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A Critique of Torcasio v. Murray and the Use of the Clear Statement Rule to Interpret the Americans with Disabilities Act

Laura E. Walvoord

Comment

A Critique of *Torcasio v. Murray* and the Use of the Clear Statement Rule to Interpret the Americans with Disabilities Act

*Laura E. Walvoord**

Anthony Torcasio was 5'7" and weighed 460 pounds when he entered Virginia's Keen Mountain Correctional Center in April 1993.[1] Suffering from morbid obesity,[2] he described his existence as "a life of misery and heartache."[3] He was unable to walk long distances, incapable of standing or lying down for long periods, and susceptible to losing his balance.[4] Torcasio requested that Virginia Department of Corrections (VDOC) officials make certain changes in his cell, bathroom facilities, and recreational areas and activities to accommodate his disability,[5] but VDOC officials declined to do so.[6] Torcasio then sued VDOC officials under Title II[7] of the Americans with Disabilities Act

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1. Torcasio v. Murray, 57 F.3d 1340, 1342 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996).

2. Morbid obesity is obesity "sufficient to prevent normal activity or physiologic function, or to cause the onset of a pathologic condition." STEDMAN'S MEDICAL DICTIONARY 1076 (25th ed. 1990).

3. *Torcasio*, 57 F.3d at 1342 (quoting plaintiff's memorandum to district court).

4. *Id.*

5. *Id.* Torcasio alleged that the Keen Mountain facilities violated his constitutional and statutory rights. Specifically, he claimed that the prison's shower, toilet, tables, cell doors, building lobby, dining hall, commissary window and pill line, cells, and infirmary, and its recreational programming, medical transportation, and personal aid all failed to accommodate his obesity reasonably. Torcasio v. Murray, 862 F. Supp. 1482, 1486-89 (E.D. Va. 1994), *aff'd in part and rev'd in part*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996).

6. *Torcasio*, 57 F.3d at 1342. The prison did provide Torcasio with a private cell, a hospital bed, reinforced chairs, and handrails and slip mats in the shower. *Id.* at 1356.

7. 42 U.S.C. §§ 12131-12134 (1994).

(ADA),[8] which prohibits state and local government entities from discriminating on the basis of disability.[9] The United States Court of Appeals for the Fourth Circuit, however, held that VDOC officials were entitled to qualified immunity because at the time of Torcasio's suit the ADA's applicability to state prisons and prisoners was not clearly established law.[10]

Torcasio is the first judicial decision to hold that Title II of the ADA does not clearly cover state prisons, thereby protecting state prison administrators from liability damages for failing to accommodate prisoners with disabilities.[11] More significantly, the *Torcasio* court's application of the clear statement rule in interpreting Title II is unprecedented.[12] The case's emphasis on protecting traditional areas of state authority at the expense of federal antidiscrimination legislation also creates troubling precedent, because the court's reasoning calls into question the ADA's applicability to other traditional realms of state and local authority beyond state prisons.[13]

This Comment argues that the *Torcasio* court erred in its use of the clear statement rule to analyze the scope of Title II of the ADA. Part I reviews the provisions and purpose of Title II of the ADA, and explores the history and application of the clear statement rule. Part II analyzes the reasoning of the *Torcasio* decision. Part III posits that the *Torcasio* court could have reached the same result on narrower grounds because both Title II and the qualified immunity doctrine allow courts to consider prison security and other administrative concerns while assessing the reasonableness of accommodating an inmate with

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8. 42 U.S.C. §§ 12101-12213 (1994). Torcasio also brought claims under the Rehabilitation Act of 1973, and the Eighth and Fourteenth Amendments. *Torcasio*, 862 F. Supp. at 1489.

9. *See* 42 U.S.C. §§ 12102(2)(A), 12131(1)(A)-(B), 12132.

10. *Torcasio*, 57 F.3d at 1343. The court also held that it was not clearly established that the ADA protects people with obesity. *Id.* at 1354-55.

11. At least one court explicitly held that Title II *does* apply to state prisons. *See* Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 WL 735802, at *3-*4 (M.D. Ala. Apr. 27, 1993); *see also infra* notes 74-75 and accompanying text (discussing the *Outlaw* court's application of Title II's coverage provisions to prisons). In other cases brought under Title II, courts have presumed that the ADA included state prisons among covered entities. *See infra* notes 33-34 and accompanying text (discussing ADA prisoner cases).

12. *See infra* notes 55-58 and accompanying text (discussing courts' reluctance to use the clear statement rule and rationales utilized to avoid the doctrine).

13. *See infra* Part III.C.2. (describing the ramifications of the *Torcasio* court's analysis on subsequent cases interpreting the scope of Title II).

disabilities. Part III argues further that courts should not use the clear statement rule in interpreting Title II of the ADA. This Comment concludes that the *Torcasio* court incorrectly analyzed the ADA's applicability to state prisons, thereby creating a flawed analytical framework with potentially far-reaching and dangerous implications for the federal government's power to remedy discrimination against people with disabilities.

I. INTERPRETING THE AMERICANS WITH DISABILITIES ACT

The *Torcasio* decision relied on the clear statement rule and its role in preserving state autonomy in administering core state functions[14] without referring to the important history and purpose of the ADA.[15] A review of the text, legislative history, purpose, and social context of the ADA illustrates the adverse impact *Torcasio*'s reasoning poses to any judicial interpretation of the ADA. This Part also examines the clear statement rule and the federal courts application of the rule, as well as prisoner suits brought under federal antidiscrimination laws.

A. TITLE II OF THE ADA

The ADA is the broadest, most far-reaching civil rights legislation enacted since the Civil Rights Act of 1964.[16] Earlier

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14. *Torcasio*, 57 F.3d at 1344-45.

15. The *Torcasio* court set forth the relevant portions of Title II and immediately discussed why it had to employ the clear statement rule to interpret the text. *Id.* at 1344-45. The court never cited the legislative history of the ADA or the history of discrimination against people with disabilities that prompted Congress to pass the Act. Instead, it simply speculated whether Congress would have wanted Title II to apply throughout state prisons or only to those areas of prisons accessible to the public. *Id.* at 1346 & n.5.

16. *See* Nathaniel C. Nash, *Bush and Senate Leaders Support Sweeping Protection for Disabled*, N.Y. TIMES, Aug. 3, 1989, at A1 (quoting Ralph G. Neas, Executive Director of the Leadership Conference on Civil Rights, who termed the ADA "the most comprehensive civil rights measure in the past two and a half decades"). Testifying before Congress, disability activist Judith Heumann stated: "[T]he passage of this monumental legislation will make it clear that our Government will no longer allow the largest minority group in the United States to be denied equal opportunity." H.R. REP. NO. 485, 101st Cong., 2d Sess., pt. 2, 49 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 331.

The ADA's coverage includes employment, public services, public accommodations, public transportation, and telecommunications. 42 U.S.C. §§ 12101-12213. Although patterned after earlier civil rights statutes, commentators characterized the ADA as a "second-generation civil rights

legislation prohibiting discrimination against people with disabilities had created a patchwork of covered entities based on the receipt of federal funding.[17] Title II of the ADA expanded federal civil rights protection for the disabled by establishing uniform provisions applicable to all state and local government entities.[18]

Congress intended the ADA to provide "clear, strong, consistent, [and] enforceable standards,"[19] and to give the federal government the central role in enforcing the ADA's provisions.[20] Congress believed that the scope of the problems facing people with disabilities justified the broad scope of the

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statute that goes beyond the 'naked framework' of earlier statutes and adds much flesh and refinement to traditional nondiscrimination law." Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 415 (1991).

17. Title II was modeled on § 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability by any entity that receives federal funding. 29 U.S.C. § 794 (1994). Title II extends § 504's antidiscrimination provisions to include all "services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance." 28 C.F.R. § 35, app. A at 439 (1995). Title II's enforcement provisions state that the "remedies, procedures, and rights" set forth in the remedies provision for § 504 are those available to plaintiffs alleging discrimination under the ADA. 42 U.S.C. § 12133 (1994).

Because the ADA was designed to incorporate and build on case law interpreting the Rehabilitation Act, courts generally have applied the reasoning of decisions construing the Rehabilitation Act to controversies arising under the ADA. *See, e.g.*, Vande Zande v. Wisconsin Dep't of Admin., 851 F. Supp. 353, 359 (W.D. Wis. 1994) ("Given the relationship between the ADA and the Rehabilitation Act and the dearth of case law interpreting the ADA, courts have relied on Rehabilitation Act cases as guides to the meaning of the ADA."), *aff'd*, 44 F.3d 538 (7th Cir. 1995); Easley v. Snider, 841 F. Supp. 668, 672 (E.D. Pa. 1993) ("[P]ast interpretations of the Rehabilitation Act are persuasive authority for ADA interpretations."), *rev'd on other grounds*, 36 F.3d 297 (3d Cir. 1994).

18. "[T]itle II applies to anything a public entity does. . . . [C]overage, however, is not limited to 'Executive' agencies but includes activities of the legislative and judicial branches of State and local governments." 28 C.F.R. § 35, app. A at 439-40 (1994). Neither the statute nor its implementing regulations list specific state entities or agencies that are specifically exempted from or included in Title II's coverage. In contrast, Title I, dealing with employment, contains explicit exceptions to its broad applicability including the federal government, Indian tribes, and private clubs. 42 U.S.C. § 12111(5)(B). Likewise, Title III, dealing with accommodations, lists twelve categories of covered private entities. *Id.* § 12181(7)(A)-(L).

19. *Id.* § 12101(b)(2).

20. *Id.* § 12101(b)(3).

ADA.[21] In preparing to draft the ADA, the Congressional Task Force on the Rights and Empowerment of Americans with Disabilities held fact-finding forums in each state and met with over 32,000 people before making formal findings of "massive, society-wide discrimination."[22] Moreover, Congress found that people who suffered discrimination because of a disability often had no legal remedies, unlike members of other constitutionally or statutorily protected groups.[23]

Title II's reasonable accommodation requirement,[24] expansive language, and the lack of exemptions from coverage allowed people to sue state and local government entities that had not been subject to the Rehabilitation Act and other earlier antidiscrimination legislation.[25] Under Title II, plaintiffs with disabilities have successfully challenged laws and policies traditionally considered within the states' police power, including

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21. One of the [ADA bill's] most impressive strengths is its comprehensive character. Over the last twenty years, civil rights laws protecting disabled persons have been enacted in piecemeal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections.

H.R. REP. NO. 485, *supra* note 16, at 48, 1990 U.S.C.C.A.N. at 330 (testimony of then-Attorney General Dick Thornburgh).

22. *Id.* at 31-32 (testimony of Justin Dart, Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities).

23. *Id.* § 12101(a)(4). *See generally* Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 399-414 (1991) (discussing the historical segregation, isolation, and degradation of the disabled in this country).

24. Courts analyzing the reasonableness of a modification or accommodation have looked at whether the requested modification would change the entire focus of a program. *See, e.g.*, Easley v. Snider, 36 F.3d 297, 305 (3d Cir. 1994). The *Easley* court rejected the plaintiff's request that the state expand its provision of personal care attendants to clients with disabilities who were not able to direct their own care. *Id.* at 299-300. The court wrote, "[t]he proposed alteration would create a program that the State, never envisioned .... The modification would create an undue and perhaps impossible burden on the State, possibly jeopardizing the whole program, by forcing it to provided attendant care services to all physically disabled individuals, whether or not mentally alert." *Id.* at 305; *see also* Gates v. Rowland, 39 F.3d 1439, 1446-47 (9th Cir. 1994) (analyzing the reasonable of modifications for HIV-positive inmates).

25. "Because many State and local government operations, such as courts, licensing, and legislative facilities and proceedings do not receive Federal funds, they are beyond the reach of section 504." U.S. DEP'T OF JUSTICE, AMERICANS WITH DISABILITIES ACT TITLE II TECHNICAL ASSISTANCE MANUAL (Supp. 1 1994).

marriage regulations,[26] social service placements,[27] zoning ordinances,[28] jury selection criteria,[29] and state bar licensing procedures.[30]

Although the text of Title II uses a broad, inclusive definition of public entity,[31] testimony before Congress nonetheless included the plight of state inmates with disabilities.[32] Despite

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26. *See, e.g.*, T.E.P. v. Leavitt, 840 F. Supp. 110, 111 (D. Utah 1993) (invalidating state law that voided marriage by persons with AIDS).

27. *See, e.g.*, Helen L. v. DiDario, 46 F.3d 325, 336-39 (3d Cir.) (holding that Title II requires state social service agency to implement reasonably integrated services for clients with disabilities), *cert. denied*, 116 S. Ct. 64 (1995).

28. *See, e.g.*, City of Edmonds v. Oxford House, 115 S. Ct. 1776, 1783 (1995) (holding that federal statute prohibiting discrimination in housing based on disability should be interpreted to allow challenge to city zoning provision that limited the number of unrelated occupants allowed in a dwelling because the provision failed to accommodate reasonably a group home for recovering addicts); *see also infra* notes 172-173 and accompanying text (discussing the significance of the *Oxford House* majority's rejection of the clear statement rule in interpreting federal antidiscrimination legislation).

29. *See, e.g.*, Galloway v. Superior Court, 816 F. Supp. 12, 20 (D.D.C. 1993) (holding that blanket exclusion of blind people from jury pool violates the ADA); People v. Caldwell, 603 N.Y.S.2d 713, 716 (N.Y. Crim. Ct. 1993) (holding that court had obligation under ADA to reasonably accommodate potential juror's visual impairment).

30. *See, e.g.*, Ellen S. v. Florida Bd. of Bar Examiners, 859 F. Supp. 1489, 1494-95 (S.D. Fla. 1994) (holding that Tenth Amendment posed no independent bar to application of ADA to state regulation of attorneys); *cf.* Medical Soc'y v. Jacobs, No. Civ. A. 93-3670 (WGB), 1993 WL 413016, at *7-*8 (D.N.J. Oct. 5, 1993) (holding that State Board of Medical Examiners' investigation of mental health history of medical license applicants violated Title II by placing additional burdens on applicants with disabilities).

31. In drafting Title II, Congress deliberately chose not to list all types of actions that constitute discriminatory conduct by public services. H.R. REP NO. 485, *supra* note 16, at 84, 1990 U.S.C.C.A.N. at 367. Congress did not include such lists because Title II "essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments." *Id.* Title II, therefore, does not include a list of exclusions like those given in Title I (Employment) or a list of specifically covered entities like Title III (Public Accommodations) of the ADA. *See supra* note 18 (discussing specific exemptions and inclusions in Titles I and III).

32. A witness describing the types of training public employees might have to undergo to sensitize them to disability issues used the example of persons with epilepsy who are wrongfully arrested because police officers are unable to distinguish seizure disorders from public drunkenness or drug withdrawal. H.R. REP. NO. 485, pt. 3, *supra* note 16, at 50, 1990 U.S.C.C.A.N. 445, 473. He testified that, "often, after being arrested, they are deprived of medications *while in jail*, resulting in further seizures. *Such discriminatory treatment based on disability* can be avoided by proper training." *Id.* (emphasis added).

At least one suit based on a similar scenario was brought under Title II. A man suffering from certain physical disabilities caused by a stroke was

the lack of explicit references to inmates in Title II's text or implementing regulations, some courts permitted state prisoners to bring,[33] and win,[34] Title II actions against correctional facilities for failing to accommodate their disabilities.

B. THE CLEAR STATEMENT RULE

Over the past thirty years, expansion of congressional power under the Fourteenth Amendment and the Commerce Clause permitted federal antidiscrimination statutes to regulate areas

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wrongfully arrested for public drunkenness and sued the city and the arresting officer. Jackson v. Inhabitants of Town of Sanford, No. Civ. 94-12-P-H, 1994 WL 589617, at *1 (D. Me. Sept. 23, 1994). The court held that the town and its police force were public entities within the meaning of Title II and thus denied defendants' motion for summary judgment as to claims brought under the ADA. *Id.* at *6.

33. *See* Dean v. Knowles, No. 94-14227-CIV, 1995 WL 791947, at *2 (S.D. Fla. Jan. 8, 1996) (denying summary judgment to prison officials who denied trustee position to HIV-positive inmate); Rewolinski v. Morgan, 896 F. Supp. 879, 881 (E.D. Wis. 1995) (permitting deaf inmate to sue under federal civil rights statute for alleged violations of Title II); Harrelson v. Elmore County, 859 F. Supp. 1465, 1468 (M.D. Ala. 1994) (permitting all of paraplegic inmate's claims under ADA to survive motion to dismiss except claim for punitive damages); Noland v. Wheatley, 835 F. Supp. 476, 482-83 (N.D. Ind. 1993) (holding that semi-quadriplegic inmate who was denied access to soap and water to clean his colostomy and urostomy bags stated a claim for relief under Title II against county sheriff and jail officials); Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 WL 735802, at *3-*4 (M.D. Ala., Apr. 27, 1993) (holding explicitly that Title II of ADA covers state and local correctional facilities).

Disability rights advocates suggest that the number of inmates with disabilities will grow due to the increase in mandatory life sentences and a corresponding aging of the prison population. Elaine Gardner, *The Legal Rights of Inmates with Physical Disabilities*, 14 ST. LOUIS U. PUB. L. REV. 175, 177 (1994) (citing *As Prison Population Grows, So, Too Could ADA Lawsuits*, NAT'L DISABILITY L. REP., Feb. 16, 1994, at 6).

34. *See, e.g.*, Clarkson v. Coughlin, 898 F. Supp. 1019, 1038 (S.D.N.Y. 1995) (holding that the New York Department of Correctional Services had failed to accommodate inmates with disabilities in multiple aspects of its facilities and programming, including "failure to make reasonable accommodations to facilitate full participation by class members in education, vocational and rehabilitative contexts"). The *Clarkson* court held that the New York Department of Correctional Services had failed to reasonably accommodate deaf and hearing-impaired inmates in education and counselling programs in two ways. First, the Department placed inmates in settings "where, without an accommodation, their opportunity to benefit is wholly unequal to that of non-disabled inmates." *Id.* at 1047. Second, the Department's internal regulations explicitly excluded inmates from programs based on their disability, without regard to accommodation or modification. *Id.*

formerly within the sole power of the states.[35] In many ways, the ADA extended the protections of major civil rights legislation to people with disabilities.[36] While Congress expanded its role into areas of traditional state police power, the Supreme Court struggled to promote federalist values and protect state sovereignty from increasing federal intrusion. Although the Tenth Amendment's status as an affirmative constitutional limit on congressional power appears moribund,[37] the Court increasingly promoted statutory interpretation as a tool to preserve the federalist balance between the states and Congress.[38]

In a variety of contexts related to state sovereignty, the Court developed and applied permutations of a "clear statement rule"[39] of statutory interpretation.[40] The clear statement rule,

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35. *See, e.g.*, Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 83 (codified as amended at 42 U.S.C. §§ 3604-3631 (1988)) (prohibiting discrimination in housing, zoning and land use); Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976) (noting that Court has "sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States"); Heart of Atlanta Motel v. United States, 379 U.S. 241, 258, 261 (1964) (holding that Public Accommodations provision of Civil Rights Act of 1964 is valid exercise of Congress's commerce power as applied to motel catering to out-of-state guests).

36. *See supra* notes 16-17 and accompanying text (discussing ADA's relationship to earlier civil rights legislation and Congress's intention that victims of disability discrimination have available remedies like those for victims of race and gender discrimination).

37. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556-57 (1985) (holding that "core [state] governmental functions" and "fundamental attributes of state sovereignty" do not create affirmative limits on Congress's power under Commerce Clause). *But see* United States v. Lopez, 115 S. Ct. 1624, 1634 (1995) (invalidating federal criminal statute as beyond scope of Congress's Commerce power).

38. Commentators have described the Court's development of "super-strong clear statement rules" designed to promote federalist values on the sub-constitutional level of statutory interpretation. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619-29 (1992). Eskridge and Frickey criticize the Court for using federalism-based clear statement rules without grappling with why federalism values should supersede individual rights and public policies. *Id.* at 643-44.

39. The clear statement rule also is called the "plain statement rule." Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

40. United States v. Bass, 404 U.S. 336, 349 (1971) ("Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."). During the past fifteen years, the Supreme Court has used clear statement rules to counter congressional intrusions on state sovereignty.

Early in its use of the clear statement rule, the Court stated that an

like other canons of statutory interpretation, is a judge-made tool used to interpret ambiguous statutory text.[41] The rule creates a presumption that if Congress seeks to impinge on areas of traditional state sovereignty, it must make explicit its intent to do so in the statutory text itself.[42] Underlying the clear statement rule is a normative presumption that Congress should take its federalist responsibilities seriously enough to put the states on notice if it intends to disrupt the usual balance of power between the states and the federal government.[43] By requiring Congress to be explicit, courts protect the states from congressional action that inadvertently impinges on state sovereignty.[44]

In 1991, the Supreme Court established its most recent and expansive version of the clear statement rule in *Gregory v.*

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unambiguous articulation in the legislative history of Congress's intent to encroach on state sovereignty could serve as sufficient indication of congressional intent. *See, e.g.*, Quern v. Jordan, 440 U.S. 332, 343 (1979) (stating that the Court "consistently . . . required a clearer showing of *congressional purpose* to abrogate Eleventh Amendment immunity") (emphasis added). In holding that states are immune from suit under section 1983, the Court wrote:

> Section 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.

Id. at 345.

In subsequent cases involving the preservation of state sovereign immunity from suit, however, the Court announced that the clear statement of congressional intent to encroach on state sovereignty must be located in the statutory text. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 65-66 (1989) (holding that § 1983 falls "far short" of satisfying "ordinary rule of statutory construction" that upsetting usual federal-state balance requires *unmistakably clear statutory text* and thus finding state immunity from suit in state court); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) ("Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear *in the language of the statute*." (emphasis added)).

41. *See, e.g.*, William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1027 (1989) (defining clear statement rules as requirements that courts interpret statutes a certain way unless Congress clearly expresses contrary intention).

42. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

43. *See id.* at 461 ("[The] rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

44. For an overview of the Court's increasing reliance on the clear statement rule, see generally Eskridge & Frickey, *supra* note 38 (discussing Court's clear statement canons).

Ashcroft.[45] In *Gregory*, the Court held that federal statutory text must contain a clear statement of congressional intent to disrupt traditional state sovereign authority if the statute's application "would upset the usual constitutional balance of federal and state powers."[46] Applying the rule, the Court held that the Age Discrimination in Employment Act (ADEA)[47] did not protect appointed state judges, whose mandatory retirement age was set forth in the state constitution.[48]

A crucial question left undecided in *Gregory* is how courts determine which state functions constitute "fundamental attributes of state sovereignty,"[49] and thus require the pro-

45. 501 U.S. 452 (1991). In *Gregory*, the Court employed the clear statement rule to interpret the ADEA's "policymaker" exception to its prohibition on state-mandated retirement ages. *Id.* at 464-67 (interpreting 29 U.S.C. § 603(b)(2)). The Missouri State Constitution required that appointed state judges retire at age 70. *Id.* at 455.

46. *Id.* at 460.

47. 29 U.S.C. §§ 621-34 (1994).

48. *Gregory*, 501 U.S. at 473.

49. The Court found that decisions regarding who was qualified to be a state judge were "of the most fundamental sort for a sovereign entity." *Id.* at 460. In making this determination, the Court relied on a series of Equal Protection cases commonly known as the "political function" cases. *Id.* at 463. The "political function" doctrine created a realm of lessened judicial scrutiny of potential Equal Protection violations involving eligibility criteria for important elected and appointed state officers who perform functions that "go to the heart of representative government." *Id.* at 461-63 (citing Sugarman v. Dougall, 413 U.S. 634, 647) (1973)). While most of the discussion in *Gregory* revolved around the applicability of the ADEA to appointed state judges, the Court ultimately phrased the rule in much more expansive language: "we will not attribute to Congress an intent to intrude on *state governmental functions* regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment." *Id.* at 470 (emphasis added).

Commentators offered two interpretations of the scope of *Gregory*'s clear statement rule: that it narrowly supported a state's right to define and enforce the qualifications of important appointed officials, or that it broadly applied to any function of state government. *See* Bruce Dayton Livingston, Gregory v. Ashcroft: *The Supreme Court Announces a New Rule of Statutory Construction in Deference to Constitutionally Recognized Principles of Federalism*, 11 ST. LOUIS U. PUB. L. REV. 234, 256-62 (1992) (discussing the alternatively broad and narrow ways to interpret *Gregory*); Deanna L. Ruddock, Note, Gregory v. Ashcroft: *The Plain Statement Rule and Judicial Supervision of Federal-State Relations*, 70 N.C. L. REV. 1563, 1565 (1992) (positing that by failing to explain how clear statement rule might apply beyond setting qualifications for appointed state officials, *Gregory* left lower courts without guidance for reviewing federal legislation covering state and local governmental entities and activities).

tection of the clear statement rule.[50] The Supreme Court's inability to create a workable definition of "traditional government functions" protected by the Tenth Amendment led the Court to reject that classification as a basis for promoting federalist values under the Constitution.[51] Nevertheless, the use of the clear statement rule to prevent all but the most explicit congressional incursions on "attributes of state sovereignty" or "core state functions" suggests that the Supreme Court seeks to enforce federalist values via statutory interpretation in certain circumstances,[52] in lieu of the Tenth Amendment.[53]

Although some commentators predicted courts would apply

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50. Justice White's concurrence in *Gregory* emphasized that the majority failed to limit the clear statement rule's scope: "Is the rule limited to federal regulations of the qualifications of state officials? Or does it apply more broadly to the regulation of any 'state governmental functions'?" *Gregory*, 501 U.S. at 478 (White, J., concurring in part and concurring in the judgment) (internal citations omitted).

51. Garcia v. San Antonio Metro. Transit Auth., 469 U.S 528, 531 (1985). The Court held in *National League of Cities v. Usery* that applying the Fair Labor Standards Act (FLSA) to limit a state's power to structure employer-employee relations in areas of traditional state authority such as "fire prevention, police protection, sanitation, public health, and parks and recreation" impaired "integral operations in areas of traditional governmental functions." 426 U.S. 833, 851-52 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). This intrusion would result in impermissible interference with "traditional aspects of state sovereignty." 426 U.S. at 849.

In *Garcia*, however, the Court pointed to the seemingly arbitrary distinctions between activities found to be "traditional government functions" and those that were not "traditional government functions." 469 U.S. at 538-39. The *Garcia* majority also noted that the emphasis in *National League of Cities* on the "traditional," "integral," or "necessary" nature of protected government functions permitted the federal judiciary to undermine state authority and sovereignty by substituting its own assessment of the importance of particular state functions for that of the state itself. *Id.* at 545-46.

52. Justice O'Connor, author of the majority opinion in *Gregory*, located the roots of the clear statement rule in constitutional protections: "The clear statement rule is not a mere canon of statutory interpretation. Instead, it derives from the Constitution itself. The rule protects the balance of power between the States and the Federal Government." Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 209 (1991). O'Connor analogized the clear statement rule to the Eleventh Amendment, both of which are rooted in, and help to maintain, the principles of federalism that structure the Constitution. *Id.*

53. *See* Eskridge & Frickey, *supra* note 38, at 612 ("'[Q]uasi-constitutional law,' the reading into statute of constitutional values subject only to clear legislative override, has replaced constitutional law, the invalidation of federal statutes, as the way in which the Court is enforcing 'our federalism.'").

the clear statement rule broadly to hinder enforcement of civil rights guarantees,[54] the Supreme Court has not employed the rule since the *Gregory* decision to limit the scope of federal antidiscrimination legislation. Lower courts have avoided application of the clear statement rule in three ways: finding statutory text sufficiently clear to validate federal regulation of state functions,[55] deeming the state interests involved insufficiently connected to state sovereignty to warrant the rule's protections,[56] or declining to apply the rule because of overriding federal interests involved.[57] Significantly, the Court recently stated in *City of Edmonds v. Oxford House* that

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54. *See, e.g.*, Ruddock, *supra* note 49, at 1589 ("*Gregory* may well reflect a trend, especially in civil rights cases, in which the Court employs a 'plain meaning' form of statutory interpretation to construe a statute more narrowly than Congress intended.").

55. *See, e.g.*, Baker v. Cuomo, 58 F.3d 814, 824-25 (2d Cir. 1995) (stating that Voting Rights Act contains sufficiently clear statement of Congress's intent to change balance of power between federal government and states to survive application of clear statement rule).

56. In a case interpreting the applicability of the ADEA to law enforcement personnel, the First Circuit limited the clear statement rule to federal legislation impinging on state constitutional officers who participate in the formulation and execution of broad public policy. Gately v. Massachusetts, 2 F.3d 1221, 1230 (1st Cir. 1993). In finding that the ADEA overrode state-mandated retirement for state troopers, the court noted the narrowness of *Gregory*'s holding: "at no point did the Court suggest that all state regulations of public employees are questions of state sovereignty." *Id.* (citation omitted).

Both the Fifth and Eleventh Circuits rejected applying the clear statement rule to a federal civil forfeiture law for real property used to commit narcotics crimes to preempt state homesteading laws. *See* United States v. Lot 5, Fox Grove, 23 F.3d 359, 362 (11th Cir. 1994) (concluding that federal preemption of state's homestead protection provision does not affect state sovereignty within meaning of *Gregory* because "homestead protection is a substantive policy choice, not a means of sovereign definition"); First Gibraltar Bank v. Morales, 19 F.3d 1032, 1040 (5th Cir. 1994) ("Although the regulation of real property may be a matter of special concern to the states, it does not seem to us to strike 'at the heart of representative government' in the same way that the ADEA did in *Gregory*." (citation omitted)).

57. At least one lower court rejected outright the application of the clear statement rule to the Voting Rights Act. League of United Latin Am. Citizens, Council No. 4434 v. Clements, 986 F.2d 728, 758-60 (5th Cir. 1993) [hereinafter *LULAC*]; *see also* League of United Latin Am. Citizens, Council No. 4434 v. Clements, 914 F.2d 620, 641-42 (5th Cir. 1990) ("Congress *has* clearly expressed the [Voting Rights] Act's application to the states . . . . The Act, with all of its intrusive effect, has been made to apply to the states".) (Higginbotham, J., concurring in judgment), *rev'd and remanded*, Houston Lawyers' Ass'n v. Attorney Gen., 501 U.S. 419 (1991).

antidiscrimination laws warrant "generous construction."[58]

C. STATE PRISONERS' FEDERAL STATUTORY CIVIL RIGHTS

Although decisions after *Gregory* involving the clear statement rule did not address the issue directly, courts traditionally have regarded state and local correctional facilities as associated with state sovereignty.[59] Courts confronted with systemic constitutional violations in state prisons described prison administration as a core state function and, therefore, noted that the federal judiciary should hesitate to interfere.[60] Those same courts, however, often paid homage to federalist

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58. In *City of Edmonds v. Oxford House*, the Court interpreted an exemption from the Fair Housing Amendments Act's prohibition against discrimination in housing against people with disabilities. 115 S. Ct. 1776, 1778 (1995) (construing 42 U.S.C. § 3607(b)(1)). The city contended that its ordinance limiting the number of unrelated people in a single family home fell within the exemption and thus that it did not discriminate in denying a single-family permit to a group home for recovering addicts. *Id.* at 1778-79. The Court held that the exemption should be construed narrowly to preserve the Act's broad policy of prohibiting discrimination against people with disabilities. *Id.* at 1780. The Court distinguished *Gregory*'s preservation of a state constitutional provision, in contrast to the local ordinance at issue in *Oxford House*. *Id.* at 1780 n.5 (citing Gregory v. Ashcroft, 510 U.S. 452, 460 (1991)). Repudiating the clear statement rule's applicability to antidiscrimination laws, the Court relied on a competing canon of statutory interpretation mandating expansive readings of civil rights legislation. *Id.* at 1783 n.11. The dissent, in contrast, argued that *Gregory*'s clear statement rule was particularly necessary in this context because land use and zoning ordinances were within the historic powers of the states. *Id.* at 1786 (Thomas, J., dissenting).

59. For instance, the Court wrote in *Preiser v. Rodriguez*, "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." 411 U.S. 475, 491-92 (1973). In *Preiser*, the Court held that when a state prisoner challenges the fact or duration of his conviction, habeas corpus is his only federal remedy, and thus he must exhaust his state remedies in state court before proceeding to federal court. *Id.* at 500.

Preiser, though, was concerned exclusively with the relationship between federal and state courts, not that between Congress and state executive agencies. The Supreme Court noted that the problems of prison administration are "peculiarly within the province of the legislative and executive branches of government," rather than the judiciary. Procunier v. Martinez, 416 U.S. 396, 405 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989).

60. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 85 (1987) ("Where a state penal system is involved, federal courts have . . . additional reason to accord deference to the appropriate prison authorities."); *Procunier*, 416 U.S. at 404-05 ("The problems of prisons in America are complex and intractable, and . . . they are not readily susceptible of resolution by decree").

principles before invalidating state prison policies[61] or ordering massive restructuring with continuing federal judicial oversight.[62]

Courts generally have permitted prisoner suits under federal civil rights statutes.[63] For example, the Seventh Circuit Court of Appeals upheld without discussion prisoners' right to sue state prison officials for race discrimination under Title VI of the Civil Rights Act of 1964.[64] Several courts explicitly addressed whether Title IX of the Education Amendments of 1972[65] applied to women in state prisons, and none found an exemption for core state functions or correctional facilities to Title IX's broad mandate forbidding gender discrimination in education.[66] Likewise, many state prisoners with disabilities sued prison officials under the ADA's predecessor statute, § 504 of the Rehabilitation Act.[67] Although, most courts allowed these suits

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61. *See, e.g., Turner*, 482 U.S. at 99 (invalidating prison policy of prohibiting inmates' marriages without prison administrators' approval as not reasonably related to any legitimate penalogical objective). The Court nonetheless noted that subjecting prison officials' decisions to close judicial scrutiny can "distort the decisionmaking process" and "seriously hamper" the ability to confront problems inherent in running prisons. *Id.* at 89.

62. *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. 1265, 1389-90 (S.D. Tex. 1980) (ordering comprehensive consent decree and appointing special masters to implement continued federal court oversight of Texas prison system).

63. Courts presumed or stated explicitly that federal antidiscrimination laws do not implicitly exempt core state functions such as prisons. *See, e.g.*, Jeldness v. Pearce, 30 F.3d 1220, 1224-25 (9th Cir. 1994) (noting that Title IX of Educational Amendments Act of 1972 contains no specific exemption from coverage although institutions are explicitly exempted).

64. David K. v. Lane, 839 F.2d 1265, 1274 (7th Cir. 1988). The plaintiffs alleged that Illinois state prison officials used federal funds to allow race-based gangs to flourish inside the prison. *Id.* The court wrote: "It is clear that plaintiffs may maintain a private cause of action to enforce the regulations promulgated under Title VI of the Civil Rights Act." *Id.*

65. 20 U.S.C. § 1681(a) (1994). Unlike Title VI of the Civil Rights Act of 1964 and Title II of the ADA, Title IX contains specific exemptions from its coverage. *See* § 1681(a)(1)-(9) (listing exemptions).

66. *See, e.g.*, Jeldness v. Pearce, 30 F.3d 1220, 1224-26 (9th Cir. 1994) (holding Title IX applicable to state prison educational programs); Women Prisoners v. District of Columbia, 877 F. Supp. 634, 672-74 (D.D.C. 1994) (relying on *Jeldness* to hold that Title IX applies to prisons and jails); Klinger v. Nebraska Dep't of Correctional Servs., 824 F. Supp. 1374, 1431-32 (D. Neb. 1993) (relying on precedent to hold courts cannot impose a Title IX exemption for prisons), *rev'd on other grounds*, 31 F.3d 727, 733 (8th Cir. 1994).

67. *See, e.g.*, Harris v. Thigpen, 941 F.2d 1495, 1522-24 (11th Cir. 1991) (permitting HIV-positive prisoners to sue under § 504); Bonner v. Lewis, 857 F.2d 559, 562-64 (9th Cir. 1988) (permitting deaf inmate to sue under § 504); Sites v. McKenzie, 423 F. Supp. 1190, 1197 (N.D. W. Va. 1976) (granting

without comment, the Ninth Circuit explicitly held in *Bonner v. Lewis* that the Rehabilitation Act protected state inmates with disabilities.[68] Other federal courts have cited the Ninth Circuit's analysis in *Bonner* approvingly.[69]

Following limited success challenging disability discrimination under the Rehabilitation Act by prisons that were not receiving federal funds,[70] state prisoners sued under the wider umbrella of Title II of the ADA.[71] Commentators and prisoners' rights advocates heralded Title II as a more viable remedy than constitutional litigation for redressing disability discrimination.[72] As in prisoner suits brought under other civil rights statutes, most defendants in suits brought under the ADA did not challenge the statute's applicability to state and local correctional facilities.[73] Before the Fourth Circuit's decision in *Torcasio*, the only court that squarely confronted a nonapplicability defense held that Title II applied to state and local

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summary judgment to inmate with mental illness under § 504 for exclusion from vocational rehabilitation program).

68. 857 F.2d at 562 (holding the broad language of Rehabilitation Act covered state prisons and noting the Act's emphasis on rehabilitation and integration was congruent with rehabilitative goals of state prisons); *accord* Donnell C. v. Illinois State Bd. of Educ., 829 F. Supp. 1016, 1020 (N.D. Ill. 1993) (holding the Rehabilitation Act applied to correctional facilities, including county juvenile detention center).

69. *See, e.g.*, *Harris*, 941 F.2d at 1522 n.41; *Donnell C.*, 829 F. Supp. at 1020.

70. By its terms the Rehabilitation Act covers only state entities that receive federal funding. *See supra* note 17 (discussing Rehabilitation Act's limited applicability). Inmates in state prisons that did not receive federal funding were thus precluded from seeking relief. Because individuals who bring suit under the Rehabilitation Act are not required to prove a nexus between federal funding and a specific prison program, however, state prisons' receipt of any federal funding made them open to suit. *See* Gardner, *supra* note 33, at 188-90 (discussing Rehabilitation Act's coverage of state prisons and federal funding nexus requirement).

71. *See supra* notes 33-34 and accompanying text (discussing state prisoner cases brought under Title II of the ADA). By its terms, Title II does not apply to inmates in federal prisons. *See* Crowder v. True, 845 F. Supp. 1250, 1253 (N.D. Ill. 1994).

72. *See, e.g.*, Susan P. Sturm, *The Legacy and Future of Correction Litigation*, 142 U. PA. L. REV. 639, 733 (1993) (noting that prisoners' rights advocates have expressed increasing interest in using statutes, including the ADA, to challenge prison conditions and services).

73. *See, e.g.*, Harrelson v. Elmore County, 859 F. Supp. 1465 (M.D. Ala. 1994) (lacking any assertion of non-applicability defense); Noland v. Wheatley, 835 F. Supp. 476 (N.D. Ind. 1993) (same).

correctional facilities.[74] The court stated that "under common usage and understanding of the terms a jail and all of its facilities . . . constitute a service, program, or activity of the [city] to which the ADA applies."[75]

Instead, findings that prison officials had qualified immunity from monetary liability have been the most common barrier to inmates' disability discrimination claims. Qualified immunity, also called good faith immunity,[76] protects government officials from suits for monetary damages arising from violations of constitutional or statutory rights.[77] Although the doctrine emerged in the context of actions against officials for constitutional violations, courts have found qualified immunity equally available for suits brought under federal statutes that create rights, such as the ADA.[78] Officials retain qualified immunity as long as they do not violate a clearly established right.[79] If the "contours" of the right were clearly established at the time of the alleged violation, officials lose the immunity regardless of whether they actually knew about the law.[80] Commentators generally agree that the Supreme Court significantly expanded the scope of qualified immunity recently, making recovery of

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74. *See* Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 WL 735802, at *4 (M.D. Ala. Apr. 27, 1993), *noted in* Torcasio v. Murray, 57 F.3d 1340, 1348 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996).

75. *Outlaw*, 1993 WL 735802, at *4.

76. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 474-76 (1994) (discussing history of qualified immunity doctrine and its transition from subjective good faith to objective reasonableness standard).

77. The underlying rationale of qualified immunity is two-fold. First, an official should not be held liable for actions she had no reason to think were illegal. *See* Scheuer v. Rhodes, 416 U.S. 232, 240 (1974) (noting official immunity guards against "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion"). Second, immunity neutralizes the threat that potential liability will deter an official from "execut[ing] his office with the decisiveness and the judgement required by the public good." *Id.*

78. *See* Noland v. Wheatley, 835 F. Supp. 476, 487-89 (N.D. Ind. 1993) (holding that qualified immunity generally is available for officials sued under the ADA, although not in this particular case).

79. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (noting that immunity fails if official knew or should have known the action violated constitutional rights).

80. *See* Anderson v. Creighton, 483 U.S. 635, 640 (1987) (holding "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right"); *Harlow*, 457 U.S. at 818 (holding that government officials are shielded from liability for civil damages where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

monetary damages increasingly difficult for civil rights plaintiffs.[81] Nonetheless, courts have denied qualified immunity to state and local prison officials when they failed to make any accommodations for inmate's disability.[82]

II. THE *TORCASIO* DECISION

Torcasio filed suit against VDOC officials in 1993,[83] alleging violations of his rights under the ADA[84] because officials failed to accommodate his disability in Keen Mountain Correctional Center's facilities and programming.[85] The VDOC

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81. *See, e.g.*, CHEMERINSKY, *supra* note 76, at 480 (concluding that recent Supreme Court decisions on qualified immunity issues were strongly pro-defendant); Leon Friedman, *New Developments in Civil Rights Litigation and Trends in Section 1983 Actions*, *in* 1 SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEY'S FEES 595, 774 (Practicing Law Institute 1994) (same).

82. *See, e.g.*, *Noland*, 835 F. Supp. at 488 ("Any reasonable person would have known that a complete lack of effort and outright refusal to accommodate [plaintiff] violated his rights under the ADA.").

83. Torcasio v. Murray, 862 F. Supp. 1482, 1486 (E.D. Va. 1994), *aff'd in part and rev'd in part*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996). Torcasio originally filed a similar complaint relating to his confinement in VDOC's Greensville Correctional Center. *Id.* The district court granted VDOC defendants' motion for summary judgment on the constitutional claims and dismissed the statutory claims as moot because Torcasio had been transferred to the Keen Mountain Correctional Center. *Id.* The United States Court of Appeals for the Fourth Circuit affirmed the dismissal of the constitutional claims, but it vacated the district court's finding that Torcasio's transfer rendered the statutory claims moot. *Id.* The Fourth Circuit remanded the case for the district court to determine whether the facilities at Keen Mountain were similar to those at Greensville, and, if so, whether they violated either the ADA or the Rehabilitation Act. *Id.*

Meanwhile, Torcasio filed a second complaint alleging similar constitutional and statutory violations at Keen Mountain. *Id.* While the remanded case was pending in the district court, Torcasio was paroled. *Id.* at 1489. The district court found that because he was no longer confined at Keen Mountain, he was no longer entitled to injunctive relief. *Id.* The Fourth Circuit's decision on appeal from remand was thus concerned with only monetary damages as remedy. *Torcasio*, 57 F.3d at 1342-43.

84. Torcasio also brought suit under the Rehabilitation Act of 1973, and the Eighth and Fourteenth Amendments. *Torcasio*, 862 F. Supp. at 1489. The district court construed Torcasio's complaint to present an additional § 1983 claim for violations by state officials of his statutory rights under the ADA and the Rehabilitation Act. *Id.* at 1489 n.4. The court did not address whether a § 1983 claim premised on ADA violations presented a different standard than a claim brought directly under Title II of the ADA.

85. Torcasio claimed that the prison failed to reasonably accommodate his obesity in its facilities—including the shower, toilet, pod tables, cell doors, building lobby, dining hall, commissary window and pill line, location of his housing unit, cell itself, and infirmary—and its programming for in-

officials moved for summary judgment, claiming the ADA does not apply to state prisons[86] and that the prison officials were entitled to qualified immunity.[87] The federal district court denied VDOC officials' motion for summary judgment on qualified immunity grounds as to some of Torcasio's claims.[88] The court also denied VDOC's defense that the ADA does not apply to state prisons.[89] Its decision relied on the plain language of the ADA,[90] as well as consistent judicial interpreta-

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mates—including indoor and outdoor recreational facilities, medical transportation, and personal aid. *Id.* at 1486-89.

86. *Id.* at 1489. Defendants raised an analogous defense to Torcasio's Rehabilitation Act claim. *Id.* at 1490.

87. *Id.* The district court held that qualified immunity is a defense to claims brought directly under the ADA and the Rehabilitation Act, as well as to those brought under § 1983. *Id.* at 1491. Although the qualified immunity doctrine arose in the context of suits alleging violations of constitutional rights, courts have found that the doctrine extends beyond constitutional claims to protect officials from suits for damages brought under other statutes, including the ADA and the Rehabilitation Act. *See, e.g.*, Noland v. Wheatley, 835 F. Supp. 476, 488 (N.D. Ind. 1993) (holding that qualified immunity is available to officials sued under the ADA).

88. The district court denied defendants' motion for summary judgment based on qualified immunity as to Torcasio's claims for accommodations regarding his toilet, chair for the pod tables, cell doors, tables for indoor recreation, his confinement in the infirmary, building lobby, commissary window and pill line, medical transportation, and personal assistant. *Id.* at 1494-95. The court also denied qualified immunity as to whether VDOC officials denied Torcasio extra time to travel between buildings, and the privileges granted to other inmates in the general population. *Id.* at 1495.

The district court granted VDOC officials qualified immunity as to Torcasio's claims involving his shower, outdoor recreation facilities, indoor recreation activities, the location of his housing unit, and the configuration of his cell. *Id.* at 1493-95.

89. *Id.* at 1491. Likewise, the court denied VDOC's defense that the Rehabilitation Act does not apply to state prisoners. *Id.* at 1490. The court identified the specific right at issue as "a morbidly obese inmate's right to the modification of specific services and facilities." *Id.* at 1493. The court found that although the ADA clearly applied to state prisons, the ADA did not clearly define the extent of the prison's affirmative duties to a morbidly obese inmate. *Id.* at 1493. The court made its factual assessment of the prison's duty to accommodate in its discussion of whether the defendants engaged in disability discrimination, not in its general discussion of qualified immunity. *See id.* at 1492 (finding that the ADA required VDOC to make its facilities readily accessible to individuals with disabilities and that a reasonable juror could find VDOC's accommodations unreasonable).

90. *Id.* at 1490-91. The text of Title II of the ADA, the district court reasoned, made clear that VDOC fit its definition of public entity: "any state or local government and any department, agency or special purpose district of a State or local government." *Id.* at 1491 (citing 42 U.S.C. § 12131). The court noted that one of the ADA's explicit purposes was to provide a comprehensive

tions that both the ADA and the Rehabilitation Act covered actions of state prison officials.[91] VDOC officials subsequently filed an interlocutory appeal of the partial denial of qualified immunity to the Fourth Circuit.[92]

The Fourth Circuit overturned the district court's partial denial of qualified immunity to the VDOC officials.[93] The circuit court found that the applicability of the ADA to state prisons was not clearly established when the alleged violations took place and, therefore, the officials were immune from suit for damages.[94] The court applied the clear statement rule[95] to hold that the ADA did not clearly apply to state prisons, despite Title II's inclusive and seemingly unambiguous language of coverage.[96] The clear statement rule applies, the court wrote, in cases that "implicat[e] Congress's historical reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States."[97] Because the court categorized state prisons as a core state function,[98] it interpreted *Gregory* to require that "Congress must speak unequivocally before we will conclude that it has 'clearly' subjected state

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national mandate for eliminating discrimination against people with disabilities. *Id.* (citing § 12101(b)(1)). Moreover, the plain language of the Rehabilitation Act also counseled for an "expansive interpretation" of regulated entities. *Id.* at 1490 (citing 29 U.S.C. § 794 (1982)).

91. *Id.* at 1490-91 (citing Harris v. Thigpen, 941 F.2d 1495, 1522 (11th Cir. 1991); Bonner v. Lewis, 857 F.2d 559, 562 (9th Cir. 1988); Candelaria v. Coughlin, 1994 U.S. Dist. LEXIS 3999, at *1, *19 (S.D.N.Y. Apr. 11, 1994); Noland v. Wheatley, 835 F. Supp. 476, 487 (N.D. Ind. 1993); Sites v. McKenzie, 423 F. Supp. 1190, 1197 (N.D. W. Va. 1976)).

92. Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996). Officials denied qualified immunity may appeal the decision immediately because it is an immunity from suit that would be effectively lost if a case were wrongly permitted to go to trial. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985).

93. *Torcasio*, 57 F.3d at 1342.

94. *Id.*; *see also supra* note 80 (discussing requirement that contours of right be clearly established before court may deny official qualified immunity).

95. *Torcasio*, 57 F.3d at 1346 (citing Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)).

96. *Id.* at 1346-47. The court conceded that "certain portions" of both Title II and the Rehabilitation Act appear "all-encompassing." *Id.* at 1344 (quoting 42 U.S.C. § 12131(1); 29 U.S.C. § 794(a), (b)(1)(A)). The court was not persuaded, however, that such language "squarely" extended to state prisons. *Id.*

97. *Id.* at 1345 (quoting United States v. Lopez, 115 S. Ct. 1625, 1655 (1995) (Souter, J., dissenting)).

98. *Id.* The court did not define the characteristics of a core state function or delineate what separated a core state function from a noncore state function.

prisons to its enactments."[99]

The *Torcasio* court based its assertion that the management of state prisons was a core state function, and thus a fundamental aspect of state sovereignty, largely on traditional comity principles.[100] Relying on precedent limiting the federal judiciary's involvement in running state prisons,[101] the court stated that principles of comity and federalism applied with special force to the context of state prisons.[102] Requiring state officials to accommodate inmates with disabilities could significantly intrude in prison management[103] and, thus, have a broad impact on federal-state relations. The court interpreted *Gregory* as creating a strong presumption against federal statutory encroachment on traditional arenas of state sovereignty,[104] one that is overcome only through unequivocal statutory text.[105] Evaluating the text of Title II, the court concluded that only a "superficial reading" of the ADA and the Rehabilitation Act supported Torcasio's assertion that the Acts

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99. *Id.* at 1346. The court did not elaborate as to what language would make the statutory text sufficiently clear.

100. Comity is a doctrine of federal judicial restraint based on mutual respect between federal and state courts. The Supreme Court has described the underlying rationale of the comity doctrine as:

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Younger v. Harris, 401 U.S. 37, 44 (1971).

101. *Torcasio*, 57 F.3d at 1345-46 (citing Turner v. Safley, 482 U.S. 78, 84-85 (1987); Rhodes v. Chapman, 452 U.S. 337, 349 (1981); Bell v. Wolfish, 441 U.S. 520, 562 (1979); Procunier v. Martinez, 416 U.S. 396, 405 (1974), *overruled on other grounds by* Thornburgh v. Abbott, 490 U.S. 401, 413-14 (1989); Preiser v. Rodriguez, 411 U.S. 475, 492 (1973)).

102. *Id.* at 1346. The cases the *Torcasio* court cited dealt exclusively with federal *judicial* intervention in state prison management to correct constitutional violations. None of the cases discussed the effect of federal civil rights statutes on state prison officials' ability to run the facilities, or the role of the federal judiciary in enforcing such statutes.

103. *Id.* The application of the ADA and the Rehabilitation Act to state prisons, the court wrote, would have a serious impact on "matters ranging from cell construction and modification, to inmate assignment, to scheduling, to security procedures." *Id.*

104. *Id.* at 1344-45; *cf. supra* note 49 and accompanying text (discussing commentators' broad and narrow interpretations of *Gregory*'s holding).

105. *See Torcasio*, 57 F.3d at 1344 ("If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute.") (internal quotations omitted).

"clearly encompass[ed] state prisons and prisoners."[106]

Because determining whether a right is clearly established requires an examination of cases that interpret and define the contours of the right,[107] the *Torcasio* court also evaluated whether other courts settled the applicability of the ADA to state prisons.[108] The court suggested that Torcasio could have overcome the "facial ambiguity" of the statutory text by demonstrating that courts uniformly interpreted the ADA to apply to state prisons,[109] or that the implementing regulations made its coverage of state prisons clear.[110] The court noted, however, that almost every court simply assumed the ADA covered state prisons without squarely addressing the issue.[111] Although the Ninth Circuit held explicitly that the Rehabilitation Act protected state prisoners,[112] the *Torcasio* court emphasized that the only court directly addressing the ADA's applicability to state prisons did so in an unpublished opinion.[113] Moreover, Title II's implementing regulations failed to convince the court that the ADA covered state prisons.[114]

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106. *Id.* at 1347.

107. *See supra* notes 76-82 and accompanying text (discussing qualified immunity doctrine).

108. *Torcasio*, 57 F.3d at 1347-49.

109. *Id.* at 1347.

110. *Id.*

111. *Id.* at 1347-49.

112. *Id.* at 1349 (discussing Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988)). Highlighting the Ninth Circuit's observation in a subsequent case interpreting the Rehabilitation Act, the *Torcasio* court stated: "The Act was not designed to deal specifically with the prison environment. . . . There is no indication that Congress intended the Act to apply to prison facilities irrespective of the reasonable requirements of effective prison administration." *Id.* at 1349 n.7 (citing Gates v. Rowland, 39 F.3d 1439, 1446-47 (9th Cir. 1994)). The Ninth Circuit, however, did not hold in *Gates* that the Rehabilitation Act did not apply to state prisons, but rather that the standard of review of a prisoner's statutory rights under the Rehabilitation Act is equivalent to the standard of review for alleged constitutional violations in prison. *Gates*, 39 F.3d at 1447.

113. *Torcasio*, 57 F.3d at 1347-48 (citing Outlaw v. City of Dothan, No. CV-92-A-1219-S, 1993 WL 735802, at *4 (M.D. Ala. Apr. 27 1993)). The court noted that unpublished opinions are an "unusually ineffective, and even counterproductive" means of showing that a right was clearly established. *Id.*

114. *Id.* at 1350-52. Title II's regulations incorporated those of the Rehabilitation Act, which did not mention correctional facilities. *Id.* at 1350-51. The ADA's Accessibility Guidelines, including requirements for newly constructed correctional facilities, were strictly advisory until the Department of Justice issued final regulations. *Id.* at 1351-52 (citing 36 C.F.R. Pt. 1191, App. A; 59 Fed. Reg. 31,676 (1994)). The court concluded, therefore, that the ADA's applicability to state prisons was not sufficiently clearly established to

After determining that the ADA did not clearly apply to state prisons, the court discussed VDOC's other defenses. Again relying on limited discussions in earlier cases, the court found that the ADA's coverage of morbid obesity as a disability was not clearly established.[115] A reasonable prison administrator, the court reasoned, could believe that a morbidly obese inmate was not disabled.[116] The court thus held that the VDOC officials were immune from Torcasio's suit because the ADA's coverage of his disability was not clearly established.[117]

Finally, the court reviewed VDOC officials' attempts to accommodate Torcasio's alleged disability. Utilizing traditional qualified immunity analysis, the court found that officials at the Keen Mountain facility reasonably could have believed that providing Torcasio with a hospital bed, reinforced chairs, and handrails and slip mats in the shower were sufficient and reasonable modifications.[118] Because case law had not clearly developed the contours of the ADA's rights, the court concluded, VDOC officials deserved qualified immunity as to all of Torcasio's claims.[119]

III. THE FOURTH CIRCUIT ERRED IN ANALYZING THE ADA'S INAPPLICABILITY TO STATE PRISONS

Courts confronting whether the ADA applies to state prisons should reject the Fourth Circuit's analysis and holding in *Torcasio* for three reasons. First, the Fourth Circuit should not have addressed the issue of the ADA's inapplicability to state prisons because two narrower grounds each would have produced the same result. Second, even if it reached the applicability issue correctly, the court erred in employing the clear statement rule to interpret statutory text that unequivocally indicated the ADA's broad scope. Finally, the court should not have used the clear statement rule to interpret the ADA because the federal government's interest in eliminating disability discrimination outweighs states' interest in efficient prison management. The court's application of the clear statement rule

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justify the district court's partial denial of qualified immunity to the VDOC officials. *Id.* at 1352.

115. *Id.* at 1353-54.
116. *Id.* at 1354-55.
117. *Id.* at 1355.
118. *Id.* at 1355-56.
119. *Id.* at 1356.

created a misguided analytical framework that undermines Title II's uniform and comprehensive antidiscrimination protections for people with disabilities and has serious ramifications beyond the context of state prisons.

A. Relying on Narrower Grounds Would Have Produced the Same Result

Fundamentally, the *Torcasio* court sought to preserve state officials' freedom to determine and implement the most effective forms of prison administration.[120] Finding that the ADA's applicability to state prisons was not clearly established when Torcasio requested accommodations for his disability enabled the court to limit federal interference with state prison management. The court, however, could have achieved the same result, holding VDOC officials not liable for Torcasio's damages claim, without finding the ADA applied to state prisons. The court had available two other avenues to the same end: Title II's "reasonable modification" standard and the qualified immunity doctrine.

1. VDOC Met the ADA's "Reasonable Modification" Standard

Title II's implementing regulations require a public entity to make reasonable modifications in its policies, practices, and procedures unless the modifications or accommodations would fundamentally alter the nature of the service, program, or activity.[121] If a public entity demonstrates that a proposed modification would change the entire focus of the program, or create an undue burden or hardship, courts have not required the government agency to make the modification.[122] This standard incorporates considerations of context in evaluating whether a proposed accommodation is reasonable.[123]

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120. *See id.* at 1345 ("That the management of state prisons is to be left to the states, as free as possible of federal interference, is confirmed by a long line of Supreme Court precedent.").

121. Title II defines "qualified individuals with a disability" as persons who "with or without reasonable modifications" to the program, policy, or procedure are qualified to participate or receive its benefits. 42 U.S.C. § 12131(1); *see* 28 C.F.R. § 35.130(b)(7) (refining and implementing reasonable modification standard).

122. *See supra* note 24 and accompanying text (discussing the reasonable modification standard).

123. *See supra* note 24 and accompanying text (discussing courts' interpretations of reasonable accommodation standard under the Rehabilitation Act and Title II).

Thus, the heightened administrative and security concerns of a state prison should factor into a court's determination of whether a particular accommodation is reasonable.[124] Other courts addressing the reasonable accommodation issue within the prison setting provided guidance for balancing competing interests when evaluating prison officials' attempts to address the needs of inmates with disabilities.[125] For instance, courts factored in the heightened risk of HIV-transmission when assessing prison accommodations of HIV-positive inmates.[126]

The Fourth Circuit acknowledged that VDOC officials fulfilled several of Torcasio's requests even before he filed suit.[127] Prison administrators placed him in a private cell originally designed for two inmates, provided him with a full-size hospital bed with railings, put reinforced chairs in his cell and dining area, and installed slip mats and handrails in the shower.[128] The court also alluded to the limits that security concerns place on prison administrators' ability to accommodate prisoners with disabilities.[129] The court, however, never

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124. *See supra* note 24 (discussing courts' evaluation of the role of administrative concerns in determining whether an accommodation was reasonable).

125. Courts interpreting the ADA and the Rehabilitation Act in the prison context recognized these constraints and permitted officials to avoid certain accommodations altogether. *Cf. supra* notes 33-34 (discussing requested and required accommodations in suits brought under ADA and Rehabilitation Act).

126. *See, e.g.*, Harris v. Thigpen, 941 F.2d 1495, 1526-27 (11th Cir. 1991) (assessing prison's duty to accommodate under Rehabilitation Act). The Eleventh Circuit noted that the risk of introducing HIV-positive prisoners into the general inmate population could pose a serious threat of violence. *Id.* at 1518. Moreover, the court wrote, prisons are places of high-risk behavior for HIV transmission. *Id.* at 1519. Nonetheless, the *Harris* court ordered the district court to assess specific programs, such as college classes, to determine whether the prison could minimize the legitimate risks and accommodate HIV-positive prisoners. *Id.* at 1526 n.47, 1527; *see also* Gates v. Rowland, 39 F.3d 1439, 1445, 1447-48 (9th Cir. 1994) (weighing in its reasonable accommodation assessment risk of violence if HIV-positive inmates were placed in food service jobs).

127. Torcasio v. Murray, 57 F.3d 1340, 1342 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996).

128. *Id.* at 1356. When Torcasio first arrived at Keen Mountain, prison officials placed him in the infirmary, which contained many modifications to make it accessible for prisoners with disabilities. *Id.* Because inmates living in the infirmary had more restrictions and fewer privileges, Torcasio requested to move into the general population. *Id.*

129. *Id.* at 1345-46. The court later cited the Ninth Circuit's analysis of the Rehabilitation Act's applicable standard in the prison setting: "'There is no indication that Congress intended the [Rehabilitation] Act to apply to prison

incorporated the prison's legitimate security or administrative concerns into its analysis of the reasonableness of the accommodations. Had the court done so, it could have concluded, for example, that Torcasio's request for a personal attendant was unreasonable in light of the prison's staffing limitations, or alternatively, because such specialized treatment might arouse jealously and violence among the other inmates.

Only after concluding that Title II did not clearly cover state prisons did the Fourth Circuit address the reasonableness of VDOC's modifications. Because the court ultimately found that VDOC's accommodations were, in fact, reasonable within the requirements of Title II,[130] it had no need to address whether Title II's coverage extended to state prisons. Had the court based its decision solely on the narrower issue of the reasonableness of the prison's modifications, it could have found VDOC officials not liable for damages without determining that Title II's applicability was clearly established law.

2. VDOC Officials' Actions Were Reasonable Under the Qualified Immunity Doctrine

Alternatively, the *Torcasio* court could have focused exclusively on whether VDOC officials met the existing standard for qualified immunity based on the accommodations they made before Torcasio filed suit.[131] Qualified immunity casts a broad net and generally protects individual officials from monetary liability unless the right at issue has been defined with considerable precision.[132] Because qualified immunity protects all

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facilities irrespective of the reasonable requirements of effective prison administration.'" *Id.* at 1346 (quoting *Gates,* 39 F.3d at 1447). The Fourth Circuit nonetheless failed to acknowledge that its citation from *Gates* undermined its reasoning about the ADA's inapplicability to state prisons and provided clear precedent for incorporating prison management concerns into Title II's reasonable accommodation requirement. *See supra* note 112 (discussing *Gates*'s holding).

130. *See supra* notes 118-119 and accompanying text (discussing court's assessment of reasonableness of VDOC's accommodations).

131. Under the qualified immunity doctrine, government actors have considerable leeway in exercising their discretion and are immune from damage actions unless they violate clearly established rights. *See supra* notes 79-80, 82 and accompanying text (discussing qualified immunity determinations and parameters of "clearly established" law).

132. *See supra* note 81 and accompanying text (discussing the Supreme Court's expansion of qualified immunity's protections).

officials who have not violated clearly established rights,[133] the court had no need to reach the broad conclusion that the ADA was not clearly applicable to state prisons.

In claims brought under the ADA and the Rehabilitation Act, courts denied qualified immunity to prison officials when they failed to make *any* accommodations for an inmate's disability.[134] Courts have not defined the contours of many of the ADA's rights because it is a relatively new law. Although a few cases granted prisoners specific rights,[135] case law is insufficiently developed to consider many *specific* rights guaranteed under the ADA "clearly established" for qualified immunity purposes.[136]

The *Torcasio* court could have grounded its decision solely on VDOC officials' qualified immunity for their actions at Keen Mountain prison.[137] When the case reached the Fourth Circuit, only Torcasio's claims for monetary damages remained.[138] Unlike earlier cases that denied officials qualified immunity from claims brought under the ADA, VDOC officials attempted to accommodate some of Torcasio's requests.[139] The Fourth Circuit could have analyzed the accommodations VDOC officials made, found that their actions did not violate any clearly established right,[140] and thus hold that qualified immunity

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133. *See supra* notes 76-82 and accompanying text (discussing qualified immunity doctrine).

134. *See supra* note 82 (discussing outcome of qualified immunity determinations in ADA and Rehabilitation Act cases).

135. For example, much of the case law developed under the ADA and the Rehabilitation Act has created rights of deaf prisoners to interpreter services and assistive technologies. *See* Gardner, *supra* note 33, at 191-94 (discussing cases brought under ADA and Rehabilitation Act).

136. *See supra* notes 79-80 and accompanying text (discussing "clearly established" requirement of qualified immunity doctrine).

137. The court examined in detail whether the ADA was even applicable to state prisons before basing its holding on qualified immunity. *See supra* Part II (setting forth *Torcasio* court's reasoning).

138. Torcasio v. Murray, 57 F.3d 1340, 1342-43 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996).

139. *See supra* notes 118, 127-128 and accompanying text (discussing VDOC's officials accommodations).

140. The court based its holding on qualified immunity doctrine, but it held that Title II's applicability to state prisons was not clearly established law. *Torcasio*, 57 F.3d at 1352. The court wrote, "[b]ecause we find that the applicability of the [ADA and Rehabilitation Act] to prisons was not clearly established at the time in question, it follows *a fortiori* that the more specific right of prisoners to the particular accommodations requested by Torcasio was likewise not clearly established." *Id.* at 1352 n.12.

rendered the officials immune from suit for damages. This alternative holding would have allowed the court to recognize that the ADA applies to state prisons while immunizing VDOC officials from monetary liability. This holding also would leave available the possibility of finding officials liable for future egregious conduct.

B. THE *TORCASIO* COURT FAILED TO APPLY THE CLEAR STATEMENT RULE PROPERLY

Assuming arguendo that the *Torcasio* court correctly addressed whether the ADA covered state prisons, the court should not have employed the clear statement rule to interpret Title II's unambiguous applicability provision. The Fourth Circuit should have recognized Title II's applicability to state prisons and therefore declined to employ the clear statement rule. Moreover, the *Torcasio* court emphasized the constraints compliance with the ADA would place on state prisons, and used those implications to justify applying the clear statement rule. As a result, the *Torcasio* court expanded beyond established precedent the realm of state activities meriting the clear statement rule's protections.

1. Title II's Coverage Provision Is Unambiguous, Therefore Obviating the Clear Statement Rule

The clear statement rule, like other canons of statutory interpretation, is a tool used to interpret ambiguous statutory language.[141] The rule creates a presumption that helps determine the meaning of words or phrases that are subject to more than one interpretation.[142] The threshold interpretive issue is, therefore, whether particular statutory text is ambiguous.

The Supreme Court in *Gregory* used the clear statement rule to determine the meaning of "policymaker" as an exception to the broad coverage of the ADEA,[143] a term susceptible to

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141. *See supra* notes 40-41 and accompanying text (locating the clear statement rule in context of the canons of statutory interpretation).

142. *See supra* notes 55-58 and accompanying text (analyzing courts' use of clear statement rule after *Gregory*).

143. Gregory v. Ashcroft, 501 U.S. 452, 467 (1991). The Court had to determine whether appointed state judges fit into the ADEA's exemption for "'appointee[s] on the policymaking level.'" *Id.* at 465 (quoting 29 U.S.C. § 630(f) (1994)).

varying interpretations and applicability.[144] Significantly, the Court did not use the clear statement rule to interpret the ADEA's broad coverage provision that included "a State or political subdivision of a State"[145] within its definition of employers. Presumably, the meaning of the latter phrase was readily apparent to the Court. Likewise, lower courts have found other examples of expansive language defining the reach of federal statutes sufficiently unambiguous to meet the clear statement rule's standard[146] or to avoid application of the rule altogether.[147]

The heart of the *Torcasio* decision focuses on language in Title II that is virtually identical to the ADEA's broad coverage provision that the Supreme Court tacitly approved in *Gregory*. Title II's provision prohibits discrimination based on disability by "any State or local government" and "any department, agency . . . or other instrumentality of a State or States or local government."[148] The statute's definition of a public entity includes "any department . . . of a State."[149] Common usage as well as common sense dictate that the Virginia Department of Corrections is a "*department* . . . of a State" and therefore subject to Title II's prohibition against discrimination based on disa-

144. *See id.* at 465 (describing petitioners' and respondent's conflicting interpretations of "policymaking").

145. *Id.* at 456 (quoting 29 U.S.C. § 630(b)(2) (1994)).

146. Confronted with even broader and less precise language, the Second Circuit found the Voting Rights Act's prohibition against state voting requirements that result in denial or abridgement of the right to vote on account of race a sufficiently clear statement under *Gregory* to shift the balance of power between the federal government and the states. Baker v. Cuomo, 58 F.3d 814, 825 (2d Cir. 1995); *see also supra* note 55 and accompanying text (discussing the court's reasoning in *Baker* and use of clear statement rule). Similarly, a district court found the Fair Labor Standards Act's definition of covered employees a sufficiently clear statement under *Gregory* to extend to state law enforcement officials, despite the state's contention that law enforcement is a traditional state government function. Schmitt v. Kansas, 844 F. Supp. 1449, 1455 (D. Kan. 1994); *accord* Ackley v. Department of Corrections, 844 F. Supp. 680, 685 (D. Kan. 1994).

147. Interpreting another provision of the ADEA, the First Circuit found that Congress's intent (as manifested in the statutory text) to protect state police officers from mandatory retirement rendered the use of the clear statement rule unnecessary. Gately v. Massachusetts, 2 F.3d 1221, 1230 (1st Cir. 1993). The court reasoned that the rule only applies where congressional intent as revealed in the text was ambiguous. *Id.; see also supra* note 56 and accompanying text (discussing the court's reasoning in *Gately* and assessment of clear statement rule's applicability to interpret ADEA).

148. 42 U.S.C. § 12131(1) (1994).

149. *Id.*

bility. The court's conclusion that this language is not sufficiently clear for a reasonable prison official to know that the ADA covers state prisons is not congruent with the plain meaning of the statutory text or prior decisions. Title II's language appears at least as clear as the ADEA's coverage provision defining a state as an employer that the *Gregory* Court found acceptable; indeed, the language is probably more clear. If the Supreme Court construed "a State or political subdivision of a State" to cover the state judiciary without ambiguity, the Fourth Circuit should have understood "any department . . . of a State" to apply unambiguously to state department of corrections officials. The *Torcasio* court should have followed the Supreme Court's lead in *Gregory* and found Title II's coverage provision sufficiently clear to obviate the application of the clear statement rule.

The *Torcasio* court instead held that Title II would have to contain a "far clearer expression of congressional intent"[150] to find the provision sufficiently unambiguous to pass muster under the clear statement rule. It is unclear how the ADA could contain a "far clearer expression of congressional intent" without including an enumerated list of covered state and municipal entities. The court noted in a footnote that "although the definition of 'public entity' contained in Title II of the ADA is a broad one, it is still true that prisons are not expressly mentioned in the statute."[151] In fact, Title II does not list any specific departments or agencies as covered entities.[152] Conventions of statutory interpretation suggest that the *Torcasio* court should not have read such criteria into Title II where none existed in the text of the statute.[153]

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150. Torcasio v. Murray, 57 F.3d 1340, 1344 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996).

151. *Id.* at 1346 n.5.

152. In contrast, Title III of the ADA (Public Accommodations) contains a list of twelve types of public accommodations subject to the ADA. 42 U.S.C. § 12181(7)(A)-(L) (1994). Similarly, Title I (Employment) specifically exempts certain employers. *Id.* at § 12111(5)(B); *see also supra* note 18 (discussing coverage provisions and exemptions in Titles I and III of ADA). Therefore, Congress knew how to draft coverage provisions that provided specific guidance as to their scope.

153. A standard canon of statutory interpretation mandates that if a statute includes specific exemptions from its coverage, courts should not create additional exemptions. *See, e.g.*, Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980), *cited in* Jeldness v. Pearce, 30 F.3d 1220, 1226 (9th Cir. 1994) ("Where Congress explicitly enumerates certain exceptions to a general

2. The Court Erred in Focusing on the Federalist Implications of State Prison's Compliance with the ADA Rather than Focusing on the Text of the Statute

Rather than carefully analyzing Title II's text, the *Torcasio* court focused on the ramifications for prison administrators of accommodating inmates' disabilities. This approach misconstrued the proper use of the clear statement rule, which has been limited to situations of genuine textual uncertainty.[154] In the Fourth Circuit's analysis, the clear statement rule lost its connection to the statutory text and operated as a quasi-substantive Tenth Amendment protection for realms of traditional state authority. The decision thus reinvigorated in the realm of statutory interpretation an analysis that the Supreme Court explicitly rejected in its Tenth Amendment jurisprudence.[155]

In *Gregory*, the Supreme Court predicated its use of the clear statement rule on a strong link between fundamental attributes of state sovereignty, requiring the clear statement rule's protection, and functions tied to representative government.[156] Likewise, lower courts held that federal legislation must impinge on "the heart of representative government"[157] or a state's "self-identification as a sovereign"[158] before courts employ the clear statement rule. Areas traditionally within the realm of state authority, such as land use, were clearly distinguishable from representative government to require application

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prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.") (citation omitted); *see also supra* note 66 and accompanying text (discussing courts' use of this canon to interpret Title IX to conclude it covers state prisons).

154. *See supra* notes 55-58 and accompanying text (analyzing portions of statutory text to which courts have applied clear statement rule).

155. *See supra* note 51 and accompanying text (discussing the Supreme Court's rejection in *Garcia v. San Antonio Metropolitan Transit Authority* of core state function analysis in Tenth Amendment cases).

156. *See supra* notes 45-49 and accompanying text (discussing *Gregory*'s articulation of the realm of traditional state functions that clear statement rule protects).

157. *See supra* note 56 (discussing *First Gibralter Bank v. Morales* and clear statement rule's applicability only to state functions at heart of representative government).

158. *See supra* note 56 (discussing *United States v. Lot 5, Fox Grove*'s interpretation of *Gregory,* and clear statement rule's applicability only to functions that are linked to states' definition as sovereign).

of the rule.[159] These courts thus conclusively rejected an expansive notion of state functions in the context of applying the clear statement rule.

The *Torcasio* court, in stark contrast, began its analysis assuming that state prisons were somehow different than other state entities: "Were we presented with the question of whether [the ADA and the Rehabilitation Act] apply to a state entity other than a prison, we might come to our task with a somewhat different jurisprudential mindset."[160] Because the management of state prisons is a core state function, the court reasoned, it is an attribute of state sovereignty that compels the court to apply the clear statement rule.[161] The court, however, did not attempt to define the parameters or attributes of a core state function. Instead, to support its determination, the court cited dicta from a series of prison-reform cases and concluded that state prisons must be as free from federal interference as possible.[162] Many of the cases cited ironically involved federal judicial interference with state prisons, and some of the remedies included massive restructuring of prison conditions with management dictated and supervised by federal courts.[163] The *Torcasio* court's reliance on these cases undercut its rationale for using the clear statement rule because precedent shows that prisons are not insulated from federal encroachment by some inherent link to state autonomy.

The court used the federalist implications of allowing the ADA to reach state prisons to create textual ambiguity where none was present.[164] The *Torcasio* decision's reliance on the "core state function" analysis broke from consistent interpretations of the clear statement rule. The court's assertion that prisons are core state functions, thus meriting federal court

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159. *See supra* note 56 (analyzing courts' determinations of what constitutes a core state function).

160. Torcasio v. Murray, 57 F.3d 1340, 1344 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996).

161. *Id.* at 1345-46.

162. *See supra* notes 101-102 and accompanying text (discussing the *Torcasio* court's use of prison cases to support its determination that prisons are core state functions).

163. *See supra* note 102 and accompanying text (discussing the role of prison cases in *Torcasio* court's analysis). None of the cases cited by the *Torcasio* court involved congressional interference with state prisons; instead, the cases addressed constitutional violations.

164. *See supra* part III.B.1. (discussing lack of textual ambiguity in Title II's coverage provision).

protection, raised the same issues the Supreme Court encountered in its Tenth Amendment jurisprudence: the inability to create a workable definition of the attributes of state sovereignty that deserve federalist protection. State prisons are far-removed from "the heart of representative government," the definition other courts used when employing the clear statement rule.[165] Whether state prisons are required to accommodate inmates with disabilities does not ensure that states are more responsive to their constituents, nor does it hinder states' ability to set qualifications for important policy-making positions. The Fourth Circuit should have recognized that state prisons are not institutions intimately linked to state representative functions and thus *are* subject to federal antidiscrimination statutes like the ADA.

C. THE *TORCASIO* COURT SHOULD NOT HAVE USED THE CLEAR STATEMENT RULE TO INTERPRET THE ADA

Regardless of whether Title II's coverage provision is sufficiently ambiguous to require the use of the clear statement rule, the *Torcasio* court should not have applied the rule at all. Courts have rejected using the clear statement rule to interpret statutes enacted under Congress's powers under the Fourteenth and Fifteenth Amendments.[166] The *Torcasio* court thus diverged from consistent interpretations of *Gregory* by using the clear statement rule to protect a state agency not fundamental to state sovereignty from an antidiscrimination statute enacted under the Fourteenth Amendment. The court erred in elevating the state's interest in autonomy over the federal government's weightier interest in preventing discrimination against people with disabilities.

1. Courts Have Declined to Apply the Clear Statement Rule to Legislation Enacted Under the Fourteenth Amendment

The Fourteenth Amendment contains a broad grant of power to Congress to legislate in areas traditionally reserved to the

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165. *See supra* note 56 (discussing courts' interpretations of what state government functions are sufficiently linked to state sovereignty to require use of clear statement rule).

166. *See supra* notes 55, 58 and accompanying text (discussing courts' rejection of clear statement rule to interpret Fair Housing Amendments Act and Voting Rights Act).

states.[167] The Supreme Court held that Congress may legislate to ensure equal protection of the laws, even if the result is preempting state law or practices that do not violate the Fourteenth Amendment.[168] The Court in *Gregory* noted that the federalism interests underlying the clear statement rule are "attenuated" when Congress acts under the Fourteenth Amendment.[169]

Given the lessened state sovereignty interests at stake when Congress uses its Fourteenth Amendment powers, the Court has twice declined to use the clear statement rule to interpret antidiscrimination legislation that nonetheless had a profound impact on core state functions. In *Chisom v. Roemer*, the Court stated that Congress adopted the Voting Rights Act for crucial remedial purposes and, therefore, courts should interpret the Act to provide the broadest possible scope to prevent race discrimination.[170] In dissent, Justice Scalia explained that the majority refused to apply the clear statement rule to the Voting Rights Act because it was a Fourteenth Amendment enactment.[171] Echoing this sentiment, the Court in *City of Edmonds v. Oxford House, Inc.* used a competing canon of statutory interpretation stating that antidiscrimination laws warranted "generous construction" to construe the Fair Housing Act.[172] The *Oxford House* decision was especially significant because the Court interpreted provisions of the Act that prohibit discrimination

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167. U.S. CONST. amend. XIV, § 5; *see also supra* note 35 and accompanying text (describing Supreme Court's sanction of expanding federal power under Fourteenth Amendment). The Fifteenth Amendment contains a similar enforcement authorization. U.S. CONST. amend. XV, § 2.

168. *See supra* note 35 and accompanying text (discussing Congress's power under Fourteenth Amendment to extend equal protection doctrine).

169. Gregory v. Ashcroft, 501 U.S. 452, 468 (1991).

170. Chisom v. Roemer, 501 U.S. 380, 403 (1991).

171. *See Chisom*, 501 U.S. at 412 (Scalia, J., dissenting) (explaining that Fourteenth Amendment can be used to distinguish *Chisom* from *Gregory*). The Voting Rights Act, however, was enacted under the Fifteenth Amendment. *See* Eskridge & Frickey, *supra* note 38, at 646 ("Contrary to Justice Scalia's comment, the Voting Rights Act was adopted pursuant to the Fifteenth Amendment, but that does not change the analysis.") In contrast, when the *Gregory* Court applied the clear statement rule, it presumed that Congress enacted the ADEA under its Commerce Clause authority. *Gregory*, 501 U.S. at 464.

172. City of Edmonds v. Oxford House, 115 S. Ct. 1776, 1783 n.11 (1995); *see also supra* note 58 and accompanying text (discussing *Oxford House*'s rejection of clear statement rule to interpret antidiscrimination legislation).

against people with disabilities.[173]

Following the Supreme Court's implicit rejection of using the clear statement rule to interpret antidiscrimination legislation, lower courts declined to employ it as well. At least one lower court rejected outright application of the rule to the Voting Rights Act. In *League of United Latin American Citizens (LULAC) v. Clements*, the Fifth Circuit restricted use of the clear statement rule to construing Commerce Clause legislation that interfered with states' ability to determine the qualifications of state officials.[174] The court relied on Congress's use of the Fourteenth and Fifteenth Amendments to enact the Voting Rights Act and held the clear statement rule inapplicable because those amendments expanded federal power over the states.[175]

Unlike the Fifth Circuit in *LULAC*, the *Torcasio* court failed to recognize that Congress enacted Title II of the ADA under the Fourteenth Amendment. The ADA states that Congress "invok[ed] the sweep of congressional authority, including the power to enforce the fourteenth amendment . . . in order to address the major areas of discrimination faced day-to-day by people with disabilities."[176] By using the Fourteenth Amendment, Congress sought to intrude in areas of traditional state authority and subject them to uniform provisions prohibiting discrimination based on disability.[177] The *Torcasio* court failed to recognize that states' interests are limited when weighed against the broad federal interest in enforcing the Equal Protection Clause. By declining to address the countervailing federal interest at stake, the court mistakenly applied the clear statement rule contrary to precedent.

2. Policy Considerations Dictate that Courts Should Not Use the Clear Statement Rule to Interpret the ADA

The *Torcasio* court's holding that the ADA did not clearly apply to state prisons fundamentally disrupted the ADA's

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173. *See id.* at 1779-80 (describing facts of *Oxford House* in context of Fair Housing Act provision, codified at 42 U.S.C. § 3607(b)(1)).

174. *LULAC*, 986 F.2d 728, 758-59 (5th Cir. 1993).

175. *Id.* at 760.

176. 42 U.S.C. § 12101(b) (1994).

177. *See supra* notes 16-17, 19-23 and accompanying text (describing Congress's intent in enacting ADA).

comprehensive remedial purpose.[178] It left inmates who are discriminated against on the basis of disability without a comprehensive statutory remedy.[179] Inmates discriminated against on the basis of race or gender, in contrast, have some recourse under Title VI of the Civil Rights Act of 1964 or Title IX of the Education Amendments Act of 1972, respectively.[180] In fact, the Fourth Circuit subsequently relied on its decision in *Torcasio* to hold that a Virginia inmate had no claim against state prison officials under the ADA and the Rehabilitation Act.[181] Several federal district courts also have used *Torcasio* to hold the ADA does not protect inmates with disabilities.[182] This result and the *Torcasio* decision itself conflict with Congress's express intent to provide victims of disability discrimination with remedies similar to those available to victims of other forms of discrimination.[183]

More significantly, the *Torcasio* decision's reliance on the clear statement rule to interpret the ADA created an unprecedented analysis that threatens Title II's applicability to all putative core state functions. Using the court's reasoning, Title II could be restricted from covering licensing boards, police departments, parks and recreation programs, and other traditional arenas of state police power.[184] Courts could exempt entire portions of state and local governments from the ADA's mandates. Judicially created exemptions could thus recreate the patchwork of coverage that existed before the ADA.[185]

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178. *See supra* Part I.A. (discussing ADA's history and Congress's purpose in enacting comprehensive legislation prohibiting discrimination on the basis of disability).

179. *See supra* notes 16-17 and accompanying text (comparing ADA to earlier antidiscrimination legislation).

180. *See supra* notes 63-66 and accompanying text (analyzing federal statutes available for state inmates alleging race or gender discrimination).

181. Garrett v. Murray, 70 F.3d 111, 1995 WL 684077 (4th Cir. 1995) (per curiam) (unpublished disposition).

182. *See* Little v. Lycoming County, 912 F. Supp. 809, 819-20 (M.D. Pa. 1996); Staples v. Virginia Dep't of Corrections, 904 F. Supp. 487, 490 n.1 (E.D. Va. 1995).

183. *See supra* notes 21-25 and accompanying text (setting forth Congress's intent to draft comprehensive civil rights legislation to protect people with disabilities).

184. *See supra* notes 37, 51 and accompanying text (discussing Supreme Court's identification of areas of traditional state authority in Tenth Amendment case law).

185. *See supra* notes 17, 25 and accompanying text (discussing Rehabilitation Act's limited coverage of state and local government entities).

Congress, however, explicitly enacted the ADA to subject state and local governments to uniform standards prohibiting discrimination on the basis of disability.[186] Decrying the lack of consistency under the Rehabilitation Act, the House Education Committee Report stated, "[t]he resulting inconsistent treatment of people with disabilities by different State or local government agencies is both inequitable and illogical for a society committed to full access for people with disabilities."[187] Both the congressional findings that form the introduction to the statute and the copious legislative history attest to the overwhelming history of disability discrimination Congress sought to remedy.[188] Furthermore, state and local governments historically engaged in egregious discrimination against people with disabilities,[189] and thus should be subjected to comprehensive and uniform antidiscrimination laws. The *Torcasio* court's result contravenes the ADA's explicit purpose of creating an overarching federal mandate to eliminate discrimination against people with disabilities.

CONCLUSION

The *Torcasio* court erred in finding that the ADA's applicability to state prisons was not clearly established law. The court should not have used the clear statement rule to interpret Title II: narrower grounds were available to reach the same result, the statute's coverage was unmistakably clear, and Congress enacted the ADA intending to encroach on areas of traditional state authority. The *Torcasio* court elevated the state's interest in running its prison system free from federal interference at the expense of an overriding federal interest in enforcing national standards prohibiting discrimination on the basis of disability. Its analysis created precedent that jeopardizes Title II's applicability to other state or local government entities that could be deemed core state functions.

The court should have protected VDOC officials from civil

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186. *See supra* notes 22-23 and accompanying text (discussing the history of discrimination against people with disabilities that Congress sought to remedy by enacting the ADA).

187. H.R. REP. NO. 485, *supra* note 16, at 37, 1990 U.S.C.C.A.N. 319.

188. *See supra* notes 19-23 and accompanying text (reviewing Congress's fact finding and assessment of discrimination faced by people with disabilities).

189. *See* Cook, *supra* note 23, at 404-14 (describing history and continuing legacy of government segregation of people with disabilities).

damages by finding either that their accommodations of Torcasio's disability were reasonable within the context of the state prison's security concerns, or that their actions did not violate any clearly established rights and were thus protected by qualified immunity. In the future, courts interpreting Title II should reject the use of the clear statement rule. They should rely instead on the ADA's unambiguous text, unequivocal legislative history, and unmistakable purpose of creating a national mandate to rectify pervasive discrimination against people with disabilities. As a result, courts will maintain the appropriate federal-state balance, fulfill congressional intent, and preserve a more uniform judicial enforcement of the ADA.