference" will have no impact if the statute that empowers an agency to create the regulation in question is invalidated by the courts.²¹¹

Although Congress clearly delegated authority to the DOJ to enact regulations designed to implement Title II,²¹² it does not seem that Congress clearly contemplated a definitive approach to the

²⁰⁴ *Chevron U.S.A. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

²⁰⁵ *Id.* at 842-43.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 843. "*Chevron* establishes that a reviewing court must often accept any reasonable agency construction, even if the court does not regard that construction as the best one." RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 398 (4th ed. 1996).

²⁰⁸ *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991).

²⁰⁹ *Id.*

²¹⁰ 467 U.S. at 843.

²¹¹ See John F. Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 GEO. WASH. L. REV. 35 (1995), for a more thorough discussion of *Chevron* and *Chevron* deference.

²¹² 42 U.S.C. § 12134 (a) (2003) ("Not later than 1 year after the date of enactment of this Act [enacted July 26, 1990], the Attorney General shall promulgate regulations in an accessible format that implement this subtitle.").

regulation of disabled parking programs when it enacted Title II. This will require any court considering the Regulation to take the second *Chevron* step. This step is not fatal because the regulation of disabled parking programs clearly falls within Title II's general coverage of state services, activities, and programs. Therefore, courts must uphold the regulation if they find that Title II is a valid exercise of congressional power.

V. THE REGULATION IS VALID UNDER THE COMMERCE POWER AND CAN BE INDIRECTLY ENFORCED AGAINST THE STATES, BUT NOT NECESSARILY IN FEDERAL COURTS

While the Regulation is likely to be upheld under the Commerce Clause, it may not be enforceable in suits brought in federal courts because of the TIA.²¹³ In its entirety, the TIA provides that “[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”²¹⁴ As the Tenth Circuit has noted, the TIA “does not operate to confer jurisdiction but instead limits jurisdiction where jurisdiction might otherwise exist.”²¹⁵ Whenever the collection of a state tax can be challenged in a state forum, plaintiffs challenging the tax will be barred from federal court by the TIA. Therefore, if the fees collected by the states for disabled parking programs are properly considered a tax, as at least one circuit finds,²¹⁶ then plaintiffs may be barred from commencing actions in federal court²¹⁷ unless they have no adequate remedy at the state level. Remedies requiring plaintiffs to pay the tax and then seek a refund are adequate to bar a plaintiff from federal court.²¹⁸ A plaintiff's ability to bring a federal claim in state court will also be sufficient, but where the state is pre-empted from providing relief or hearing a federal claim by federal law the Act will not bar a plaintiff from federal court.²¹⁹

²¹³ 28 U.S.C. § 1341 (2002).

²¹⁴ *Id.*

²¹⁵ *May v. Supreme Court of Colorado*, 508 F.2d 136, 137 (1974).

²¹⁶ See discussion of *Hedgepeth v. Tennessee*, 215 F.3d 608 (6th Cir. 2000), *infra* PART V.A.

²¹⁷ The Act has been construed as a jurisdictional bar to much more than claims for injunctive relief. In *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), the Court found that damage actions against the states for illegal taxation were also barred where plaintiffs could obtain a remedy at the state level. A year later in *California v. Grace Brethren Church*, 457 U.S. 393 (1982), the Court held the Act also presented a jurisdictional bar to actions for declaratory relief.

²¹⁸ See *Kohn v. Central Distrib. Co., Inc.*, 306 U.S. 531 (1939).

²¹⁹ See *E-Systems, Inc. v. Pogue*, 929 F.2d 1100 (5th Cir. 1991) (finding that the

The few circuits that have considered the issue of whether the fees charged by the states are properly considered a tax under the TIA are split on the issue.²²⁰ The courts' analyses turn on intent: whether the state is only attempting to recoup the cost of the disabled program or is attempting to use the charge to produce money for the state in excess of program costs.²²¹ In the latter case the fee is a tax, in the former it is not. These circuit decisions indicate that plaintiffs' access to the *Ex Parte Young* remedy and actions in federal courts may be reduced or eliminated in states that charge fees in excess of the cost of the parking programs.

A. *The Circuit Split on Whether Disabled Parking Program Fees are a Tax for the Purposes of the TIA.*

The Fifth,²²² Ninth,²²³ and Tenth²²⁴ Circuits considered the issue of fees ranging from \$4.00 to \$5.25 per placard, and determined the fees are regulatory in nature rather than revenue generating.²²⁵ Consequently, the courts held the TIA does not bar plaintiffs seeking relief from these fees from federal court.²²⁶ The key factor for each of these courts was that the fee charged by the state bore some relationship to the cost of the program and was not designed to raise revenue. The reasoning in *Hexom v. Oregon DOT*, a Ninth Circuit case, is representative of all three opinions:

The fee is not designed to raise revenue, and enjoining its collection will not threaten the flow of central revenues of Oregon's government. It is not at all critical to general state functions. It is, instead, designed to pay for the costs of a special program. In fine, it is not a tax, and this action is not precluded by the TIA.²²⁷

existence of a state remedy to plaintiff's claim was preempted by ERISA, and that the plaintiff's claim therefore qualified as an exception to the Tax Injunction Act).

²²⁰ See *supra* PART III.A.

²²¹ *Id.*

²²² *Neinast*, 217 F.3d at 277.

²²³ *Hexom v. Oregon DOT*, 177 F.3d 1104 (9th Cir. 1999).

²²⁴ *Marcus v. Dep't of Revenue*, 170 F.3d 1305 (10th Cir. 1999).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 1139 (internal quotations and citations omitted). "As the Texas statute applies the charges toward the cost of the program, the district court erred in holding that the placard funds were a tax and thus within the scope of the Tax Injunction Act." *Neinast*, 217 F.3d at 277 (finding that even though the fees were not earmarked to cover the costs of the parking programs, their size indicates that this is what they were intended for); see also *Marcus*, 170 F.3d at 1311.

In *Hedgepeth v. Tennessee*,²²⁸ the Sixth Circuit considered a much larger fee than that considered by the Fifth, Ninth, or Tenth Circuit. The court determined that the fees levied on disabled drivers were not merely intended to defray the administrative costs of Tennessee's regulatory program, but were instead intended as a general revenue-raising tax.²²⁹ The court, finding that none of the \$20.50 that disabled drivers must pay to obtain a disabled driving permit (or any of the \$3 charged to renew) went directly to the cost of the state's regulatory program, determined that the charges were, in fact, taxes controlled by the TIA.²³⁰ Under the TIA, plaintiffs do not have standing to sue unless the state fails to provide a "plain, speedy and efficient remedy."²³¹ Because Tennessee law does not preclude the plaintiffs from bringing their claim before Tennessee's Claims Commission, the court found the initial requirement of the TIA was satisfied because the Claims Commission proceeding equated to a "plain, speedy and efficient remedy."²³² This language, according to the court, meant the TIA required the plaintiffs first pursue their federally created right with the Claims Commission, then with the state courts, and if these failed, in federal court.²³³

B. Whether or Not the Fees Collected by the States Constitute a Tax, Plaintiffs Should be able to Prevent the States from Charging Such Fees

It is clear that when states charge fees proportional to the cost of their disabled parking program activities, plaintiffs will be able to use *Ex Parte Young* to enforce the Regulation in federal court because these types of fees are not taxes for the purposes of the TIA.²³⁴ While states that charge fees much higher than the cost of their disabled parking program may be able to force plaintiffs into state remedial schemes, state decisions to single out the disabled as a source of revenue should actually provide disabled plaintiffs with damage actions in state court. This remedy is available because state targeting of the disabled as a source of revenue constitutes the kind of irrational discrimination against the disabled discussed in Part I.

²²⁸ 215 F.3d 608 (6th Cir. 2000).

²²⁹ *Id.* at 612.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 616.

²³³ *Id.*

²³⁴ See *supra* PART V.A.

Thus, while the *Hedgepeth* logic²³⁵ might still prevent a plaintiff from bringing suit in federal court, plaintiffs forced out of federal court may be able to obtain an additional remedy in state court. If Title II is a valid exercise of congressional power the states must, under the Supremacy Clause, enforce it in their own courts when the tax is challenged.²³⁶ Whether the states charge the disabled fees, or tax them as Tennessee and Massachusetts do,²³⁷ the disabled should ultimately be able to enjoin the states from charging them to participate in disabled parking programs. Class action suits in state court should also provide an effective remedy for taxes already collected.

CONCLUSION

The above discussion demonstrates that all fifty states can ultimately be prohibited from charging the disabled fees to participate in disabled parking programs. Although disabled individuals, pending the Courts ruling on whether Title II is a valid exercise of Fourteenth Amendment enforcement power, may not have direct enforcement actions for violations of the regulation, they should still be able to sue state officials for injunctive relief under *Ex Parte Young*. This is because (1) Title II is a valid exercise of Commerce power; (2) Title II does not violate the Tenth Amendment; (3) the Regulation is a valid interpretation of Title II under the *Chevron* framework; and (4) while the TIA may bar some plaintiffs from seeking relief in federal court, if their state uses its disabled parking program to generate revenue, such plaintiffs will still be able to obtain relief in a state forum. If the fees certain states charge are taxes—designed to generate revenue—the disabled in those states may be able to sue for violations of their Equal Protection Clause rights even without the protection afforded under the ADA. To be successful on this claim the disabled would have to show taxing those who participate in disabled parking programs amounts to irrational state discrimination against the disabled.

While the states can be forced to comply with the Regulation as it regulates disabled parking programs, the states should put their

²³⁵ “The substantial difference between the actual cost of the permanent placard or license plate and the amount that must be paid to obtain one supports a conclusion that the assessment is for general revenue raising purposes.” *Hedgepeth*, 215 F.3d at 614.

²³⁶ State courts not only have the power to hear Title II actions, but are obligated to do so. *See Testa v. Katt*, 330 U.S. 386 (1947).

²³⁷ Massachusetts charges its disabled drivers more than any other state: \$25 for placards. MASS GEN. LAWS ch. 90, § 2 (2001).

money where their policy is and stop charging such fees—even if not required to do so by a court order. Disabled parking programs are in effect in all fifty states. No state has challenged the requirement that they have disabled programs. It follows that the states believe they should have such programs even if the ADA did not exist. The states that force the disabled to pay in order to participate in disabled parking programs undermine their own policies of affirmatively acting to include the disabled in society. This “pay to play” mentality marginalizes the disabled because it suggests that accommodating the disabled is not really an important goal and is only supportable when convenient to the rest of society—when they do not impact the state budget. If disabled parking programs are important enough to enact, states should not tokenize the programs by forcing the disabled to fund the programs and certainly should not, as is current practice in several states, use the programs as general sources of revenue for the state.