1999

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THE NEW FEDERALISM AND THE ADA: STATE SOVEREIGN IMMUNITY FROM PRIVATE DAMAGE SUITS AFTER *BOERNE*

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State sanctioned disability-based discrimination comes in two basic flavors: prejudice and thoughtlessness.[1] The former takes disability into consideration, while the latter ignores it.[2] The Fourteenth Amendment's Equal Protection Clause[3] prohibits the prejudice[4] but not the thoughtlessness, at least when the latter is unassociated with irrational assumptions based on myths, fears and stereotypes.[5] Unlike most other civil rights statutes, the Americans With Disabilities Act (hereinafter "ADA" or "Act")[6]

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* Professor of Law, The Columbus School of Law, The Catholic University of America. I would like to acknowledge the very able editorial assistance provided by the editorial board and staff of the *Review of Law & Social Change*, and especially the diligent work of Jeffrey Burritt, the *Review*'s Articles Editor assigned to this article. Their effort has strengthened the final product materially.

1. *See* Alexander v. Choate, 469 U.S. 287, 296 n.12 (1985) (acknowledging "well-cataloged instances of invidious discrimination against the handicapped," along with discrimination resulting from "thoughtlessness and indifference—of benign neglect").

2. *See* Robert L. Burgdorf, Jr., *"Substantially Limited" Protection From Disability Discrimination: The Special Treatment Model and Misconstructions of the Definition of Disability*, 42 VILL. L. REV. 409, 517 (1997) [hereinafter Burgdorf, *Substantially Limited*] (defining the two ways in which people with disabilities are "socially differentiated").

3. The Fourteenth Amendment provides, in relevant part:

> Section 1 . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
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> . . .
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> Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

4. In *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Court described the constitutional principles restricting disability-based discrimination through the adoption of notoriously uncertain boundaries. The Court held that disability-based discrimination rates only a rational basis standard of judicial review but then applied that relaxed requirement with an uncommon bite. Specifically, the Court held unconstitutional a Texas city's denial of a special use permit for a group home for developmentally impaired persons, finding a prejudicial motive primarily from the underinclusiveness of the reasons advanced for denying the permit but also from the city's willingness to accede to the prejudicial attitudes of some local residents. *See also* discussion *infra* notes 154-162 and accompanying text.

5. See discussion *infra* notes 163-168 and accompanying text.

6. Americans With Disabilities Act (ADA) of 1990, codified at 42 U.S.C. §§ 12101-12213 (1994).

prohibits both prejudice and thoughtlessness[7] and aptly has been characterized as a "second-generation civil rights statute."[8] Unfortunately, the ADA's claim to innovation might yet prove to be its constitutional Achilles heel. Across the United States, state governments are challenging Congress's constitutional power under Section 5 of the Fourteenth Amendment to prohibit any state-sponsored disability-based discrimination other than prejudice-based differential treatment.[9] The spear point of this constitutional attack is the ADA's requirement that the states as employers sometimes must provide a reasonable accommodation. This article explores the issues raised by this constitutional assault on the ADA.

OVERVIEW

In June 1998, the Supreme Court decided *Pennsylvania Department of Corrections v. Yeskey*,[10] holding that the ADA applies to state prison inmates. The Court refuted the Pennsylvania Department of Corrections' statutory arguments in a short unanimous opinion written by Justice Scalia. In this otherwise straightforward case, petitioner raised the constitutional argument that Congress had exceeded its Fourteenth Amendment Section 5 power by enacting the ADA, applying it to the states, and providing for federal court enforcement.[11] The Court dismissed these constitutional issues because they were not raised in a timely fashion.

Until recent years, it seemed almost self-evident that Section 5's "positive grant of legislative power . . . to secure the guarantees of the Fourteenth Amendment"[12] was sufficient to enact a civil rights statute such as the ADA.[13] Three well-established propositions bolstered this view: 1)

7. No other civil rights statute so aggressively roots out needless impediments to full participation in the mainstream of American economic and social life. The ADA's most innovative strategy for integrating persons with disabilities is requiring employers to provide reasonable accommodations that do not impose an "undue hardship." *See* ADA, 42 U.S.C. §§ 12111(9), 12111(10), 12112(b)(5)(A).

8. *See generally* 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 (1991) [hereinafter Burgdorf, *Analysis and Implications*] (arguing that as a "second generation" civil rights statute, the ADA provides a novel framework for eradicating discrimination).

9. See discussion *infra* notes 19-23 and accompanying text.

10. 524 U.S. 206 (1998).

11. *Id.* at 212. Petitioners also challenged congressional power under the Commerce Clause. *Id.* These constitutional arguments relied primarily on two 1997 Supreme Court decisions: *Printz v. United States*, 521 U.S. 898 (1997) (finding lack of commerce power), and *City of Boerne v. Flores*, 521 U.S. 507 (1997) (finding lack of Section 5 power).

12. Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

13. It was not uncommon or unreasonable in the years immediately following ADA's enactment to conclude that Congress clearly possesses Section 5 authority to enact the ADA. *See, e.g.*, Stephen L. Mikochik, *The Constitution and the Americans With Disabilities Act: Some First Impressions*, 64 TEMP. L. REV. 619, 626 n.45 (1991) (asserting that "the ADA . . . is plainly a 'measure adopted [sic] to enforce . . . the [Fourteenth] Amendment'") (quoting Morgan, 384 U.S. at 651 n.10)). *See also* ROBERT L. BURGDORF JR., DISABILITY

Section 5 does not limit Congress's power to prohibiting only unconstitutional conduct; Congress may create broader statutory rights;[14] 2) the scope of Congress's Section 5 authority parallels the broad authority provided through the Necessary and Proper Clause;[15] and 3) the scope of judicial review of Congress's exercise of Section 5 power is limited to an inquiry into whether the judiciary can "perceive a basis" upon which to conclude that legislation was aimed at enforcing rights guaranteed by the Fourteenth Amendment.[16]

Because of constitutional law developments over the past several years, Congress's authority under Section 5 to enact a statute such as the ADA is now the subject of considerable dispute. Through eight cases decided during the 1990s, the Supreme Court has refashioned its conception of federal-state relations.[17] Although much still remains to be decided,[18] there is no doubt that these recent decisions embrace principles sufficient

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DISCRIMINATION IN EMPLOYMENT LAW 51 (1995) [hereinafter BURGDORF, DISABILITY DISCRIMINATION] (stating that to the extent that the ADA regulates the activities of state and local governments, "such activity constitutes state action and thus certainly falls within the scope of congressional authority to enact legislation appropriate to implement the equal protection guarantee of the Fourteenth Amendment.").

14. *See* Fullilove v. Kluznick, 448 U.S. 448, 502 (1980) (Powell, J., concurring) (asserting that it is incorrect to conclude that Congress lacks enforcement authority "unless the judiciary [first] decides . . . that [the proscribed behavior] is forbidden by the Equal Protection Clause itself . . . . [I]t is beyond question . . . that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing [effects]."). *Accord* Morgan, 384 U.S. at 648-49 (requiring the judiciary to find constitutional violation before upholding congressional enactment that would unnecessarily limit legislative power); BURGDORF, DISABILITY DISCRIMINATION, *supra* note 13, at 50 (stating that "[t]he Supreme Court has indicated that congressional authority to regulate under Section 5 does not depend on whether the judiciary would find a denial of equal protection in the absence of legislation.").

15. U.S. CONST. art. I, § 8, cl. 18. *See* Morgan, 384 U.S. at 650 (determining that Section 5 grants Congress "the same broad powers expressed in the Necessary and Proper Clause").

16. *See* Morgan, 384 U.S. at 653 ("It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.").

17. The Court held that the Commerce Clause excludes intrastate regulation of firearms near schools because such legislation has a limited effect on interstate commerce and hence exceeds congressional authority. United States v. Lopez, 514 U.S. 549 (1995). Similarly, the Court has found that Congress lacks the power to enforce federal rights against the states in federal court via the Indian or Interstate Commerce Clauses because the doctrine of sovereign immunity denies Congress this power against the states. Seminole Tribe of Fla. v. Florida, 514 U.S. 44 (1996). The Court has also found that the strictures of the intergovernmental immunity doctrine forbid Congress from appropriating local officials to help administer federal regulatory statutes (here the handgun Violence Prevention Act). Printz v. United States, 521 U.S. 898 (1997). Intergovernmental immunity was also employed in *New York v. United States*, 505 U.S. 144 (1992), to invalidate the take-title provision of a federal regulatory program to dispose of nuclear waste. The provision required the state either to legislate a solution to the accumulation of low-level nuclear waste or claim ownership and liability for the waste. The Court held Congress has no authority to "'commandee[r] states' legislative processes.'" *Id.* at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1991)). Relying on the enumerated powers doctrine, the separation of powers doctrine, and notions of federalism, the Court in *Boerne*,

to sustain a successful counterattack against the ADA. Indeed, they may have the effect of dismantling much of Congress's work since World War II to place state governments within the regulatory and enforcement framework of federal law.

One need not speculate whether the States appreciate the unique opportunity presented by the Court's recent federalism cases. The counterattack is well underway. Pennsylvania's aborted constitutional challenge to the ADA in *Yeskey* is but one of many examples. States have successfully challenged Congress's Section 5 authority to enact the ADA in two United States Circuit Court of Appeals[19] and federal district courts in

521 U.S. 507 (1997), limited Congress's Section 5 authority to prohibit state and local interference with religious freedom. *Boerne* stiffened the nexus required between the proscriptions of Section 5-based legislation and the limitations on state action imposed by the Fourteenth Amendment itself, as interpreted by the Court. Applying *Boerne*, the Court ruled in *Florida Prepaid Postsecondary Education Fund v. College Savings Bank*, 119 S. Ct. 2199 (1999) (*College Savings Bank I*), that Congress lacked authority under Section 5 to provide for patent infringement suits against state governments in federal court because the aim of extending patent infringement legislation to the states was to provide for enforcement uniformity rather than eradicate deprivations of property without due process of law. In a companion case, *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999) (*College Savings Bank II*), the Court similarly ruled Congress could not extend the false advertising prohibitions in federal trademark laws to the states on the theory of preventing the deprivation of property without due process of law because neither the right to be free from a competitor's false advertising nor the right to be secure in one's business interests is "property" protected by the due process clause of the Fourteenth Amendment. Also in *College Savings Bank II*, the court held that Congress may not require a waiver of state sovereign immunity from suit in federal court as a condition of engaging in commercial activities in interstate commerce. *Id.* at 2226-31. Finally, in *Alden v. Maine*, 119 S. Ct. 2240 (1999), the Court ruled that state sovereign immunity implicit in the history and structure of the Constitution prohibits Congress from providing for a private damage action on a federal claim against a state in a state's own courts, at least when Congress is barred from providing a federal forum to adjudicate such claims.

18. *See, e.g.*, David Cole, *The Value of Seeing Things Differently:* Boerne v. Flores *and Congressional Enforcement of the Bill of Rights*, 1997 SUP. CT. REV. 31, 75 (1997) (concluding that *Boerne* and *Lopez* are part of "an increasingly long line of cases reaffirming the importance to today's Court of states' interests. Whether [these cases] will in the end impose a significant constraint on Congress's Section 5 powers remains to be seen."); Richard H. Fallon, *The Supreme Court, 1996 Term: Implementing The Constitution*, 111 HARV. L. REV. 54, 133, 137 (1997) (noting that "it has proved difficult for the five justices most concerned about judicial federalism to agree on a doctrinal structure that effectively guards the states from suit in federal court .... [These] Justices apparently remain uncertain or divided about how federalism principles should be specified and implemented beyond the facts of the few particular cases that they have decided in recent Terms.").

19. Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999); *cert. granted*, No. 99-423, 2000 WL 63302, at *1 (U.S. Jan. 25, 2000); Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999), *aff'g* 987 F. Supp. 451 (E.D.N.C. 1997), *petition for cert. filed*, 68 U.S.L.W. 3164 (U.S. Sept. 8, 1999) (No. 99-424). *But see* Amos v. Maryland Dep't of Pub. Safety & Correctional Servs., 178 F.3d 212 (4th Cir. 1999) (holding that Congress has Section 5 power to apply Title II of ADA to state prisons).

Ohio,[20] Alabama,[21] New York[22] and Tennessee.[23] Many other federal district courts have resolved the issue in favor of congressional Section 5 power, but have done so based on widely disparate and, in many cases, problematic reasoning.[24] Several United States Circuit Courts of Appeals have held Congress possesses Section 5 power to enact the ADA, with many decisions inspiring strong dissents.[25] The states also have mounted

20. *See* Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168 (S.D. Ohio 1997) (granting Ohio Environmental Protection Agency's motion to dismiss a former employee's ADA claim).

21. *See* Garrett v. Board of Trustees of Univ. of Ala., 989 F. Supp. 1409 (N.D. Ala. 1998) (granting summary judgment to state defendants in case consolidating two employees' claims).

22. *See* Kilcullen v. New York State Dep't of Transp., 33 F. Supp. 2d 133 (N.D. N.Y. 1999) (granting summary judgment due to state defendant's immunity to suit in federal court, under the 11th Amendment).

23. *See* Hedgepeth v. Tennessee, 33 F. Supp. 2d 668, 674-77 (W.D. Tenn. 1998) (granting state's motion to dismiss for lack of subject matter jurisdiction a challenge under ADA to assessment of handicapped parking placard fees). *See also* Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Fla., 166 F.3d 1126 (11th Cir. 1999) (finding that ADA Title III cannot be applied to Native American Indian tribes because Congress failed to express clearly an intent to abrogate Indian tribes' sovereign immunity).

24. *See, e.g.*, Thompson v. Colorado, 29 F. Supp. 2d 1226 (D. Colo. 1998); Martin v. Kansas, 978 F. Supp. 992 (D. Kan. 1997); Anderson v. Dep't of Pub. Welfare, 1 F. Supp. 2d 456 (E.D. Pa. 1998); Johnson v. State Tech. Ctr. at Memphis, 24 F. Supp. 2d 833 (W.D. Tenn. 1998); Thorpe v. Ohio, 19 F. Supp. 2d 816 (S.D. Ohio 1998). *See also* Schnurbusch v. North Carolina Dep't of Admin., 1998 WL 757968 (E.D.N.C. 1998) (upholding Congress's Section 5 power to enact the ADA—post-*Boerne*—making no reference to *Boerne*); Wallin v. Minnesota Dept. of Corrections, 974 F. Supp. 1234 (D. Minn. 1997) (same).

The pre-*Boerne* decisions that considered the issue uniformly found Congress possesses Section 5 authority to enact the ADA. Most based this conclusion on evidence of Congress's unequivocal expression of intent to abrogate. *See, e.g.*, Williams v. Ohio Dep't of Mental Health, 960 F. Supp. 1276, 1280-83 (S.D. Ohio 1997); Muller v. Costello, 1996 WL 191977 (N.D.N.Y. 1996); Ellen v. Florida Bd. of Bar Exam'rs, 859 F. Supp. 1489 (S.D. Fla. 1994); Eisfelder v. Michigan Dep't of Natural Resources, 847 F. Supp. 78 (W.D. Mich. 1993); Martin v. Voinovich, 840 F. Supp. 1175 (S.D. Ohio 1993); Davis v. Mak, 1997 WL 133410 (Conn. Super. Ct. March 7, 1997); Anonymous v. Connecticut Bar Examining Comm'n, 15 Conn. L. Rptr. 218 (Docket No. 534160 Aug. 17, 1995).

Other pre-*Boerne* courts explored the issue more deeply to conclude Congress acted within its Section 5 authority to enact the ADA. *See* Mayer v. University of Minn., 940 F. Supp. 1474, 1477-80 (D. Minn. 1996) (reasoning that the Act was within Section 5 power because Congress possesses authority to "find[ ] that [a] class of persons has been subjected to a history of unequal treatment and legislat[e] pursuant to its enforcement powers under the Fourteenth Amendment to protect that class of persons from arbitrary discrimination"); Armstrong v. Wilson, 942 F. Supp. 1252, 1260-62 (N.D. Cal. 1996) (reasoning that the ADA's provisions are a prophylactic rule to prevent and remedy invidious discrimination prohibited by the Fourteenth Amendment), *aff'd on other grounds*, 124 F.3d 1019 (9th Cir. 1997).

25. *See* Seaborn v. Florida, 143 F.3d 1405 (11th Cir. 1998) (unanimous opinion) (relying on the precedent set in *Kimel, infra*), *cert. denied*, 119 S. Ct. 1038 (1999); Autio v. AFSCME Local 3139, 157 F.3d 1141 (8th Cir. 1998) (6-6 en banc opinion) (affirming district court opinion finding Section 5 power to enact ADA); Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998) (2-1 opinion) (finding "the ADA was properly enacted under Congress's Fourteenth Amendment enforcement powers"), *cert. granted on related issue*, 119 S. Ct. 901 (1999); Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998) (2-1 opinion) (finding Congress did not exceed its Section 5 powers in enacting the ADA), *cert. denied*, 119 S. Ct.

vigorous, and frequently successful, constitutional attacks on Congress's Section 5 authority to enact other civil rights and labor legislation[26] as well as regulations relating to bankruptcy, patent, trademark, copyright and other business activities.[27]

Two Constitutional issues converge when a state challenges Section 5 power: 1) whether Congress is barred from abrogating a state's Eleventh Amendment immunity from a federal court damage suit brought by a private party and 2) whether Congress is barred from abrogating a state's immunity from such a suit in that state's own courts. The first examines state sovereign immunity as a forum-allocation concept, the second as a liability-immunization doctrine. This article discusses both.

THE NEW FEDERALISM AND THE ADA – STATE SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT

Contraction of Congress's Authority to Abrogate Sovereign Immunity

The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[28] On its face, the Eleventh Amendment does not incorporate an overarching sovereign immunity principle.[29] Nevertheless, the Court has discovered one in

58 (1998); Clark v. California, 123 F.3d 1267 (9th Cir. 1997) (finding "the ADA . . . within the scope of appropriate legislation under the Equal Protection Clause") (unanimous opinion), *cert. denied*, 118 S. Ct. 2340 (1998); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997) (unanimous opinion) (finding the ADA to be properly enacted under Section 5 of the Fourteenth Amendment). *Compare* Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 178 F.3d 212 (4th Cir. 1999) (2-1 opinion) (holding that Congress has Section 5 power to apply Title II of ADA to state prisons), *with* Brown v. North Carolina Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) (2-1 opinion) (holding that regulation promulgated pursuant to ADA Title II prohibiting states from charging fee for issuance of parking placards permitting use of handicapped parking spaces is beyond Congress's Section 5 power). *See also* Torres v. Puerto Rico Tourism Co., 175 F.3d 1, 6 n.7 (1st Cir. 1999) (declining to address the Section 5 issue but stating in dicta "we have considered the issue of Congress's authority sufficiently to conclude that, were we to confront the question head-on, we almost certainly would join the majority of courts upholding the [abrogation] provision").

26. See discussion *infra* notes 337-346 and accompanying text.

27. See discussion *infra* notes 347-352 and accompanying text.

28. U.S. CONST. amend. XI.

29. Its literal terms do nothing more than strip federal courts of Article III diversity jurisdiction when a state is a defendant. Seminole Tribe, 514 U.S. at 54 (1996). Eleventh Amendment immunity applies equally to a state agency because it is considered an "arm of the State." Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977). *Accord* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 (1984) (noting that suits against state agencies and subdivisions constitute suits against the state because the state is the real party in interest).

the Constitution's history and structure.[30] The Court interprets the Eleventh Amendment "to stand not so much for what it says, but for the presupposition . . . which it confirms."[31] Consequently, "for over a century [the Court] has reaffirmed that federal jurisdiction over suits against nonconsenting States 'was not contemplated by the Constitution when establishing the judicial review power of the United States.'"[32]

Eleventh Amendment immunity is not absolute, however.[33] Congress, for example, possesses authority to abrogate states' sovereign immunity and provide for private damage actions against a state in federal court. "Because the Eleventh Amendment implicates the fundamental constitutional balance between the Federal Government and the States, [the] Court consistently has held that [the] exceptions [to sovereign immunity] apply only when certain specific conditions are met."[34] This principle has resulted in a considerable judicial debate regarding two questions: 1) what demonstration of congressional intent to abrogate is required; and 2) under what circumstances does Congress possess abrogation authority?

In 1996, the Supreme Court addressed both issues in *Seminole Tribe of Florida v. Florida*.[35] Prior to *Seminole Tribe*, the Court had confirmed that Congress could abrogate states' immunity from suit in federal court through its commerce power[36] and its power under Section 5 of the Four-

30. "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993).

31. Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991). The presupposition confirmed is two-part: "first, that each state is a sovereign entity in our federal system; and second that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" Seminole Tribe, 514 U.S. at 54 (quotations omitted) (quoting Hans v. Louisiana, 134 U.S. 1, 13 (1890) (quoting THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

32. Seminole Tribe, 514 U.S. at 54 (quoting Hans, 134 U.S. at 15). The most renowned application of this principle is that notwithstanding its literal language, the Eleventh Amendment also bars federal courts from hearing cases against a state brought by its own citizens. *See* Puerto Rico Aqueduct & Sewer Auth., 506 U.S. at 144 (1993) (holding that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state").

33. State sovereign immunity does not apply to suits against the states in federal court brought by the United States government or its agencies. United States v. Mississippi, 380 U.S. 128, 136-38 (1965); United States v. Texas, 143 U.S. 621, 643-46 (1892). Also, a state may consent to jurisdiction, and thereby waive immunity, by "express language" or by "overwhelming implication." Edelman v. Jordan, 415 U.S. 651, 673 (1974).

34. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238-39 (1985).

35. 514 U.S. 44 (1996).

36. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 19-20 (1989) (plurality opinion) (holding that Congress has the authority to render states liable in federal court for monetary damages under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) when legislation was passed pursuant to the commerce clause).

teenth Amendment.[37] *Seminole Tribe* expressly rejected Congress's commerce power as a source of abrogation authority, leaving only Section 5.[38]

The Court in *Seminole Tribe* also held that a reviewing court must determine whether Congress "'unequivocally expressed its intent to abrogate the immunity' [and whether Congress acted] 'pursuant to a valid exercise of power.'"[39] Thus, in every dispute over congressional authority to abrogate states' immunity from suit in federal court, the party asserting abrogation must show that (1) Congress made a sufficiently clear statement of its intent to abrogate, (2) Congress acted pursuant to its Section 5 power, and (3) the exercise of Section 5 power was valid under the circumstances.[40]

The first two requirements are both readily met in ADA litigation and no court has held to the contrary.[41] The heart of the constitutional controversy currently being litigated in the lower courts is whether the ADA represents a valid exercise of Congress's Section 5 power. Resolution of that

37. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 452-56 (1976) (limiting the Eleventh Amendment by section 5 of the Fourteenth Amendment, and therefore allowing private suits against states which would be unconstitutional in other contexts).

38. The abrogation issue arose in *Seminole Tribe* because the court had agreed to decide whether the Indian Commerce Clause also was a source of congressional abrogation authority. Finding it was not, the Court held that neither was the Interstate Commerce Clause, reversing *Union Gas Co.*. *See* Thorpe v. Virginia State Univ., 6 F. Supp. 2d 507, 512 (E.D. Va. 1998) (declaring that *Seminole Tribe* "now is generally regarded as foreclosing Article I as a source of power for the congressional abrogation of States' Eleventh Amendment immunity" (citations omitted)). For an argument that the War Power may have survived *Seminole Tribe* as an additional source of abrogation authority see discussion *infra* note 352.

39. Seminole Tribe, 514 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

40. The second step has generated some debate. *Compare* Coger v. Board of Regents, 154 F.3d 296, 303 (6th Cir. 1998), *vacated and remanded*, No. 98-821, 67 U.S.L.W. 3364 (U.S. Jan. 18, 2000) (stating that "[e]ven after *Seminole Tribe*, the question we must answer is whether Congress actually possessed the authority to adopt the legislation, not whether Congress correctly articulated the source of that authority . . . . As long as Congress possesses the authority, whether it also has the specific intent to legislate pursuant to that authority is irrelevant"), *and* Scott v. University of Miss., 148 F.3d 493, 501 (5th Cir. 1998) (determining that "Congress need not 'recite the words "Section Five" or "Fourteenth Amendment" or "equal protection" for "[t]he . . . constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise"'" (citing EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983)), *with* Driesse v. Florida Bd. of Regents, 26 F. Supp. 2d 1328, 1332. (M.D. Fla. 1998) (asserting that for a statute to "be regarded as an enactment to enforce the Equal Protection Clause,. . . the statute should indicate that it is being passed to enforce Fourteenth Amendment rights"). *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 16 (1981) (stating that "we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment"). *See also* EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (concluding that a court must "be able to discern some legislative purpose or factual predicate that supports the exercise of [the Section 5] power").

41. The ADA, 42 U.S.C. § 12202 provides:

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a

issue will depend on whether the ADA satisfies the requirements established by the 1997 decision in *City of Boerne v. Flores*,[42] which held that Congress lacked Section 5 authority to enact the Religious Freedom Restoration Act of 1993 (RFRA).[43]

Contraction of Congress's Authority to Exercise Its Section 5 Power

In what has been described as an "unusually bipartisan effort—only three members of Congress vot[ing] against its passage"[44]—Congress enacted RFRA to reverse a 1990 Supreme Court decision, *Employment Division v. Smith*.[45] In *Smith*, the Court held that the Free Exercise Clause of the First Amendment does not provide protection from the incidental burdens on religious expression that may result from the nondiscriminatory

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violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

Courts overwhelmingly hold that by this language, Congress unequivocally expressed its intent to abrogate. *See, e.g.*, Coolbaugh v. Louisiana, 136 F.3d 430, 433 (5th Cir. 1998) (finding Congress's intent to abrogate in the ADA "patently clear"); Clark v. California, 123 F.3d 1267, 1269 (9th Cir. 1997) (characterizing Congress's intent to abrogate as "unequivocally expressed"); Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168, 1170 (S.D. Ohio 1997) (finding first prong of *Seminole Tribe* test to be clearly satisfied, although holding that accommodation provision of ADA was not a valid exercise of Congress's enforcement power under the 14th Amendment); Mayer v. University of Minn. 940 F. Supp. 1474, 1477 (D. Minn. 1996) (finding that Congress "explicitly indicated" its intention to abrogate).

Moreover, Courts uniformly agree that Congress intended to exercise its power under Section 5 of the Fourteenth Amendment. In 42 U.S.C. § 12101(b)(4), Congress stated that one purpose of the ADA was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment [sic] in order to address the major areas of discrimination faced day-to-day by people with disabilities." *See* Martin v. Kansas, 978 F. Supp. 992, 998 (D. Kan. 1997) (stating that "Congress abrogated the States' immunity with respect to the ADA pursuant to a valid exercise of its power under Section 5 of the Fourteenth Amendment"). *See also* Nihiser, 979 F. Supp. at 1171 (interpreting the language of the ADA at 42 U.S.C. § 12101(b)(4) to indicate that "Congress intended to utilize its enforcement powers under Section 5 of the Fourteenth Amendment"); Mayer, 940 F. Supp. at 1480 (concluding that Congress enacted the ADA "pursuant to a valid exercise of its authority to enforce the Equal Protection Clause of the Fourteenth Amendment").

42. 521 U.S. 507 (1997). It appears that some, lacking a proper Texas education, may have mispronounced the name of the city, Boerne, Texas. The academic literature aids the uninformed by explaining that the proper pronunciation is "Bernie." *See* Michael W. McConnell, *Institutions and Interpretation: a Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153. 161-62 (1997); Douglas Laycock, *Conceptual Gulfs in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 743, 743 (1998).

43. Religious Freedom Restoration Act (RFRA) of 1993, ch. 21B, codified at 42 U.S.C. § 2000bb (1994).

44. Cole, *supra* note 18, at 39.

45. 494 U.S. 872 (1990). For many years prior to *Smith*, facially neutral laws of general application that imposed a substantial burden on the free exercise of religion were considered unconstitutional unless justified as necessary to advance a compelling state interest. *See* Sherbert v. Verner, 374 U.S. 398 (1963) (holding denial of claimant's unemployment benefits for refusing employment requiring work on the Sabbath to be unconstitutional); Wisconsin v. Yoder, 406 U.S. 205 (1972) (barring state from compelling public school attendance by Amish school children as inconsistent with Free Exercise Clause of the First Amendment). *See also* Boerne, 521 U.S. at 513 (reasoning that under *Sherbert*, the Court

application of facially neutral laws of general application.[46] After *Smith*, laws that burdened religious expression could be challenged on Free Exercise grounds only if they were "specifically targeted at or intended to burden religious practices."[47] RFRA reversed that outcome by prohibiting laws that "substantially burden[ed]" the exercise of religion unless they advanced a "compelling governmental interest" and were "the least restrictive means of furthering that compelling governmental interest."[48] In *Boerne*, the Court concluded that Congress violated the principles of separation of powers and state sovereignty when it deployed Section 5 to enact RFRA.[49]

Broadly speaking, the Court in *Boerne* had available several options to resolve the issue concerning Congress's Section 5 authority. The most restrictive, prominently staked out by Justice Harlan in his dissent in *Katzenbach v. Morgan*,[50] would suggest that Section 5 authorizes Congress to proscribe only conduct the Court would conclude violates the Fourteenth Amendment.[51] Under this posture RFRA clearly would be unconstitutional. The Court rejected this constricted view of Section 5. The Section 5 power is preventative in the sense that Congress may prevent legislatively what the Court concludes the Constitution prohibits,[52] but the power also is "remedial."[53] The Court stated: "Legislation which deters or remedies

"would have asked whether [a state's] prohibition substantially burdened a religious practice and, if it did, whether the burden was justified by a compelling interest"). For a discussion of the "freedom protective interpretation" of the Free Exercise Clause prior to the Court's decision in *Smith* and the effect of *Smith*, *see* McConnell, *supra* note 42, at 158-159.

46. In *Smith*, members of the Native American Church claimed that a state law barring the use of peyote violated their religious freedom since for them peyote was a sacrament. 494 U.S. at 872.

47. Cole, *supra* note 18, at 38. *See also* Boerne, 521 U.S. at 513-14 (noting that "*Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest").

48. 42 U.S.C. § 2000bb 1(a), (b).

49. *See* Boerne, 521 U.S. at 536 (maintaining that "[b]road as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance").

50. 384 U.S. 641, 659 (1966) (Harlan, J., dissenting). The majority upheld Section 4(e) of the 1965 Voting Rights Act. The Court found that Section 4(e) was appropriate legislation to enforce the Fourteenth Amendment although previously it had held that literacy tests do not per se violate the Fourteenth Amendment.

51. *See, e.g.*, Stephen Gardbaum, *Reflections on* City of Boerne v. Flores: *The Federalism Implications of Flores*, 39 WM. AND MARY L. REV. 665, 675 (1998) (arguing that "it seems likely (though not certain) that Justice Harlan believed that the legislative remedy for a recognized violation may not impose congressional limitations on state power beyond the constitutional prohibitions contained in Section 1 of the Amendment").

52. *See* Boerne, 521 U.S. at 519 (observing that "Congress can enact legislation under [Section] Five enforcing the constitutional right"); *id.* at 525 (reasoning that Congress can pass legislation "'such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing . . . .'" (quoting The Civil Rights Cases, 109 U.S. 3, 13-14 (1883))).

53. *See* Boerne, 521 U.S. at 524 (finding that Section 5 power is "remedial and preventive").

constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of authority previously reserved to the states.'"[54] The Section 5 question thus is not concerned with whether Congress may ban both constitutional and unconstitutional state action, but rather with the breadth of Congress's Section 5 authority to prohibit state action that is constitutional as a means of preventing or remedying that which is unconstitutional.

One option interprets Section 5 as providing Congress with the authority to expand constitutional rights by defining for itself what the Fourteenth Amendment prohibits and legislating against it, even if the Court were not prepared to find the Fourteenth Amendment so sweeping in its prohibitions.[55] Justice Brennan's majority opinion in *Morgan* has been characterized as the "launching pad for this view of congressional power."[56] In what has been described by one commentator as an expression of "umbrage"[57] and by another as an effort "to put down what it saw as a congressional rebellion,"[58] the Court in *Boerne* held that "Congress has [no] power to decree the substance of the Fourteenth Amendment's restrictions of the States."[59] It continued, "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the

54. Boerne, 521 U.S. at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)). This conclusion was unexceptional since in four prominent voting rights cases, the Court had upheld congressional Section 5 power to limit state authority to enforce various voting practices, none of which violated the Constitution. Furthermore, voting practices were understood to be uniquely within the peculiar prerogative of the states. *See generally* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (upholding several provisions of the Voting Rights Act of 1965); Katzenbach v. Morgan, 384 U.S. 641 (1966) (upholding ban on literacy tests that had the effect of prohibiting certain people schooled in Puerto Rico from voting); Oregon v. Mitchell, 400 U.S. 112 (1970) (upholding five-year nationwide ban on literacy tests and similar voting requirements for registering to vote); City of Rome v. United States, 446 U.S. 260 (1980) (upholding seven-year extension of the Voting Rights Act's requirement that certain jurisdictions pre-clear certain changes in their voting practices).

55. *See, e.g.*, Archibald Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 107 (1966) (stating that "Congress, in the field of state activities and except as confined by the Bill of Rights, has the power to enact any law which may be viewed as a measure for correction of any condition which Congress might believe involves a denial of equality or other fourteenth amendment rights.").

56. *See* Fallon, *supra* note 18, at 129 n.447.

57. Cole, *supra* note 18, at 76. Cole argues that:

> RFRA was an unusual statute—it marked virtually unanimous congressional disagreement with the Court on a constitutional matter. The Court in [*Boerne*] appeared to take umbrage at Congress's critical assessment, and treated the statute as a challenge to the Court's power to interpret and enforce the Constitution, virtually akin to Arkansas Governor Orville Faubus's blocking the schoolhouse door in Little Rock in defiance of a federal court desegregation decree.

58. Gardbaum, *supra* note 51, at 669.

59. Boerne, 521 U.S. at 519.

Clause."[60] Unsurprisingly, the Court declined to entertain a vision of congressional legislative authority that would undercut its supremacy to determine what the Constitution means.

In much of the literature interpreting the *Boerne* Court's strongly worded disavowal of Congress's power to create new substantive constitutional rights, commentators have referred to *Boerne* as little more than misdirection, or as some have called it, a "red herring,"[61] a "straw man"[62] and a "makeweight."[63] This judgment seems both accurate and somewhat overstated. Nothing on the face of RFRA purports to deprive the Court of its final say on what the Constitution means.[64] But that alone does not eliminate all separation of powers concerns when Congress exercises its Section 5 power to prohibit state behavior that is not unconstitutional.[65]

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60. *Id.* "Congress does not enforce a constitutional right by changing what the right is. It has been given the power 'to enforce' not the power to determine what constitutes a constitutional violation." *Id.* Congress's power is "corrective or preventive, not definitional." *Id.* at 525.

61. *See* Gardbaum, *supra* note 51, at 666 (arguing that though . . . its separation-of-powers argument was the more central of the two grounds in driving the Court's analysis, it was, in reality, a red herring in the case"); Cole, *supra* note 18, at 40 (calling the separation-of-powers argument "a red herring—whatever else one might say about RFRA, it did not violate the separation of powers").

62. McConnell, *supra* note 42, at 174 (commenting that "the 'substantive' interpretation of Section Five . . . is . . . something of a straw man").

63. Cole, *supra* note 18, at 43 (maintaining that "[a]s an analytical matter, the separation of powers portion of [*Boerne*] is a makeweight. But it is more than that. The Court's separation of powers analysis is driven ultimately by what appears to be an intuitive sense that it is improper or disrespectful for Congress to disagree with the Court's view of the Free Exercise Clause.").

64. The Court's essential function to determine finally the meaning of the Fourteenth Amendment was neither challenged in the petitioner's briefs in *Boerne* nor at oral argument to the Court. *See* Brief for Petitioner, City of Boerne v. Flores, 1996 WL 689630, 521 U.S. 507 (1997) (No. 95-2074); Brief for Respondent at 7, City of Boerne v. Flores, 1997 WL 13201, 521 U.S. 507 (1997) (No. 95-2074). In addition, the history of Section 5 and the Court's Section 5 precedents all reserve for the Court final review of legislation enacted pursuant to the Section 5 power. Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 165-67 (1995). *See also* Cole, *supra* note 18, at 47-48 & n.44 (discussing the United States' arguments in *Boerne* before the United States Circuit Court of Appeals that RFRA was merely an attempt to deter constitutional violations, uncover hidden unlawful purpose, and protect religious adherents from discrimination).

65. The Civil War Amendments were "specifically designed as an expansion of federal power and an intrusion on state sovereignty, City of Rome v. United States, 446 U.S. 156, 179 (1980), bestowing on the federal government "responsib[ility] for the protection of liberty in the states." Laycock, *supra* note 42, at 757 (citing JAMES MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION, 141-43 (1990)). Yet they also provoked a fear of centralization from the time of their enactment. *See* Rachel Toker, *Tying the Hands of Congress:* City of Boerne v. Flores (1997), 33 HARV. C.R. - C.L. L. REV. 273, 285 (1998) (reviewing the congressional debates over the enactment of Section 5). By providing both the federal courts and the Congress with concurrent authority to provide for liberty in the states, the Fourteenth Amendment provides a built-in check and built-in conflict. Lupu explains it this way:

> *Marbury* licenses the Court; *McCulloch* charters the Congress. *McCulloch* deference softens the Court's *Marbury* grip. [However,] a broad reading of Section 5 . . . representing maximum elasticity of implied power is in stark tension with the

Judicial review of such legislation is still necessary to test whether its aim really is to deter the states' unconstitutional behavior, or whether it actually is intended to expand the Fourteenth Amendment's substantive sweep. If the Court's review of such legislation becomes too attenuated, the Court will have surrendered its preeminent role as interpreter of the Constitution. In other words, the separation of powers discussion in *Boerne* was hardly a red herring because choosing an appropriate standard of judicial review in Section 5 cases raises important separation of powers issues.

The final two options that were available to the Court in *Boerne* differ in the degree of deference, built into the standard of judicial review, that is appropriate when Congress proscribes constitutional state behavior as a means of deterring or preventing Fourteenth Amendment violations. What showing of necessity will the Court insist upon? The most deferential option is the rational basis test,[66] originating in the late Nineteenth Century reconstruction cases. In *Ex parte Virginia*,[67] the Court defined "appropriate legislation" in Section 5 as those means "adapted to carry out the 'objects' the amendments have in view . . . if not prohibited."[68] In *The Civil Rights Cases*,[69] the Court equated the scope of Section 5 power with that

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Court's *Marbury* function. When Congress legislates broadly to prevent what it perceives as violations of Section 1 of the Fourteenth Amendment, it strikes at the Court's dominance in law declaration as well as at autonomy of state operations.

Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right—Reflecting on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 793, 811-12 (1998).

As a consequence, the history of Section 5 has been one of vacillation, at times expanding and at other times contracting Congress's Section 5 power, leaving "both sides with talking points from history." Laycock, *supra* note 42, at 762. Cole has argued that "[t]he root cause of the difficulty presented by the Fourteenth Amendment is that unlike most provisions in the Constitution, it empowers two branches with concurrent authority to enforce its guarantees: the Court and the Congress." Cole, *supra* note 18, at 34. This "peculiar delegation of concurrent authority," (*id.* at 44-45), has posed the persistent questions of "[w]ho has the final say, and what standard of review should the branch with the final say apply to the other's actions?" *Id.* at 35. With the emergence of incorporation of the Bill of Rights into the Fourteenth Amendment, "Congress's Section 5 authority [became] potentially quite expansive .... The potential sweep of Section 5, when combined with the effects of incorporation, is dramatic." Cole, *supra* note 18, at 54-55. With these forces and counter forces at play, Laycock may have captured the essence when he writes that *Boerne* "was ultimately a case about the meaning of the Civil War." Laycock, *supra* note 42, at 757. "The debate over the meaning of the Civil War, or from another perspective, the struggle to secure the fruits of the Civil War, can continue forever." *Id.* at 762.

66. This option has been characterized as providing Congress "limitless deference." Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1987 SUP. CT. REV. 79, 94 (1997) (arguing that "[o]ne explanation [of Section 5 power] that has found great favor [holds that] when Congress is enlarging rights, typically the only objection sounds in enumerated powers, and the all but limitless deference traditionally granted Congress with regard to its enumerated powers should apply.").

67. 100 U.S. 339 (1879).

68. *Id.* at 346.

69. 109 U.S. 3 (1883).

associated with the "necessary and proper" clause.[70] The Court in *Katzenbach v. Morgan*,[71] quoting *McCulloch v. Maryland*,[72] stated that "consistent with 'the letter and spirit of the Constitution,'" Congress's Section 5 role is "to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[73] As Professor Gardbaum has summarized this option:

> This test translates into the following division of labor: Congress is to "assess and weigh" the various conflicting considerations involved in a decision to displace state law and authority, including the nature and significance of state interests affected; the Court is to determine whether it "perceive[s] a basis" upon which Congress might decide that such action on its part is necessary to secure the goals of the amendment.[74]

The Court in *Boerne* rejected the rational basis test, so conspicuously animated by a "spirit of generous deference to congressional judgment,"[75] notwithstanding its firm foundation in precedent. In fact, not once did the Court in *Boerne* even mention the Necessary and Proper Clause. The Court recognized that the "line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern."[76] Moreover, the Court acknowledged that "Congress must have wide latitude in determining where [the line] lies."[77] Citing *Morgan*, the Court emphasized that "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference."[78] Notwithstanding these conciliatory nods directed to Congress, the Court declared RFRA unconstitutional, concluding

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70. *Id.* at 13-14. For a summary of the legislative history of Section 5 and the early cases see Cole, *supra* note 18, at 49-52; Toker, *supra* note 65, at 276-79.

71. 384 U.S. 642 (1966).

72. 17 U.S. (4 Wheat.) 316, 421 (1819).

73. Morgan, 384 U.S. at 641, 650-51.

74. Gardbaum, *supra* note 51, at 681-82 (quoting Morgan, 384 U.S. at 653). For a discussion of other modern cases equating the Section 5 power to the broad powers under the Necessary and Proper Clause, *see id.* at 680-82 nn.68 & 76 (discussing Oregon v. Mitchell, 400 U.S. 112, 142-44 (1970) (separate opinion of Douglas, J.); South Carolina v. Katzenbach, 383 U.S. 301, 325-27 (1966); City of Rome v. United States, 446 U.S. 156, 176 (1980)); Toker, *supra* note 65, at 279-84.

75. Eisgruber & Sager, *supra* note 66, at 86.

76. Boerne, 521 U.S. at 519.

77. *Id.*

78. *Id.* at 537 (quoting Morgan, 384 U.S. at 651). The Court also accepted that "[j]udicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide . . . .' As a general matter, it is for Congress to determine the method by which it will reach a decision." Boerne, 521 U.S. at 531-32.

> RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.[79]

In so holding, the Court introduced what is now called the "congruence and proportionality" test. It states, "[t]here must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[80] This approach is more demanding than the rational basis test.[81] The "congruence and proportionality" test permits the Court to probe more deeply the telic relationship between the legislation that regulates constitutional conduct by the states and the Fourteenth Amendment violations to be prevented or remedied.[82]

The ADA and other civil rights and labor legislation applicable to the states must now meet this more demanding "congruence and proportionality" test. The real challenge lies in determining what the Court meant by "congruence and proportionality." Commentators disagree about how much Congressional deference is involved.[83] Although I would readily

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79. *Id.*

80. *Id.* at 520. The Court suggested the "congruence and proportionality" test follows from the reasoning of *The Civil Rights Cases*. *See* Boerne, 521 U.S. at 532 (asserting that "[r]emedial legislation under [Section] 5 'should be adapted to the mischief and wrong which the [Fourteenth] Amendment was intended to provide against'" (quoting *The Civil Rights Cases*, 109 U.S. at 13)).

81. It does not entail a court merely determining if it can "perceive a basis" for Congress's conclusion regarding "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Morgan*, 384 U.S. at 651, 656.

82. This test "reset the federal-state balance [and] confirmed in unambiguous terms just how serious [the Court] is about federalism." Gardbaum, *supra* note 51, at 666.

83. Douglas Laycock, lead appellate lawyer for Archbishop Flores in the *Boerne* case, has reflected:

> If the assumptions about RFRA and religious liberty dominated the decision, then [*Boerne*] may be a special ticket, good for this day and this train only .... [But if *Boerne*] mean[s] what it says, [then *Boerne*] is by far the most important of the recent round of federalism decisions. Several statutes that were previously uncontroversial are now subject to serious constitutional attack .... [N]othing is overruled, but everything is changed.

Laycock, *supra* note 42, at 744.

Marci Hamilton, the lawyer for the city of Boerne, Texas, has argued that "RFRA's invalidation is a victory for the people [because *Boerne*] is a strong message to Congress to act with responsibility, accountability, and independent judgment." Marci Hamilton, City of Boerne v. Flores: *A Landmark for Structural Analysis*, 39 WM. & MARY L. REV. 699, 722 (1998).

Those less directly involved in the litigation are somewhat more circumspect. Borrowing a line from Charles Fried, Richard Fallon concludes that "whether *Boerne* will prove to be a 'mule' or a 'mustard seed' remains to be seen." Fallon, *supra* note 18, at 133 (citing Charles Fried, *Forward: Revolutions?*, 109 HARV. L. REV. 13, 42-45 (1995)). As Fallon explains, Fried "distinguish[ed] 'mustard seeds,' or decisions from which large and important

concede that *Boerne* is the product of a clash of different conceptions of religious freedom,[84] I align myself with those who warn against thinking of *Boerne* only in those terms.[85] As Chemerinsky has observed, *Boerne* not only "speaks to basic issues concerning the powers of Congress and the Supreme Court in interpreting the Constitution [but in addition, it addresses] the scope of Congress's authority under an increasingly important constitutional provision—Section 5 of the Fourteenth Amendment."[86] Lupu made a closely-related point when he observed that "[i]f *Seminole Tribe* is to have any bite, there must be real limits imposed on the Section 5 power."[87] In other words, for all these reasons, *Boerne* is a case to be taken seriously. It contains all the analytical tools needed to put real teeth into *Seminole Tribe's* constriction of Congress's authority to abrogate the states' Eleventh Amendment immunity from suit in federal court.

That said, how seriously, if at all, does *Boerne* call into question Congress's authority under Section 5 to enact the ADA? Put another way, are the ADA's proscriptions congruent and proportional to preventing and remedying the states' unconstitutional treatment of persons with disabilities? Unfortunately, none of the lower courts that have considered this question to date have provided a convincing assessment.

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doctrines ultimately grow, from 'mule[s],' or decisions that prove unable to spawn the progeny needed for ultimate doctrinal significance." *Id.* at 127 n.429.

84. *See* Eisgruber & Sager, *supra* note 66, at 97-105 (stating that RFRA embraced a conceptually different vision of religious liberty from that held by the Court, and this largely explains the outcome in *Boerne*).

85. *See* Erwin Chemerinsky, *Reflections on* City of Boerne v. Flores*: The Religious Freedom Restoration Act is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 603 (1998) (concluding that "[b]y any measure, [*Boerne*] is an enormously important decision."); Eisgruber & Sager, *supra* note 66, at 83 (affirming that *Boerne* "may well be the most important statement by the Court about Congress's power under the Reconstruction Amendments since *Katzenbach v. Morgan* in 1966.").

86. Chemerinsky, *supra* note 85, at 603-04. This insight deserves emphasis. Surely Chemerinsky is right when he claims that Section 5's scope has become increasingly critical following *Seminole Tribe,* since Section 5 remains the sole source of congressional abrogation authority. Moreover, in light of cases such as *United States v. Lopez* that truncated the scope of Congress's commerce power, Section 5 emerges as an important alternative source of congressional power. *Id.* at 603-04 & n.14.

87. Lupu, *supra* note 65, at 815 n.109. This observation applies equally to Congress's power to compel a state to waive sovereign immunity from suit in federal court as a condition of its engaging in commercial activities in interstate commerce. For example, in *College Savings Bank II*, Justice Scalia candidly admitted that "[r]ecognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would . . . , as a practical matter, permit congress to circumvent the antiabrogation holding of *Seminole Tribe* . . . . [C]onstructive waiver is little more than abrogation under another name." *College Savings Bank II*, 119 S. Ct. at 2230. In addition, "when one recalls that Section 5 power exercises are aimed typically at states qua states in their governance activities, it is not difficult to see [*Boerne*] as a first cousin of the state sovereignty principle of *New York v. United States*." Lupu, *supra* note 65, at 815 n.110. For a discussion of *New York v. United States*, 505 U.S. 144 (1992), *see supra* note 17. It is worth adding to Lupu's "first cousin" observation that *Printz v. United States*, 521 U.S. 898 (1997) was decided two days before *Boerne*. It relies on and expands the intergovernmental immunity principles developed in *New York v. United States*. *See* discussion *infra* note 17.

The Current Judicial Response to the Constitutional Attack on the ADA

Soon after the Court's decision in *Boerne*, states initiated a counterattack against the ADA based on various interpretations of *Boerne*. An initial argument put forth was that Congress lacked Section 5 power to enact legislation except with respect to suspect classifications. Because disability is not considered a suspect classification,[88] Congress lacked the authority to enact the ADA. This argument is premised on the assumption that individuals with disabilities derive no protection from the Equal Protection Clause. Such an assertion is easily refuted.[89] The fact that a legislative classification is not suspect means only that a lower standard of review will be applied to state action rather than principles of strict scrutiny. Thus,

88. In *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the court held that legislative classifications of the mentally disabled are not quasi-suspect classifications. However, the Court's reasoning applies equally to the physically disabled. In finding no heightened scrutiny for mentally disabled individuals, the Court in *Cleburne* focused on the difficulty of "distinguish[ing] a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large." *Id.* at 445. The Court then listed a variety of groups, including those with physical disabilities. *Id.* at 446. *See also* Hansen v. Rimel, 104 F.3d 189, 190 n.3 (8th Cir. 1997) (agreeing that "[a]lthough protected by statutory enactments such as the [ADA], the disabled do not constitute a 'suspect class' for purposes of equal protection analysis."); Suffolk Parents of Handicapped Adult v. Wingate, 101 F.3d 818, 824-27 (2d Cir. 1996) (applying rational basis standard to claims of handicapped individuals who challenged a state's denial of funding), *cert. denied*, 520 U.S. 1239 (1997); Does v. Chandler, 83 F.3d 1150, 1155 (9th Cir. 1996) (concluding that "[f]or the purposes of equal protection analysis, the disabled do not constitute a suspect class."); Spragens v. Shalala, 36 F.3d 947, 950 (10th Cir. 1994) (holding that "a classification applying to blind persons is not suspect, or even quasi-suspect, and we therefore apply the 'rational basis' standard, rather than some more strict one"); More v. Farrier, 984 F.2d 269, 271 (8th Cir. 1993) (holding that the wheelchair-bound are not a suspect class). *See also* Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion) (arguing that what "differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relations to ability to perform or contribute to society.").

89. *See, e.g.*, Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997) (concluding that "[t]he State does not explain why the Court's choice of a level of scrutiny for purposes of judicial review should be the boundary of the legislative power under the Fourteenth Amendment, nor have we found any case to so hold. The levels of scrutiny in equal protection cases are 'standards for determining the validity of state legislation or other official action that is challenged as denying equal protection.' City of Cleburne, 473 U.S. at 439-40. The State cites no case which holds that these levels of scrutiny define the limits of Congress's power to enforce the Fourteenth Amendment."); Lamb v. John Umstead Hosp., 19 F. Supp. 2d 498, 504 (E.D.N.C. 1998) (proposing that "[t]he levels of scrutiny do not define the limits of Congress's power to enforce the Fourteenth Amendment."). *Accord* Coolbaugh v. Louisiana, 136 F.3d 430, 433-34 (5th Cir. 1998) (rejecting this reason for challenging Section 5 power to enact the ADA); Goshtasby v. Board of Trustees of the Univ. of Ill., 141 F.3d 761, 770 (7th Cir. 1998) (rejecting this reason for challenging Section 5 power to enact the ADEA); Young v. Pennsylvania House of Representatives, Republican Caucus, 994 F. Supp. 282 (M.D. Pa. 1998) (same); Hines v. Ohio State Univ., 3 F. Supp. 2d 859, 872-73 (S.D. Ohio 1998) (same).

disabled individuals do derive some level of equal protection, albeit less than classifications considered suspect.[90]

A variation of this interpretation—that the ADA is unconstitutional because disability-based discrimination does not receive strict judicial scrutiny—focuses on *Boerne*'s holding that Congress may not legislatively redefine the substantive rights afforded by the Fourteenth Amendment.[91] The district court in *Brown v. North Carolina Division of Motor Vehicles*,[92] relied upon this argument to find the ADA unconstitutional, arguing that the Act has substantively altered the meaning of the Fourteenth Amendment by creating more protections than the Fourteenth Amendment provides.[93] But this argument fails. To the extent that the ADA prohibits behavior not already prohibited by the Fourteenth Amendment, such prohibitions still fall within Congress's Section 5 power if they are congruent and proportional to remedying or preventing unconstitutional behavior by the states.

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90. The Supreme Court has defined the Equal Protection Clause to mean "that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." Cleburne, 473 U.S. at 439 (internal quotations omitted). *See id.* at 446 (clarifying that "[o]ur refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination."). *See* discussion *supra* notes 154-168 and accompanying text.

91. *See* Boerne, 521 U.S. at 520 (noting the "Fourteenth Amendment's history confirms the remedial, rather than substantive, nature of the Enforcement Clause . . ."); *id.* at 519 (stating that "Congress does not enforce a constitutional duty by changing what the right is.").

92. 987 F. Supp. 451 (E.D.N.C. 1997), *aff'd*, 166 F.3d 698 (4th Cir. 1999).

93. *See id.* at 458 (finding Congress acted "outside . . . its Enforcement Clause authority" because it "declar[ed]" that "disabled people are . . . a class entitled to increased Fourteenth Amendment protection . . . .").

> Congress cannot force the courts to adopt a new regime vis-a-vis the classification of individuals with disabilities . . . . Because the Supreme Court held in *Cleburne* that disabled people are not a class entitled to increased Fourteenth Amendment protection, the Court cannot now decide that Congress had the power to declare otherwise in the ADA.

Id. The ADA contains one finding that requires clarification, as it might seem to provide credibility for the argument that in the ADA Congress intended to add a new level of scrutiny enforceable in the federal courts. Congress found: "Individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals." 42 U.S.C. § 12101(a)(7). Professor Robert Burgdorf, who was closely involved in the drafting of the ADA, writes:

> This wording is an amalgam of various phrasing used by the Court to denote the qualifications of a constitutionally "suspect" classification for equal protection purposes. The finding is, in effect, a congressional endorsement that classifications that disadvantage people with disabilities should be subject to heightened judicial scrutiny under the Equal Protection Clause . . . . While not a direct statutory reversal of the Court's rejection of heightened scrutiny in *Cleburne*, the congressional finding in the ADA may be used by plaintiffs with disabilities to seek heightened equal protection scrutiny in future litigation.

BURGDORF, DISABILITY DISCRIMINATION, *supra* note 13, at 11.

Other courts have also failed to analyze the ADA properly, according to the demands of the *Boerne* decision. The thoughtful but erroneous dissent of Judge Jerry E. Smith in *Coolbaugh v. Louisiana*[94] deserves attention in this respect because it attempts to demonstrate that the Court's finding that RFRA is unconstitutional compels a finding that the ADA is also unconstitutional. Judge Smith concluded that Congress exceeded its Section 5 power in enacting the ADA by "increas[ing] the level of judicial scrutiny for states' actions that incidentally burden disabled persons."[95] Falling into the same trap as did the district court in *Brown*, Judge Smith reasoned that Congress had essentially told the judiciary "what is, or is not, constitutional conduct . . . ."[96]

Judge Smith began his argument by referring to the Court's statement in *Boerne* that "in enacting RFRA, Congress had impermissibly attempted to expand the scope of substantive constitutional rights under the Fourteenth Amendment by subjecting generally applicable laws that had the effect of burdening religion to a higher level of judicial scrutiny than what had been deemed appropriate in [*Smith*]."[97] This is exactly, he continued, what the ADA does in the context of disability rights under the Equal Protection Clause. The ADA alters the Supreme Court's conclusion in *Cleburne* that "state legislation having incidental burdens on the disabled [is to be considered] constitutional if 'rationally related to a legitimate governmental purpose'"[98] The ADA

> purport[s] to establish greater rights for individuals against the states by increasing the measure of judicial scrutiny for conflicting state actions to a level higher than the Supreme Court has found appropriate under the Fourteenth Amendment . . . . [T]he ADA, by its very terms "remedies" more than "arbitrary" local governmental actions against the disabled.[99]

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94. 136 F.3d 430, 439 (5th Cir. 1998) (Smith, J., dissenting).

95. *Id.*

96. *Id.* at 432 n.1.

97. *Id.* at 440.

98. *Id.* (quoting *Cleburne*, 473 U.S. at 446).

99. *Id.* at 440-41. The judge creatively interlineated references to the ADA into one of *Boerne*'s central holdings to demonstrate how closely the ADA parallels RFRA.

> The stringent test ~~RFRA~~ **[the ADA]** demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved. If an objector can show a substantial burden ~~on his free exercise~~ **[on his rights under the ADA]**, the State must ~~demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest~~ **[show that it cannot reasonably accommodate him]** . . . . Laws valid under ~~Smith~~ **[Cleburne]** would fall under ~~RFRA~~ **[the ADA]** without regard to whether they ~~had the object of stifling or punishing free exercise~~ **[were rationally related to a legitimate governmental purpose]**. We make these observations . . . to illustrate the substantive alteration of ~~[Smith's]~~ **[Cleburne's]** holding attempted by ~~RFRA~~ **[the ADA]**. Even assuming ~~RFRA~~ **[ADA]** would be interpreted in effect to mandate

To summarize Judge Smith's argument: in enacting RFRA, Congress attempted to provide individuals with greater protection from the incidental burdens of generally applicable laws than the Constitution provides; the ADA similarly provides persons with disabilities greater protections than the Constitution provides; the Court found RFRA to exceed congressional Section 5 power; therefore the ADA also exceeds congressional Section 5 power. Unfortunately, this argument misses the point of the *Boerne* decision, which is that Congress may enact legislation that provides greater protection than the Constitution provides so long as the legislation satisfies the two-pronged test from *Boerne*. Namely, it must be congruent—acting to remedy or prevent violations of equal protection—and the means must be proportional to the evil sought to be remedied or prevented.

Others challenging the constitutionality of the ADA have adopted a different analytical strategy, focusing on the reasonable accommodation provisions of the ADA rather than the fact that persons with disabilities raising equal protection claims do not receive heightened judicial scrutiny. The most prominent of the decisions adopting this approach is *Nihiser v. Ohio Environmental Agency*.[100] That case involved a claim that the state employer had failed to accommodate an employee's back injury by either restructuring his job or reassigning him to a vacant position. The court held that Congress lacked Section 5 power to require states to reasonably accommodate their employees' disabilities because the reasonable accommodation provisions of the ADA do not vindicate any right judicially recognized by the Fourteenth Amendment.[101]

This reasoning had previously been adopted by the court in *Pierce v. King*,[102] and was subsequently adopted in the dissenting opinion in *Kimel*

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some lesser test, say one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional invasion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens. *Id.* (interlineating changes in *Boerne*, 117 S. Ct at 2171).

100. 979 F. Supp. 1168 (S.D. Ohio 1997).

101. The reasoning proceeds as follows:

> [T]he accommodation provisions of the ADA . . . demand unequal treatment for disabled employees . . . . [A]n employer who treats a disabled employee the same as a non-disabled employee may violate the ADA. By requiring reasonable accommodations, the ADA shifts away from similar treatment to different treatment of the disabled by accommodating their disabilities . . . . The accommodation provisions may require an employer to provide special equipment or other benefits, such as changes in working arrangements, to which non-disabled employees are not entitled. "Nothing in the United States Constitution requires [an employer] to accommodate [a disabled person's] condition." Welsh v. City of Tulsa, Oklahoma, 977 F.2d 1415, 1420 (10th Cir. 1992). Thus in enacting the accommodation provisions, Congress created a substantive right to preferential treatment where no such right previously existed under the Equal Protection Clause.

Nihiser, 979 F. Supp. at 1173-74.

102. 918 F. Supp. 932 (E.D.N.C. 1996). That court held "the [ADA's] operative remedial provisions demand not equal treatment but special treatment tailored to the claimed disability. . . . This the Fourteenth Amendment cannot authorize." *Id.* at 940.

v. State of Florida Board of Regents.[103] The dissent in *Kimel* reasoned that "the ADA provides much greater protection for the disabled than does the Equal Protection Clause," including "distinctions built on generalizations—even if rational. It prohibits discrimination for practically any reason that does not reflect a business necessity .... It requires assessment of each employee's abilities and reasonable accommodation to the point of undue hardship."[104] Most recently, the Fourth Circuit has championed this idea in *Brown v. North Carolina Division of Motor Vehicles.*[105] There the Court found it is beyond Congress's Section 5 power to prohibit states from charging for handicapped parking permits. Such a proscription is an "attempt to create a positive entitlement to a free handicapped parking space."[106]

The *Kimel* dissent argued that the ADA's reasonable accommodation provisions provide rights in excess of those provided by the Constitution, whereas the decisions in *Brown*, *Nihiser*, and *Pierce* argued in terms of special rights and entitlements. They share, however, the faulty syllogism that the Constitution promises equality; the ADA provides more than equality; the ADA provides more than the Constitution; and, therefore, the ADA has made a substantive alteration of constitutional rights. In other words, the courts have repackaged the same analytical mistake made in the decisions that relied upon the fact that persons with disabilities do not constitute a group enjoying heightened judicial scrutiny.[107] These courts mistakenly reason that because Congress legislatively creates rights that are not found in the Fourteenth Amendment, it has made an unconstitutional substantive alteration to the Fourteenth Amendment. This argument misses everything that is interesting, important, and complex in *Boerne.*[108]

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103. 139 F.3d 1426, 1444 (11th Cir. 1998) (Cox, J., concurring in part and dissenting in part), *cert. granted sub nom.* Florida Dep't of Corrections v. Dickson, No. 98-829, 67 U.S.L.W. (U.S. Jan. 20, 2000).

104. *Id.* at 1449.

105. 166 F.3d 698 (4th Cir. 1999).

106. *Id.* at 707.

107. See discussion *supra* notes 88-90 and accompanying text.

108. Two courts have argued a variation on this theme—that Congress may not create rights beyond those already provided by the Fourteenth Amendment unless the state action regulated is unconstitutional most of the time. For example, the court in *Brown v. North Carolina Division of Motor Vehicles* found that it was unconstitutional for the ADA to proscribe charging disabled individuals a fee for parking placards because there is no "support in the legislative record ... that state surcharges for handicapped programs are motivated by animus toward the class." 166 F.3d 698, 707 (4th Cir. 1999). Congress could prohibit the surcharges only if their use could be shown to be "pervasive[ly] discriminatory." *Id.* Similarly, the district court in *Kilcullen v. New York State Department of Transportation*, 33 F. Supp. 2d 133 (N.D.N.Y. 1999), argued that Section 5 permits Congress to bar only "that ... type of conduct [that] is significantly likely to be unconstitutional." *Id.* at 145. Accordingly, the court held that Congress lacks Section 5 authority to require state employers to provide disabled employees a reasonable accommodation because there is no evidence that "failure to accommodate will often have no rational relation to any legitimate purpose. [Indeed,] the record lacks even one cited instance where a refusal to accommodate was actually found

If the decisions finding no Section 5 power to enact the ADA lack persuasive force, the same is true of those upholding congressional power. They generally rely on assertion or generality in place of close examination of: 1) Congress's aim; 2) the legislative theory of how the ADA attempts to advance those aims; and 3) whether the means chosen to advance the ADA's aims are narrowly tailored.[109] These tasks are taken up next.

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to be unconstitutionally irrational." *Id.* at 146, 148. This reading of *Boerne* eliminates "proportional" from the decision, for all practical purposes, substituting it with a simple rule: Congress only may prohibit through Section 5 that which is unconstitutional always or usually. If the Supreme Court had intended that result, it certainly need not have so extensively elaborated the congruence and proportionality test.

109. *See, e.g.,* Clark v. California, 123 F.3d 1267 (9th Cir. 1997) (upholding, within days following the announcement of the *Boerne* decision, the district court's denial of defendant's motion to dismiss, finding that the ADA was a valid exercise of Congress's Section 5 power). The court in *Clark* reasoned: 1) the Equal Protection Clause prohibits discrimination against the disabled, citing *Cleburne*; 2) in the ADA Congress explicitly found that persons with disabilities have suffered discrimination; and therefore, 3) the ADA is within the scope of appropriate legislation under the Equal Protection Clause. Moreover, the court found that the remedies offered by the ADA were not "so sweeping that they exceed the harms that they are designed to redress." *Id.* at 1270. *Accord* Autio v. AFSCME, Local 31397, 140 F.3d 802, 805 (8th Cir. 1998), *vacated, reh'g en banc granted, aff'd by an equally divided court*, 157 F.3d 1141 (1998); Kimel v. State of Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998); Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 487 (7th Cir. 1997) (decided three weeks prior to the announcement of the *Boerne* decision).

But see Kimel, 139 F.3d at 1442 (Hatchett, C.J., concurring) (finding that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment' and its conclusions are entitled to much deference" (quoting *Boerne*, 521 U.S. at 526). *Accord* Coolbaugh v. Louisiana, 136 F.3d 430, 436 (5th Cir. 1998). True enough, but *Boerne* insists that there be a basis for concluding that Congress's true aim was an evil prohibited by the Fourteenth Amendment, and also a basis for concluding that the means used were proportional to that evil.

Although some judicial opinions have acknowledged *Boerne*'s congruence and proportionality requirement, only a few have put it into practice. For example, Chief Justice Hatchett's concurring opinion in *Kimel* tried to base the constitutionality of the ADA on the fact that it is different from RFRA. He pointed out that RFRA, unlike the ADA, "prohibited official actions of almost every description and regardless of subject matter." *See* Kimel, 139 F.3d at 1443 (Hatchett, C.J., concurring) (quoting *Boerne*, 521 U.S. at 532). Also, unlike the ADA, RFRA set a "standard of review that was 'the most demanding test known to constitutional law.'" Kimel, 139 F.3d at 1443 (quoting *Boerne*, 521 U.S. 534). Therefore, the ADA "is [not] so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." Kimel, 139 F.3d at 1443 (quoting Boerne, 521 U.S. at 532).

Finally, Chief Justice Hatchett argued that in contrast to RFRA, in the ADA, "Congress included no language attempting to offset the balance of powers and usurp the Court's function of establishing a standard of review by establishing a standard different from the one previously established by the Supreme Court." *Id.* (quoting *Coolbaugh*, 136 F.3d at 438). Just as RFRA provides relief from state action that exceeds constitutional protections, as interpreted by the Court in *Smith*, so also the ADA provides greater relief than the constitution provides, as interpreted in *Cleburne*. *See* discussion *infra* notes 154-168 and accompanying text.

Boerne Revisited: A More Nuanced Inquiry

A plausible explanation for the superficial analysis of *Boerne* is that the decision rests on several perplexing distinctions. As Cole has observed, it may have been the "understatement of the term" when the Court stated that it would be difficult to distinguish measures that remedy or prevent unconstitutional actions from measures that make a substantive change in the governing law.[110] Several judges have recognized this problem.[111] Coherence resides in the proper application of the congruence and proportionality test, which in turn requires that a reviewing court both inquire into the legislative process used to enact Section 5 legislation such as the ADA and analyze each statute's specific provisions.

The Boerne Court's perceived malfunction in the legislative process that produced RFRA

The dilemma in *Boerne* was that the Respondents represented RFRA as merely a congressional effort to check the states' habit of targeting religious beliefs and practices.[112] The Court could not simply reject this representation, yet RFRA appeared to redefine constitutional rights. To resolve this apparent inconsistency, the Court deployed a technique, used in similar contexts, of deferring to the majoritarian political process, except when

110. Cole, *supra* note 18, at 46. In a similar vein, Gardbaum has noted that since "valid exercises of Section 5 power may result in the trumping of otherwise constitutional state laws or the preemption of constitutionally granted state authority[,] . . . . [Congress can] expand[ ] federal legislative rights against the states beyond those contained in Section 1 [of the Fourteenth Amendment]" notwithstanding the Court's insistence that "Congress does not have power to enact legislation that expands the rights contained in Section 1 . . . ." Gardbaum, *supra* note 51, at 675 & n.44.

111. Judge Flaum put it well in *Varner v. Illinois State University*, 150 F.3d 706 (7th Cir. 1998), *vacated and remanded on other grounds*, No. 98-1117, 67 U.S.L.W. 3469 (U.S. Jan. 18, 2000), a case challenging Congress's Section 5 power to enact the Equal Pay Act of 1963 (EPA). See discussion *infra* note 339 and accompanying text. There, the court explained, the University had argued that:

> the Equal Pay Act, by not requiring proof of discriminatory intent, necessarily proscribes some state action that is constitutional. Because of this feature, the University argues that the Equal Pay Act constitutes "substantive" legislation. This contention is not without some appeal [citing to the split decision in the *Kimel* case]. The Supreme Court's recognition that Congress's "remedial" power "extends only to enforcing the provisions of the Fourteenth Amendment" is difficult to reconcile with the Court's statement that remedial legislation may be appropriate "even if in the process it prohibits conduct which is not itself unconstitutional" (citing *Boerne*). The Supreme Court recognized this difficulty, stating that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern." Nonetheless, "the distinction exists and must be observed."

Id. at 716 (citations omitted).

112. Boerne, 521 U.S. at 529. "Respondent contends that RFRA is a proper exercise of Congress's remedial or preventive power. The Act, it is said, is a reasonable means of protecting the free exercise of religion as defined by *Smith*. It prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices." *Id.*

there is a persuasive reason for approaching legislation skeptically.[113] That persuasive reason in *Boerne* was the inadequacy of the legislative process that produced RFRA.

In *Cleburne*, the Court explained that although "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes," trust in the majoritarian political process sometimes attenuates.[114] This occurs when the Court perceives that prejudice, antipathy or other prejudicial factors motivate legislation. In such cases, the Court concludes that improvident legislation is "unlikely soon to be rectified by legislative means."[115] It is then that judicial intervention is most justified.[116] As I show next, the Court in *Boerne* perceived a malfunction in the legislative process that would ordinarily protect the states from excessive federal regulation. For the Court, this justified greater judicial scrutiny of Congress's judgment that RFRA was needed to prevent or remedy unconstitutional state action.

For almost a decade, the Court checked congressional overreaching through the doctrine developed in *National League of Cities v. Usery*,[117] until that case was overruled as unworkable in *Garcia v. San Antonio Metropolitan Transit Authority*[118] by a 5-4 vote. The states, the Court reasoned, could adequately rely on the "safeguards inherent in the structure of the federal system."[119] But some justices have expressed doubt in the efficacy

113. See discussion *infra* notes 115-16 and accompanying text.

114. 473 U.S. at 440.

115. *Id.* In the case of suspect legislative classifications, that loss of confidence in the efficacy of the democratic process's self-righting forces arises from the reality that classifications by race, alienage, or national origin, rely on distinguishing "factors [that] are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Id.* The Court expressed the same idea in *Massachusetts Board of Retirement v. Murgia*, reasoning that skepticism arises when there is reason to believe that a group burdened by legislation is in need of "'extraordinary protection from the majoritarian political process.'" 427 U.S. 307, 313 (1976) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

116. John Hart Ely has compressed this description by the Court of its judicial process into the phrase, "Democracy and Distrust." He argues that the foundations of heightened judicial scrutiny in individual rights cases are "akin to what might be called an 'antitrust' as opposed to a 'regulatory' orientation to economic affairs—rather than dictate substantive results [the Court] interferes only when the 'market[,]' in our case the political market, is systematically malfunctioning." JOHN HART ELY, DEMOCRACY AND DISTRUST 102-03 (1980). *See also* Fallon *supra* note 18, at 88-90 & n.91 (citing Ely's antitrust analogy and concluding that Ely's thesis is a "plausible explanation for the prominence of suspect-content tests in Equal Protection. . . law.").

117. 426 U.S. 833, 851 (1976) (holding Congress's commerce power to enact regulatory legislation applicable to the states may not be employed to interfere with performance by states of traditional governmental functions integral to their sovereignty, such as employment).

118. 469 U.S. 528 (1985).

119. *Id.* at 552. *Accord* South Carolina v. Baker, 485 U.S. 505, 512 (1988) (noting that "[s]tates must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."). In this

of the national political process to protect states from congressional aggrandizement. Twenty years before the Court's decision in *Garcia*, Justice Harlan's dissent in *Morgan*[120] warned against undue reliance on the structural protections inherent in the federal system. He argued that the Court should defer to Congress's legislative judgments only when the deliberative processes producing those judgments are adequate. Ideally, before enacting new legislation, Congress should assess and weigh the competing legitimate state and federal interests thoroughly. In the absence of such analysis Congress cannot expect deference.[121]

The Court's confidence in the "safeguards inherent in the structure of the federal system" appears to have waned since *Garcia*, supplanted by a sense of distrust more akin to Justice Harlan's admonition. For example, the Court has resurrected the *League of Cities* limits on Congress's regulating states as states.[122] It also has eliminated all sources of congressional

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regard, the Court cited Herbert Weschler's *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The Court argued, through reference to Weschler's work, that Congress is a representative body whose work is controlled by lawmakers from each state, whose reelections depend on local centers of power and authority. Accordingly, this political reality causes sober reflection on the respective federal-state interests and checks unwarranted congressional aggrandizement of its own authority. *See also* JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT (1980).

McConnell has more recently added that the "structural safeguard[s] against congressional overreaching" are especially substantial with respect to Section 5 legislation interpreting the Bill of Rights more protectively than do the courts:

> Unlike enactments under the Commerce Clause or most other sources of congressional power, interpretations of the Bill of Rights under Section Five limit the powers of Congress and the federal government to precisely the same extent that they limit the power of the states . . . . [T]he federal government will bear no less cost and inconvenience than the states . . . . This makes it exceedingly unlikely that Congress will act from anything other than a genuine interest in enforcement of constitutional freedoms.

McConnell, *supra* note 42, at 188. *See also* Cole, *supra* note 18, at 58 (taking the position that the Court is a greater threat to state autonomy than Congress because "[t]he Court, unlike Congress, is not structurally suited to consider state interests" and there exists no institutional reason to expect courts to protect state prerogatives). Cole has concluded that although Wechsler has been challenged, citing Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979), "it is certainly fair to say that Congress is, as an institutional matter, more likely to be sensitive to states' interests than is the Court." Cole, supra note 18, at 58.

120. *See* Morgan, 384 U.S. 641, 669 (1966) (Harlan, J., dissenting) (finding "we have here not a matter of giving deference to a congressional estimate, based on its determination of legislative facts, bearing upon the validity *vel non* of a statute, but rather what can at most be called a legislative announcement that Congress believes a state law to entail an unconstitutional deprivation of equal protection.").

121. Justice Harlan's dissent in *Morgan* argues that "legislative facts" are due respect when they are built on "empirical foundations," and are the product of a legislative process punctuated by serious and earnest reflection and consideration of the evidence. By contrast, unsupported *ipse dixit* is unworthy of deference. *Id.* at 668, 671.

122. *See* Printz v. United States, 521 U.S. 898 (1997) (holding unconstitutional the Brady Act amendment to the Gun Control Act of 1968 for temporarily obligating state law

abrogation authority from the Constitution—other than Section 5.[123] In *United States v. Lopez*, moreover, the Court enforced limits on Congress's power under the Commerce Clause to protect the regulatory prerogatives of state and local governments, noting Congress had failed to make any findings that the presence of handguns near schools has an adverse effect on interstate commerce.[124]

In his concurring opinion in *Lopez*, Justice Kennedy, the author of the *Boerne* opinion, explicitly stated that malfunctions in the legislative process call for heightened judicial scrutiny of legislation affecting the states' autonomy to govern.[125] He observed that federalism presents the Court with the most difficult challenges among all the structural relationships in the Constitution.[126] On the one hand, all members of Congress are sworn to uphold the "constitutional design." But, on the other hand, there exists no "structural mechanism to require [government] officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue[s] against a complete renunciation of the judicial role."[127] In short, substantial evidence suggests that a majority of the Court has lost confidence in Congress's capacity to restrain itself when presented with the option to include or exclude the states when enacting regulatory legislation.[128]

The Court's reasoning in *Boerne* evidences the Court's lack of confidence in Congress's restraint. In *Boerne*, the Court juxtaposed the commendable legislative process that produced the voting rights statutes with the inadequate legislative process that produced RFRA. The federal voting rights statutes became the subject of considerable litigation from the 1966 decision in *Morgan* until the 1980 decision in *City of Rome*.[129] In enacting those statutes, Congress traced the historic experience of racial

enforcement officials to execute federal law); New York v. United States, 505 U.S. 144 (1992) (holding unconstitutional under the Tenth Amendment a provision in the federally-enacted Low-Level Radioactive Waste Policy Amendments Act of 1985 obligating states to either accept ownership of waste or regulate according to congressionally-enacted standards).

123. See discussion *supra* notes 36-38 and accompanying text.

124. 514 U.S. 549, 562-63 & n.14 (1995).

125. *Id.* at 568-83 (Kennedy, J., concurring).

126. *Id.* at 575 (Kennedy, J., concurring).

127. *Id.* at 578 (Kennedy, J., concurring). *See also* Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of* Ex parte Young, 72 N.Y.U.L. REV. 495, 500 n.22 (1997) (suggesting recent federalism cases "may be informed by a mistrust of the institutional capacity for self restraint of the political branches (and of the lower federal courts).").

128. In a somewhat caustic response to the dissent's argument in *College Savings Bank II* that federalism requires an acknowledgment of Congress's need for flexibility—to sometimes include and sometimes exclude the states in federal regulation of the economy—Justice Scalia answered, "[l]egislative flexibility on the part of Congress will be the touchstone of federalism when the capacity to support combustion becomes the acid test of a fire extinguisher." College Savings Bank II, 119 S. Ct. at 2223.

129. *See generally* Boerne, 521 U.S. at 518, 524-27, 532-33.

discrimination in voting and accumulated evidence that states used facially-neutral voting procedures to perpetuate racial discrimination.[130] The legislative process in RFRA, by comparison, failed to establish any contemporary evidence of state-sponsored targeting of religious practices in American society.[131] Without a rational basis upon which to hold that Congress's purpose in enacting RFRA was in fact to challenge state-sponsored attacks on religious freedom—the evil that *Smith* found the Free Exercise Clause addresses—the Court could not uphold RFRA.

Thus the congruence prong of the *Boerne* "congruence and proportionality" test assays the legislative record to ascertain whether it can support the representation that Congress proscribed constitutional behavior as a means to remedy or prevent unconstitutional behavior. As the Court explained in *Boerne*, federal laws prohibiting constitutional state action "are sometimes appropriate remedial measures, [but] there must be congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented."[132] In *Boerne*, the claim that Congress's concern was the eradication of religious bigotry was implausible on the record before the Court. The opinion left as the only rational conclusion that "Congress's concern was with the incidental burdens imposed, not [, as represented,] the object or purpose of the [state] legislation [RFRA actually made unlawful]."[133]

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130. *See id.* at 525. The *Boerne* majority stated that "'[t]he constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience . . . it reflects.'" (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (omissions in original)). The majority then approvingly summarized each of its voting rights cases. As to each, the Court emphasized that the legislative record Congress had developed and relied on demonstrated an "historic[ ] experience" revealing racial discrimination in voting that was real and substantial. *See id.* at 525-27.

131. To the contrary, the Court found that "[t]he history of [religious] persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years." *Id.* at 530. "In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.*

The legislative record did contain what the Court characterized as "anecdotal evidence" of legislation burdening religious practice. However, none of this evidence rose to the level of demonstrating "animus or hostility to the burdened religious practices or. . . some widespread pattern of religious discrimination in this country." *Id.*

One appraisal of the *Boerne* decision commented that RFRA effected a "wholesale alteration in free exercise jurisprudence . . . erected on the flimsiest of foundations: a handful of anecdotes and dated stories of religious persecution." Hamilton, *supra* note 83, at 712-13. *See also* Robert F. Drinan, S.J., *Reflections on the Demise of the Religious Freedom Restoration Act*, 86 GEO. L.J. 101, 104 (1997) (reflecting that "[i]n retrospect, it may be that the lack of opposition to RFRA as it went through Congress turned out to be a weakness. Some basic premises of RFRA were not subjected to the ordinary adversary system that accompanies the enactment of almost any law in Congress. The overwhelming support of a phalanx of religious and civil liberties groups almost drowned out any opposition that might have and probably should have emerged.").

132. Boerne, 521 U.S. at 530.

133. *Id.* One must also note the poignancy in the Court's characterization of the legislative process used to enact RFRA as one contesting the Court's understanding of the scope

The Court hastened to add that the formal legislative record is not determinative on the question of congressional intent; the Court simply required some basis in evidence to justify giving due regard to the decisions of Congress.[134] That basis need not always be formal legislative findings. When, as in *Boerne*, the record insufficiently supports representations made to the Court, other factors may warrant giving Congress's conclusions "due regard."[135] With respect to RFRA, however, the evidence did not persuade the Court that Congress's aim was preventing or deterring religious bigotry.

The Court's subsequent decision in *College Savings Bank I*[136] illustrates the requirement that something in the legislative process must support representations made to the Court. In that case, the Court invalidated Congress's attempted abrogation of state sovereign immunity from suit in federal court in suits alleging patent infringement. Specifically, the Court rejected the argument that Congress possessed Section 5 authority to prohibit states' infringement of patents as a means of preventing or remedying states' deprivation of property without due process of law. The Court reasoned that deprivation occurs only when infringement is intentional and a deprivation violates due process requirements only when state laws provide no remedy or an inadequate remedy.[137] The patent laws are not limited to intentional infringements nor do they apply only when state law provides an inadequate remedy. Moreover, the legislative history "provides little support for the proposition that Congress sought to remedy a Fourteenth Amendment violation in enacting the Patent Remedy Act."[138] As the Court observed, "Congress . . . barely considered the availability of state remedies for patent infringement [and] identified no pattern of patent infringement by the states let alone a pattern of constitutional violations."[139]

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of the Free Exercise Clause, not one calculated to produce legislation to deter or prevent constitutional violations as defined in *Smith*. *Id.* at 515 (concluding that "points of constitutional interpretation were debated by Members of Congress in hearings and floor debates. Many criticized the Court's reasoning [in *Smith*], and this disagreement resulted in the passage of RFRA.").

134. "This lack of support in the legislative record . . . is not RFRA's most serious shortcoming. Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on the due regard for the decision of the body constitutionally appointed to decide.' As a general matter, it is for Congress to determine the method by which it will reach its decision." *Id.* at 531-32 (internal citations omitted). *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 503 (1980) (Powell, J., concurring) (noting that "forc[ing] Congress to make specific factual findings with respect to each legislative action . . . would mark an unprecedented imposition of adjudicatory procedures upon a coordinate branch of Government.").

135. *See, e.g.*, Boerne, 521 U.S. at 532 (allowing that "[p]reventative measures . . . may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional.").

136. 119 S. Ct. 2199 (1999).

137. *Id.* at 2208, 2209.

138. *Id.* at 2207, 2209.

139. *Id.*

The Court thus rejected the representation that the aim of the challenged statute was to protect patent holders from deprivations of property without due process of law. Instead, the Court concluded that "[t]he statute's apparent and more basic aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under [the patent law] regime."[140]

In sum, congruence plumbs the legislative process for evidence that a statute's purpose is to prevent or remedy constitutional violations. This serves a separation of powers function—to verify that Congress is not attempting to expand the substantive scope of the Fourteenth Amendment. It also serves a federalism function—to ensure that a sufficiently significant constitutional infringement exists to compel Congress's abridgement of state governing autonomy through Section 5 legislation.[141]

The Boerne Court's perception of RFRA as exacting an unacceptably high social cost

The other facet of RFRA that captured the Court's attention was its high cost-to-benefit ratio. The Court analyzed this facet using the proportionality prong of the congruence and proportionality test, which addresses the specific provisions of each piece of Section 5 legislation.

In *Boerne*, the Court determined that RFRA's aggregate costs substantially outweighed its benefits, rendering it not proportional. According to the Court, RFRA threatened an "intrusion at every level of government displacing laws and prohibiting official actions of almost every description and regardless of subject matter,"[142] and created "universal coverage"[143] by providing a federal claim for "any individual who alleges a substantial

140. *Id.* at 2211.

141. *See* Hamilton, *supra* note 83, at 713 (arguing that "Congress bears a responsibility to show to a reasonable degree that its solution is in fact aimed at an existing problem"); Gardbaum, *supra* note 51, at 686 (asserting that

> the [*Boerne*] majority drew attention to the issue of the sufficiency of the congressional record and findings .... [I]t seems desirable from both a constitutional and a public policy perspective that the principle of federalism—no less than that of deliberative democracy—should entitle the states to serious and genuine congressional consideration before their primary authority is abolished.).

See also Reynolds v. Alabama Dep't of Transp., 4 F. Supp. 2d 1092, 1108 (M.D. Ala. 1998) (finding that

> [t]he teaching of *Boerne* is that there must be a substantial constitutional hook: The principal object of the legislation must be to address rights that are judicially recognized; Congress can prohibit conduct that is not unconstitutional, but such legislation must be nothing more than incidental to a primary effort of prohibiting conduct that is unconstitutional .... [T]he prohibited constitutional conduct must be, at most, always a bridesmaid and never the bride; the bride must always be the unconstitutional conduct.).

142. Boerne, 521 U.S. at 532.

143. *Id.* at 516.

burden on his or her free exercise of religion."[144] The Court also found that because of "the stringent test RFRA demands of state laws," it would be highly unlikely that state and local governments sued under RFRA could prevail.[145] The Court concluded: "The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause . . . ."[146]

RFRA's costs also included a challenge to the Court's vision of religious freedom. The Court had abandoned the previously-controlling *Sherbert* "balancing test"[147] in favor of *Smith*'s intent test[148] because of the "anomaly" that the *Sherbert* rule permits one to disobey a law of general application that substantially burdens one's religious practice if the government is unable to demonstrate a compelling interest.[149] In addition, the pre-*Smith* regime had required the judiciary to execute the unappealing,

144. *Id.* at 532. Additionally, RFRA lacked a "termination date or termination mechanism." *Id.* However,

> [t]his is not to say, of course, that [Section] 5 legislation requires termination limits, dates, geographic restrictions, or egregious predicates. Where, however, a congressional enactment pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action, limitations of this kind tend to ensure Congress's means are proportionate to ends legitimate under [Section] 5.

Id. at 533.

145. *See id.* at 533-34 (arguing that given "[t]he stringent test RFRA demands of state laws[,]. . . 'many laws will not meet the test . . . .' Even assuming RFRA would be interpreted in effect to mandate some lesser test, . . . the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation.").

146. *Id.* at 534. Accordingly, the Court determined that RFRA "reflects a lack of proportionality or congruence between the means adopted and the legitimate ends to be achieved." *Id.* at 533. One can see from the Court's proportionality discussion in *Boerne* that proportionality, like congruence, serves a federalism function (guarding against costs that far exceed benefits) as well as a separation of powers function (again testing Congress's real aim in enacting Section 5 litigation). *See id.* at 532 (finding "RFRA is so out of proportion to a *supposed* remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. *It appears, instead, to attempt a substantive change in constitutional protections.*" (emphasis added)).

147. *Id.* at 513 (characterizing the test for determining violations of the Free Exercise Clause set out in Sherbert v. Verner, 374 U.S. 398 (1963)). For an explanation of the *Sherbert* test see *supra*, note 45.

148. *See* Boerne, 521 U.S. at 513. Explaining the change, Justice Kennedy wrote:

> The application of the *Sherbert* [effects] test, the *Smith* decision explained, would have produced an anomaly in the law, a constitutional right to ignore neutral laws of general applicability. The anomaly would have been accentuated, the Court reasoned, by the difficulty of determining whether a particular practice was central to an individual's religion . . . . [I]t "is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."

(citing Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990)).

149. Such a rule grants religious adherents, but not others, the right to "ignore neutral laws of general applicability." *Id.*

and perhaps unworkable, task of inquiring into "whether a particular practice was central to an individual's religion."[150] *Smith* had attempted to avoid these twin costs: RFRA reintroduced and exacerbated them,[151] to the Court's dismay.[152]

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150. *Id.* at 513. *See* Smith, 494 U.S. at 889 n.5 & 890 (intimating the undesirability of the task of determining the impact of laws on religious practice necessitated by the *Sherbert* effects test).

151. The Court observed that RFRA "'restore[s] the compelling interest test as set forth in [*Sherbert*]' [but also requires that] the 'government . . . demonstrate the burden . . . is the least restrictive means of furthering that compelling governmental interest.'" Boerne, 521 U.S. 515-16 (quoting RFRA's stated purpose and a provision from RFRA, 42 U.S.C. § 2000bb-1). This change would constrict states' freedom to govern much more dramatically than during the *Sherbert* era when "the only instances where a neutral, generally applicable law had failed to pass constitutional muster . . . were cases in which other constitutional provisions were at stake." *Id.* at 513-14. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding invalid compulsory school attendance law as applied to Amish parents who refused on religious grounds to send their children to school based on free exercise of religion, but also the right of parents to control their children's education).

Other laws dealing with unemployment compensation that burdened religious practice were invalidated, the Court said, because they were not neutral to religion—they provided "a system of individual exemptions" but not religious exemptions without a compelling reason. *See* Boerne, 521 U.S. at 514 (quoting Smith, 494 U.S. at 884). *Accord* Eisgruber & Sager, *supra* note 66, at 101 (finding "[t]he marked collapsibility of the *Sherbert* 'rule' in the Supreme Court was the norm in other courts as well. The pattern was simple and constant: Free Exercise claimants seeking exemptions from generally applicable laws virtually never prevailed. In other constitutional contexts, the compelling state interest test was 'strict in theory and fatal in fact'; in Free Exercise jurisprudence, it was strict in theory and feeble in fact . . . .").

152. With respect to questions of religious belief, the majority suggested that resolution of such questions may lack judicially cognizable standards. "What principle of law or logic [the Court asked] can be brought to bear to contradict a believer's assertion that a particular act is central to his personal faith?" Boerne, 521 U.S. at 534 (quoting Smith, 494 U.S. at 887) (internal quotation marks omitted). The Court previously had concluded in *Smith* that questions of centrality and sincerity of religious belief were "not within the judicial ken." Smith, 494 U.S. at 887. Congress might "announce" as it did in RFRA, that "the compelling interest test . . . is a workable test for striking sensible balances between religious liberty and competing prior governmental interests" (Boerne, 521 U.S. at 515), but as a co-equal branch charged with the responsibility of adjudicating alleged violations of RFRA, the Court could legitimately reject this legislative determination. After all, the federal judiciary, not Congress, would have to administer RFRA's test and survive any resulting crossfire. *See also* Lupu, *supra* note 65, at 807-08 (noting that *Boerne* "eliminates the costs of defending RFRA claims against state and local government, and the antireligious resentment and skepticism that such claims may have fueled . . . . Over time, I expect that RFRA's disappearance will leave religious liberty in no worse, and perhaps better, condition than RFRA would have produced.")

With respect to RFRA reintroducing a "constitutionally required religious exemption[ ] from civic obligations of almost every conceivable kind," Boerne, 521 U.S. at 534, the Court seems to view this as an "anomaly" because it represents an unacceptable vision of religious liberty. Eisgruber and Sager argue that "even if [RFRA] does not rise to the level of an Establishment Clause violation, it works at cross-purposes with the Court's understanding of religious liberty and other elements of constitutional justice." Eisgruber & Sager, *supra* note 66, at 97. RFRA, they argue, represents a view that "religious commitments [should] receive better treatment than other, comparably serious commitments." *Id.* at 104. The other view argued is that used by the Court in *Smith* and *Boerne*: that "the only sound

In conclusion, a careful appraisal of *Boerne* reveals more nuance than courts currently recognize but less intrusion into Congress's legislative prerogatives than some commentators have suggested.[153] *Boerne* did not advance an overarching right for the federal judiciary to determine independently the necessity or wisdom of Section 5 legislation. *Boerne* insists on: 1) congruence: some basis in legislative process to support the claim that the aim of Section 5 legislation is, as represented, preventing or remedying unconstitutional behavior; and 2) proportionality: a convincing basis for concluding that the benefits of the legislation are not so out of proportion to the costs as to make incredulous the claim that Congress's purpose was to remedy and prevent unconstitutional behavior. In short, the Court in *Boerne*, held that it will defer to Congress's legislative judgments when they are a product of legislative processes rooted in empirical analysis rather than assertion, and when the resulting legislation evidences sensitivity to the federalism mandate that states' autonomy not be impaired unnecessarily. As the following discussion demonstrates, Congress fully met these twin prerequisites when enacting the ADA.

The Aim of the ADA Was to Prevent or Remedy Unconstitutional Disability-Based Discrimination

To say that Congress's aim in enacting the ADA was to remedy or prevent unconstitutional disability-based discrimination presupposes consensus regarding constitutional limits. The starting point is *Cleburne*, in which the Court held: "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is

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conception of religious liberty is founded upon protecting religious exercise against persecution, discrimination, insensitivity, or hostility." *Id.* *See also* Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2350 (1997) (finding

> RFRA was the first-ever direct effort by Congress to proscribe a regulatory framework governing church-state relations for the country. It marked a massive, unprecedented shift in the triangular relation among the federal government, the state governments, and religion . . . . RFRA was a congressional effort to dictate the terms of religious neutrality to which state law must conform . . . . RFRA would therefore have been unconstitutional even if it had fallen within Congress's Section 5 powers . . . .).

153. Asserting the judiciary's right and duty to examine the efficacy of legislative process and the scope of the resulting legislation is very different from saying that the *Boerne* majority declared an *a priori* right to "ma[ke] independent judgments regarding the risk and frequency of [constitutional violations], the fit between the constitutional evil and the statutory remedy, and the degree of impact on traditional state functions." McConnell, *supra* note 42, at 166 (citations omitted). *See also* Laycock, *supra* note 42, at 746 (clarifying that "[t]he proportionality part of [the *Boerne*] standard seems to require an empirical judgment: Congressional enforcement legislation is valid only if violations of the Constitution, as interpreted by the Court, appear in a sufficiently large proportion of all cases presenting violations of the statute."); *id.* at 770 (asserting "a test of congruence and proportionality [invites outcomes] based on the Court's view of whether the statute was necessary. . . . For the first time since 1937, the Court is second-guessing Congress on questions of degree in the interpretation of delegated powers.").

rationally related to a legitimate state interest."[154] The ends must be "legitimate"—not "rooted in considerations that the Constitution will not tolerate."[155] It is clear that one legislative end the Constitution will not tolerate is malice or animus, such as "'a bare . . . desire to harm a politically unpopular group.'"[156]

The Constitution prohibits any state action irrationally based on prejudice, whether conscious or not.[157] In this regard, suspect and nonsuspect classifications differ not in what the Constitution will tolerate, but rather in methods of proof.[158] The facts in *Cleburne* are illustrative. There, the Court found the denial of a special use permit to a residential home for the mentally retarded unconstitutional because it rested on "an irrational prejudice against the mentally retarded."[159] That conclusion was not based on any finding of conscious malice against persons with disabilities by governmental officials.[160] As the Court explained, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable . . . are not permissible bases for treating [persons with disabilities] differently."[161] The Equal Protection Clause prohibits legislative classifications harming the disabled that are based on "vague, undifferentiated fears."[162]

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154. *Cleburne*, 473 U.S. at 440.

155. *Id.* at 446.

156. *Id.* at 447 (citing United States Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)). *Accord* Romer v. Evans, 517 U.S. 620 (1996).

157. *See* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L. J. 279, 288 (1997) (concluding that "definitional attempts to equate intent with animus, malice, or a conscious awareness . . . represent a misunderstanding of how the Court has defined intent.").

158. As the Court explained in *Cleburne*, the laws regarding suspect classifications are "deemed" to "reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." Cleburne, 473 U.S. at 440. With nonsuspect classifications, proof of such prejudice and antipathy, conscious or unconscious, is required.

159. *Id.* at 450.

160. In *Cleburne*, the city "was concerned with the negative attitude of the majority of property owners located within [close proximity] to the [residential home] as well as the fears of elderly residents of the neighborhood." *Id.* The city also said its concern over potential conflict between residents of the home and others in the surrounding community justified rejecting the special use permit. These proffered explanations were rejected.

161. *Id.* at 448. "'Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'" *Id.* (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

162. *Id.* at 449. In *Cleburne*, the city also attempted to justify refusing the special use permit because the residential facility was situated on a 500-year flood plain and because of population density concerns. These also were rejected as pretextual because others similarly situated were not required to obtain a special use permit. This left the earlier explanation of the surrounding community's irrational prejudice as the surviving explanation. *Id.* at 449-50. In *Romer v. Evans*, 517 U.S. 620 (1996), the Court similarly was unconcerned whether the animus that underlay the state constitutional provision denying homosexuals equal access to government processes was conscious or not. As the Court explained, "its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests." *Id.* at 632.

As Robert Burgdorf correctly stated, "[t]he Supreme Court has struck down governmental restrictions upon persons with mental retardation under the equal protection clause on the ground that these restrictions were based upon 'negative attitudes,' 'fear,' and 'irrational prejudice.'"[163] There is no rational basis to a decision based on erroneous beliefs: 1) that are the product of "negative attitudes, or fear, unsubstantiated by factors which are properly cognizable,"[164] 2) when the decision directly or indirectly gives effect to "private biases,"[165] or 3) when the state harms the disabled because of "vague, undifferentiated fears."[166] The Constitution certainly permits the government to take disability into consideration, unlike race, which is almost never a relevant consideration. If, however, the disabled individual can perform a job, a state may not offer its ignorance of the facts as a defense when the mistake is based on myths, fears, or stereotypes. One cannot find a rational basis in an incorrect belief based on an irrational foundation.[167] *Cleburne* has greatly contributed to the constitutional principles that inform disability-based discrimination by denying the government the right to rely on honestly held but mistaken myths, fears, and stereotypes about persons with disabilities.[168]

Many of the ADA's employment provisions simply ban unconstitutional conduct. The ADA prohibits discrimination "against a qualified individual with a disability because of the disability."[169] The Act then describes the prohibited behavior in seven subsequent paragraphs.[170] Three of these seven definitions of discrimination and a subpart of another prohibit unconstitutional behavior.

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163. Burgdorf, *Analysis and Implications, supra* note 8, at 518. Professor Karlan's observation also is accurate that "[a] disabled individual who could perform the job in its present form, but whom the employer refuses to hire because of a mistaken belief that she cannot perform the requisite tasks or out of revulsion against the worker's disability (such as a disfiguring cosmetic condition), is simply a victim of traditional [unconstitutional] discrimination." Pamela S. Karlan, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 8 (1996). *See* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 541 (7th Cir. 1995) (excluding or segregating persons because of impairments that incorrectly are believed to be disabling is "analogous to [being] discriminated against because of . . . skin color or some other vocationally irrelevant characteristic.").

164. Cleburne, 473 U.S. at 448.

165. *Id.* (quoting Palmore, 466 U.S. at 433 (1984)).

166. *Id.* at 449.

167. Romer v. Evans, 517 U.S. 620, 635 (1996) (finding the constitutionality of "status-based enactment[s]" depends on a "*factual context* from which we could discern a relationship to legitimate states interests . . . .") (emphasis added).

168. Thus, for example, if a state refused to hire a lawyer with mental illness because of an unsubstantiated and inaccurate fear that she would not withstand the stress of the work, that "undifferentiated fear" and "negative attitude . . . unsubstantiated by factors which are properly cognizable," even if honestly held, would be no defense to a constitutional challenge. The same applies to an honestly held, but erroneous belief, that a cosmetic condition will so upset co-workers or others that state functions will be impaired were the person with the condition to be hired.

169. ADA, 42 U.S.C. § 12112(a).

170. *See* ADA, 42 U.S.C. § 12112(b).

For example, Section 12112(b)(1) of the Act proscribes "limiting, segregating, or classifying an applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee." The EEOC has suggested that this section prohibits covered entities from "restricting the employment opportunities of qualified individuals with disabilities on the basis of stereotypes and myths about the individual's disability. Rather, the capabilities of qualified individuals with disabilities must be determined on an individualized, case by case basis."[171] The exclusion or segregation of persons with a disability, due to their status as disabled individuals, is unconstitutional. As the Court stated in *Cleburne*, disability distinctions are "largely irrelevant unless the [regulated behavior by the disabled] would threaten legitimate interests of the [government] in a way that other permitted [behavior] would not."[172] Differential treatment because of the status of being disabled, as opposed to differentiation because of the limitations created by one's disability, do not meet this test. For example, segregating or limiting all cancer survivors, because of that status, may reflect "prejudice and antipathy—a view that [they] are not as worthy or deserving as others,"[173] or it may result from "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable,"[174] or the "vague, undifferentiated fears" of others,[175] or some other irrational prejudice. Certainly, not all cancer survivors possess traits that "threaten legitimate interests of the [government] in a way that [an]other permitted [status] would not."[176]

Section 12112(b)(4) of the Act prohibits "excluding, or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." This section also prohibits unconstitutional behavior for the same reasons as discussed above with respect to Section 12112(b)(1). The Court in *Cleburne* struck down governmental restrictions based on "negative attitudes," "fear" or "irrational prejudice."[177] It is these irrational motives that explain discrimination against an individual for his or her association with a disability. In any event, absent evidence of some specific risk of harm to state interests, a state could never

171. EEOC Interpretive Guidance on Title I of the ADA, 29 C.F.R. § 1630.5 app. (1998) [hereinafter EEOC Interpretive Guidance].

172. Cleburne, 473 U.S. at 447-48. *See also* Mark C. Weber, *Beyond the Americans With Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 132 n.46 (1998) (demonstrating "[t]he essence of invidious discrimination is being treated worse than others because of a trait that one has no control over and that has no just relation to the entitlement at issue.").

173. Cleburne, 473 U.S. at 440.

174. *Id.* at 448.

175. *Id.* at 449.

176. *Id.* at 447-48.

177. See discussion *supra* notes 154-168 and accompanying text.

demonstrate that an adverse employment action—taken because one associated with a disabled individual—threatens legitimate government interests in a way another permitted status would not."[178]

Section 12112(b)(2) of the Act prohibits a covered entity from participating in contractual or other arrangements that effectively subject a qualified employee with a disability to the discrimination prohibited by the ADA. Section 12112(b)(3)(B) prohibits methods of administration "that perpetuate the discrimination of others who are subject to common administrative control." These provisions also address unconstitutional behavior when, for example, the contractual arrangement or method of administration referred to results in discrimination that would be unconstitutional if the state itself had caused it.[179] A state's indifference to the discrimination by its agents would provide no defense.[180]

The remaining sections of the ADA that define prohibited discrimination primarily limit constitutional behavior—the incidental effects of administration of facially neutral policies.[181] The Act bans this behavior because it effectively impedes the integration of persons with disabilities into the workforce.[182] The current constitutional attack on the Act focuses on these remaining sections. Their constitutionality depends on whether they are an appropriate means for preventing or remedying unconstitutional state action as required by *Boerne*. The first task is to establish that Congress's aim in enacting them and applying them to the states was to eradicate unconstitutional disability-based discrimination. That task begins with an examination of the ADA's legislative process.[183]

The literature concerning the ADA has examined the ADA's legislative process exhaustively.[184] I shall not attempt to repeat that effort here.

178. Cleburne, 473 U.S. at 447-48. And, as discussed above, even if a state official holds an honest but mistaken belief that association with a person with a disability threatens legitimate state interests, *Cleburne* makes plain that such mistaken belief, based on myths, fears, and stereotypes, is no defense to a constitutional challenge. See discussion *supra* notes 154-168 and accompanying text.

179. *See also* Arizona Governing Comm'n v. Norris, 463 U.S. 1073, 1086 (1983) (finding employer liable for sex discrimination under Title VII due to acts of agent administering fringe benefits plan).

180. See discussion *supra* notes 154-168 and accompanying text.

181. ADA, 42 U.S.C. §§ 12112(b)(3)(A) and 12112(b)(6) prohibit the use of standards, employment criteria, or methods of administration that have discriminatory effects, unless they are job-related and consistent with business necessity. Section 12112(b)(7) requires that employment tests be administered to applicants or employees with disabilities in such a way as to reflect accurately their essential skills. Section 12112(b)(5) makes it illegal for a covered entity to refuse to make reasonable accommodations except for undue hardship, or to deny employment opportunities to an individual on the basis of her need for reasonable accommodations.

182. See discussion *infra* notes 235-251 and accompanying text.

183. See discussion *infra* notes 184-234 and accompanying text.

184. For a history of legislative efforts prior to the introduction of legislation that became the ADA *see* BURGDORF, DISABILITY DISCRIMINATION, *supra* note 13, at 23-43. For a discussion of the legislative history of the ADA itself, *see id.* at 43-48. *See also* R. Bales, *Libertarianism, Environmentalism, and Utilitarianism: An Examination of Theoretical*

Rather, drawing freely from it, I shall demonstrate that it fully supports three conclusions: 1) that the ADA's legislative process uncovered a persistent pattern of societal discrimination, including discrimination by state and local governments, of the type the constitution condemns; 2) that Congress found this disability discrimination to be pervasive; and 3) that Congress enacted the ADA, *inter alia*, to prevent or remedy this unconstitutional discrimination.

The process that resulted in the 1990 enactment of the ADA began in the early 1970s with an effort to amend Titles VI and VII of the 1964 Civil Rights Act, by adding disability as a protected class.[185] Concurrently, in 1969 and throughout the 1970s, persons with disabilities brought many successful constitutional attacks in courts throughout the United States, challenging disability discrimination in education, employment, transportation, guardianship, medical services, sterilization, voting, and confinement in residential treatment centers.[186] These individuals brought this litigation against regional transportation authorities, public housing authorities, school systems, state governments, and state residential treatment centers,[187] uncovering considerable government involvement in unconstitutional disability-based discrimination. Congress responded by enacting legislation prohibiting disability-based discrimination in state and local governmental activities and services, public education, employment, air transportation, housing, institutionalization, and voting.[188] In short, throughout the late 1970s and the 1980s, Congress accumulated considerable evidence of state-sponsored unconstitutional discrimination against individuals with disabilities.

Three important Supreme Court decisions during the years immediately preceding the enactment of the ADA substantiated the presence of society-wide discrimination against persons with disabilities and state culpability. In 1985, the Court decided *Alexander v. Choate*,[189] in which it acknowledged for the first time the "well-cataloged instances of invidious

Frameworks for Enforcing Title I of The Americans With Disabilities Act, 1993 DET. C.L. REV. 1163, 1167-1174 (1993); Burgdorf, *Analysis and Implications, supra* note 8, at 426-34; Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 399-415 (1991); Lowell P. Weiker, *Historical Background of the Americans With Disabilities Act*, 64 TEMP. L. REV. 387, 387-390 (1991).

185. BURGDORF, DISABILITY DISCRIMINATION, *supra* note 13, at 26-27; Bales, *supra* note 184, at 1167. Actually federal legislation predates efforts to amend Title VII. As early as 1948, to assist disabled World War II veterans, Congress enacted legislation to prohibit discrimination based on physical handicaps within the United States Civil Service. Weiker, *supra* note 184, at 387.

186. BURGDORF, DISABILITY DISCRIMINATION, *supra* note 13, at 24-25.

187. *Id.* at 24-25 & nn.152-164.

188. *Id.* at 27-33; Weiker, *supra* note 184, at 389. In 1968, Congress also enacted legislation requiring "buildings constructed, altered, or financed by the federal government to be accessible to and usable by people with disabilities." *Id.* at 387.

189. 469 U.S. 287 (1985).

discrimination against the handicapped."[190] *Alexander* also cited testimony to Congress that persons with disabilities historically had been excluded and segregated.[191] That same year, as Burgdorf has written, "[i]n separate opinions in the *Cleburne* case, five justices acknowledged the 'history of unfair and often grotesque mistreatment' arising from 'prejudice and ignorance.'"[192] In his dissent in *Cleburne*, Justice Marshall summarized some of the worst of the state-sponsored discrimination against persons with disabilities, concluding that "[f]or the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; outdated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continues."[193]

Two years later in *School Board of Nassau County, Florida v. Arline*[194] the Court reviewed the legislative history of Section 504 of the Rehabilitation Act of 1973.[195] The case arose when a state agency refused to continue the employment of a teacher afflicted with tuberculosis. The Court found that Congress enacted the Rehabilitation Act of 1973 to counter "society's accumulated myths and fears about disability and disease," its "prejudiced attitudes or the ignorance of others," its "public fear and misapprehension," and its "irrational fear"[196]—the very things which the Court in *Cleburne* had found to violate the constitution when motivated by state action.

Meanwhile, in 1983, the United States Commission on Civil Rights published an influential study entitled *Accommodating the Spectrum of Individual Abilities*.[197] It documented the similarity between discrimination against racial minorities and discrimination against persons with disabilities. In both cases, "active hostility, ignorance, indifference, and misconceptions about the abilities of the group" motivated discriminatory actions.[198] In one of its most important findings, the Commission stated that "[h]istorically, society has tended to isolate and segregate handicapped

190. *Id.* at 296 n.12.

191. *Id.* at 296.

192. *See* BURGDORF, DISABILITY DISCRIMINATION, *supra* note 13, at 11-12. In his partial dissent in *Cleburne*, Justice Thurgood Marshall, writing for himself and two other justices, wrote of a "regime of state-mandated segregation and degradation." Cleburne, 473 U.S. at 462 (Marshall, J., concurring in part and dissenting in part). In addition, "Justice Stevens, joined by Chief Justice Berger, similarly acknowledged 'the history of unfair and often grotesque treatment' by government officials of persons with disabilities as a result of ignorance and prejudice." Cook, *supra* note 184, at 400 (citing *Cleburne*, 473 U.S. at 454 (quoting Cleburne Living Ctr., Inc. v. Cleburne, 726 F.2d 191, 197 (5th Cir. 1984))).

193. *Cleburne*, 473 U.S. at 467 (Marshall, J., dissenting).

194. 480 U.S. 273 (1987).

195. 29 U.S.C. § 759 (1994).

196. Arline, 480 U.S. at 284, 285 n.13.

197. BURGDORF, DISABILITY DISCRIMINATION, *supra* note 13 at 44-45, citing U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES (1983) [hereinafter ACCOMMODATING THE SPECTRUM].

198. Bales, *supra* note 184, at 1167. *See id.* at 1167 n.8 (citing Jeffrey O. Cooper, *Overcoming Barriers to Employment: the Meaning of Reasonable Accommodation and Undue*

people. Despite some [recent] improvements, . . . discrimination against handicapped persons continues to be a serious and pervasive social problem."[199] Following the publication of the Commission's study, the National Council on the Handicapped published one report to the President and the Congress in 1986, and another in 1988 that further substantiated the persistence of society-wide discrimination against persons with disabilities and the need for remedial legislation.[200]

On April 28, 1988, legislation was introduced in the 101st Congress that would later become the ADA. Over the next several years, as Burgdorf has reported, "[a]fter conducting 63 public forums in all 50 states, the District of Columbia, Guam, and Puerto Rico, and meeting with more than 32,000 people, a congressional task force made a formal finding in 1990 of 'massive, society-wide discrimination.'"[201] The House of Representatives held eleven public hearings and the Senate three.[202]

The ADA's legislative history abounds in testimony of discriminatory activities engaged in by state and local governments. After reviewing this legislative history, Mikochik has written that "[t]he record before Congress . . . evidenced that discrimination against disabled people persisted in government programs [including] conditions [that] impede access to state and municipal employment for the 43 million disabled Americans."[203] Cook, reviewing the record of governmental hostility to persons with disabilities, has concluded that "state and local officials, consciously and intentionally, out of animus and ignorance, segregated persons with disabilities

Hardship in the Americans With Disabilities Act, 139 U. PA. L. REV. 1423, 1427 (1991) (observing that the sources of discrimination were parallel)).

199. ACCOMMODATING THE SPECTRUM, *supra* note 197, at 159 (quoted in BURGDORF, DISABILITY DISCRIMINATION, *supra* note 13, at 9-10). For a summary of the major congressional and executive branch reports substantiating the persistence of discrimination against persons with disabilities, *see* Burgdorf, *Analysis and Implications, supra* note 8, at 416 n.15.

200. *See* BURGDORF, DISABILITY DISCRIMINATION, *supra* note 13, at 44-45. "The Council, which was composed of 15 presidential appointees, had been established as an independent federal agency in 1984 and was charged, *inter alia*, with issuing, by February 1986, a report to the President and Congress analyzing federal laws and programs and presenting legislative recommendations to enhance the productivity and quality of life of Americans with disabilities." *Id.* at 45. "In [consumer] forums, Council members heard repeatedly that the primary problem facing individuals with disabilities was discrimination." Weiker, *supra* note 184, at 390.

201. BURGDORF, DISABILITY DISCRIMINATION, *supra* note 13, at 10 (citing TASK FORCE ON THE RIGHTS AND EMPOWERMENT OF AMERICANS WITH DISABILITIES, EQUALITY FOR 43 MILLION AMERICANS WITH DISABILITIES: A MORAL AND ECONOMIC IMPERATIVE 8 (1990), quoted in HOUSE COMM. ON EDUCATION AND LABOR, REP. ON THE AMERICANS WITH DISABILITIES ACT, H.R. REP. NO. 101-485, Pt. 2 at 32 (1990)).

202. Cook, *supra* note 184, at 393-94. For an extensive listing of the evidence of the pervasive discrimination against persons with disabilities, *see* Coolbaugh v. State of Louisiana, 136 F.3d 430, 436-37 (5th Cir. 1998).

203. Mikochik, *supra* note 13, at 623 & n.33.

and denounced [them] as not only inferior, but also as dangerous, and unworthy of the quality of life accorded other citizens."[204] He continues, "Congress was aware [of this] regime of segregation and degradation . . . [and] therefore took strong action in the ADA to eliminate disability segregation in this country."[205]

In addition to the evidence gathered by Congress when it considered the ADA, the public record contains evidence of state-sponsored unconstitutional disability-based discrimination. For instance, many state and local laws segregate the disabled. Cook concluded that "persons with disabilities continue to be forcibly and officially segregated throughout this nation by public officials who refuse to provide essential services in an integrated fashion."[206] Marcia and Robert Burgdorf's research has uncovered that as recently as the late 1950s, twenty-eight states provided for sterilization of the disabled, and "at least" seventeen for epilepsy and mental retardation.[207] States also proscribed marriage, even among the physically disabled.[208] Voting rights were denied to persons who were "under some

204. Cook, *supra* note 184, at 397. Cook's research concludes that "state legislatures put a system of apartheid into place, and the courts enforced it [and] these official forms of segregation and discrimination remain with us today because of continued fear, ignorance, hostility, and the inertia supplied by a long history of disability segregation."

205. *Id.* at 397-98. In addition to the numerous field and congressional hearings noted at *supra* notes 197-202 and accompanying text, Congress was provided with "hundreds of discrimination diaries submitted for the legislative record by persons with disabilities." *Id.* at 408.

The Senate Report on the ADA concluded that "'[o]ur society is still infected by an ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination.'" Cook, *supra* note 184, at 409 (quoting SENATE COMM. ON LABOR AND HUMAN RESOURCES, REP. ON THE AMERICANS WITH DISABILITIES ACT, S. REP. NO. 101-116, (1990) [hereinafter SENATE REPORT]). *Accord* Erickson v. Board of Governors, No. 95 C 2541, 1998 WL 748277 *1, at *4 (N.D. Ill. Sept. 30, 1998) (demonstrating that "[u]nlike RFRA, Congress did incorporate into the ADA modern instances of persistent discrimination by individuals with disabilities"); Lamb v. John Unstead Hosp., 19 F. Supp. 2d 498, 506 (E.D.N.C. 1998) (reasoning Congress found a "significant likelihood of unconstitutional action with respect to the disabled"); *id.* at 509 (finding "the ADA was specifically designed with the overall and explicit purpose of prohibiting, preventing, and remedying the irrational classification of and intentional discrimination against the disabled").

206. Cook, *supra* note 184, at 412. Cook assembled examples of "eugenic-based laws from the earlier historical era requiring segregated treatment [that] remain in effect still." *Id.* at 412 & n.134 (citing marriage restrictions for retarded people still in effect in Kentucky, Michigan, and Mississippi as of 1985).

207. Marcia Pearce Burgdorf and Robert Burgdorf Jr., *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause,* 15 SANTA CLARA L. REV. 855, 861 (1975).

208. *Id.*

form of guardianship."[209] The Burgdorfs also found that government-sponsored homes for the mentally retarded had "little regard for the constitutional rights of those in the institution."[210] At the time of the enactment of the ADA, persons with disabilities in Mississippi could not even obtain a hunting or fishing license on an equal basis with nondisabled persons.[211] As recently as 1973, Chicago still had "ugly laws" that prohibited appearance in public by those whom the law deemed unsightly or disgusting.[212] Other cities with similar laws enforced them as late as 1974.[213] Weber also found that "there are numerous examples of private enterprises and government officials refusing to serve individuals because they felt the persons' disabilities made their appearance upsetting to others."[214]

Listed below are some of the examples of invidious discrimination against persons with disabilities considered by Congress or in the public record when the ADA was enacted:

- Child confined to a wheelchair refused admission to public school "because the principal ruled that [she] was a fire hazard."[215]
- Applicant for a teaching position denied employment "because of paralysis of both lower extremities [because of] poliomyelitis."[216]
- "[A]pplicant with cerebral palsy told she was not qualified for job in metropolitan hospital because fellow employees [were] not comfortable working with her."[217]
- "[A] woman 'crippled by arthritis' denied a job. . . because college trustees [thought] 'normal students shouldn't see her.'"[218]
- Children with Down's Syndrome refused admission to zoo because zoo keepers were concerned they might upset the chimpanzees.[219]

209. *Id.* at 906.

210. *Id.* at 866 n.83. One court found that mental patients in a state hospital had "suffered a history of unequal treatment [and had been] subjected to discrimination." *Id.* Moreover, individuals involuntarily institutionalized in mental hospitals were found to have been denied their constitutional right to treatment. *Id.* at 891-92.

211. *Id.* at 863 & n.52. A search in the winter of 1999 showed that this continues to be the case.

212. *Id.* at 864.

213. *Id.* (reporting enforcement in Omaha, Nebraska). Airlines also had prohibitions against serving customers with "gross disfigurement or other unpleasant characteristics so unusual as to offend fellow passengers" and applied the proscription to persons with epilepsy. Airlines also required wheelchair bound passengers to fly with an attendant "whether or not these passengers are capable of caring for themselves in flight." *Id.* at 865.

214. Weber, *supra* note 172, at 132 n.43.

215. SENATE REPORT, *supra* note 205, at 7.

216. *Id.*

217. Cook, *supra* note 184, at 408 n.103.

218. SENATE REPORT, *supra* note 205, at 7 (quoting 118 CONG. REC. 36761 (1972) (remarks of Sen. Mondale)).

219. *Id.*

- Child with cerebral palsy denied admission to a public school because "his teacher claimed his physical appearance 'produced a nauseating effect' on his classmates."[220]
- Wheelchair-bound hospital patient refused a ride home by a public transit service upon release from a hospital although a reservation had been made three weeks previously.[221]
- Plaintiffs who suffered birth defects that created visible deformities excluded from the courtroom in their own mass products liability litigation on the ground that they were unfit to be present in the courtroom because their "appearance might excite passions against the defendant."[222]
- Polio victim in a wheelchair denied teaching license because public officials concluded the person was "physically and medically unsuited for teaching."[223]
- Victim of paralysis testified that "being paralyzed has meant far more than being unable to walk—it has meant being excluded from public schools, being denied employment opportunities and being deemed an 'unfit parent.'"[224]
- Blind rehabilitation counselor denied job because the person could not "drive to see. . . clients."[225]
- Person with epilepsy denied counseling position at a juvenile correction facility "because he lacked a driver's license."[226]
- Blind person refused permission by Philadelphia public school officials to take a qualifying examination to demonstrate teaching competence.[227]

Aware that persons with disabilities suffered from persistent state-sponsored unconstitutional discrimination, Congress exercised its full constitutional authority to prevent and remedy this situation.[228] In its statement of findings, Congress concluded: 1) "historically, society has tended

220. *Id.* (quoting 117 CONG. REC. 45974 (1971) (statement of Rep. Vanik)).

221. *Id.*

222. Weber, *supra* note 172, at 132 n.44 (referencing *In re* Bendectin Litig., 857 F.2d 290 (6th Cir. 1988)).

223. Mikochik, *supra* note 13, at 624 & n.33.

224. SENATE REPORT, *supra* note 205, at 15-16 (testimony by Arlene Mayerson of the Disabilities Rights Education and Defense Fund).

225. Mikochik, *supra* note 13, at 624 n.33.

226. *Id.*

227. Gurmankin v. Costanzo, 556 F.2d 184 (3d Cir. 1977) (holding that "[t]he refusals . . . to permit her to take the examination violated due process by subjecting Ms. Gurmankin to an irrebuttable presumption that her blindness made her incompetent to teach sighted students").

For other anecdotal accounts of unconstitutional discrimination prior to the enactment of the ADA, see Burgdorf, *Analysis and Implications, supra* note 8, at 420 n.33.

228. *See* Cook, *supra* note 184, at 415-16 (stating that Congress understood "that public officials historically have been among the major perpetrators of segregated services in this country," and acted "to reverse the regime of official discrimination and segregation on the basis of disability.").

to isolate and segregate individuals with disabilities, [and this] continue[s] to be a serious and pervasive social problem";[229] 2) "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;"[230] and 3) the discrimination suffered by persons with disabilities includes "a history of purposeful unequal treatment,"[231] as well as "outright intentional exclusion, . . . segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities."[232] Accordingly, the Congress enacted the ADA to "provide a . . . national mandate for the elimination of discrimination against individuals with disabilities."[233]

This synopsis of ADA's legislative process demonstrates that the ADA is sufficiently distinct from RFRA in this respect. As the Court found in *Boerne*, "[t]he history of [religious] persecution in this country detailed in the [RFRA] hearings mentions no episodes occurring in the past 40 years."[234] To the contrary, as the discussion above shows, Congress accumulated abundant evidence of society-wide discrimination against persons with disabilities as of the enactment date of the ADA and found that state-sponsored disability-based unconstitutional discrimination was a prevalent form of that problem. The ADA's legislative record and statement of findings and purposes show that Congress was aware of the state-sponsored unconstitutional discrimination prevalent in society at the time of the ADA's enactment. Furthermore, they show that Congress enacted the ADA to prevent or remedy such discrimination. In other words, the legislative processes of the ADA identified discrimination sufficient to satisfy *Boerne*'s congruence requirement.

The ADA also satisfies *Boerne*'s proportionality prong. As discussed next, when enacting the ADA Congress fully satisfied its obligation under federalism not to infringe unnecessarily on the states' autonomy to govern. First, the ADA regulates certain constitutional state action in order to integrate persons with disabilities into mainstream society and thereby prevent future unconstitutional discrimination by attacking its cause—the prejudice

229. ADA, 42 U.S.C. § 12101(a)(2).
230. ADA, 42 U.S.C. § 12101(a)(3).
231. ADA, 42 U.S.C. § 12101(a)(7).
232. ADA, 42 U.S.C. § 12101(a)(5).
233. ADA, 42 U.S.C. § 12101(b)(1).
234. Boerne, 521 U.S. at 530. As the Court said, "[a] comparison between RFRA and the Voting Rights Act is instructive. In contrast to the record which confronted Congress and the judiciary in the voting rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* RFRA's supporters acknowledged that this "absence of more recent episodes" was explained by the contemporary reality that "deliberate persecution is not the usual problem in this country" and "[l]aws targeting religious practices have become increasingly rare." *Id. Cf. College Savings Bank I*, 119 S. Ct. at 2214 (finding "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.").

arising from isolation of the disabled. In addition, the methods Congress chose to eliminate social segregation are measured to accommodate the competing legitimate federal and state interests.

Congress's strategy in the Act for preventing future invidious discrimination was to integrate persons with disabilities into the economic, political, and social mainstream, as the ADA's legislative history,[235] academic literature,[236] and the Act itself[237] each demonstrate. Cook has summarized

235. The Report from the Senate's Committee on Labor and Human Resources could not have been more explicit: "The purpose of the ADA is to . . . bring persons with disabilities into the economic and social mainstream of American life." SENATE REPORT, *supra* note 205, at 2. This purpose was a response to legislative testimony, reports from several Presidential commissions, and poll data, showing that "individuals with disabilities have been isolated and subjected to discrimination and such isolation and discrimination is still pervasive in our society." *Id.* at 6. U.S. Attorney General Dick Thornburgh, who testified before the Committee, agreed, pointing out that "many persons with disabilities in this Nation still lead their lives in an intolerable state of isolation and dependence." *Id.* at 9.

The ADA's legislative history in the House of Representatives similarly demonstrates a legislative concern for eliminating the segregation experienced by persons with disabilities. *See e.g.*, Report of the House Committee on Public Works and Transportation, H.R. REP. No. 101-485(I), at 2-3 (1996); Report of the House Committee on Energy and Commerce H.R. REP. No. 101-485(IV), at 25 (1990) (stating "[t]he ADA renews the commitment made by Congress in enacting Section 504 to promote the mainstreaming of individuals with disabilities . . . by ensuring that the Federal government plays a central role in enforcing . . . standards"). *See also* 136 CONG. REC. H2413 (daily ed. May 17, 1990) (statement of Sen. Bennett) (asserting that the "[ADA] is a compassionate and useful tool to bring into the mainstream of life many who otherwise must suffer on the edges or in the shadows of real life.") 136 CONG. REC. H4621 (daily ed. July 12, 1990) (statement of Rep. Fish) (declaring that "[i]n . . . his acceptance speech for the Republican nomination, President Bush pledged to 'do whatever it takes to make sure the disabled are included in the mainstream.' Today we are in the final stages of the effort to fulfill that promise.").

236. *See, e.g.*, BURGDORF, DISABILITY DISCRIMINATION, *supra* note 13, at 15 (arguing "full participation and integration [and] the concept of independent living provide[ ] a significant frame of reference for interpreting laws that address discrimination against people with disabilities"); Burgdorf, *Substantially Limited, supra* note 2, at 515 & n.556 (referencing examples from many different statutes of Congress's endorsement of integration as the "national policy regarding individuals with disabilities"); Cook, *supra* note 184, at 422 (asserting that "[n]umerous statements in the [ADA's] legislative history specifically endorse the prohibition of segregated public services . . . . [T]he House Judiciary Committee Report stressed, '[I]ntegrated services are essential [to] eradicat[e] the invisibility of the handicapped.'") (quotations omitted); *id.* at 424 (stating that the argument made on the Senate floor was that the ADA "will roll back the unthinking and unacceptable practices by which disabled Americans today are segregated, excluded, and fenced off from fair participation in our society by mindless biased attitudes and senseless physical barriers.") (quoting the remarks of Sen. Edward Kennedy). *See also* John J. Sarno, *The Americans With Disabilities Act: Federal Mandate to Create an Integrated Society*, 17 SETON HALL LEGIS. J. 401, 414-15 (1993) (noting "[t]he ADA clearly acknowledges the myths and fears [about disability] and adopts [the] reasoning [that they] are as handicapping as are the physical limitations that flow from actual impairment").

237. *See, e.g.*, ADA, 42 U.S.C. § 12101(a)(1)(2) (finding "historically society has tended to isolate and segregate individuals with disabilities"); ADA, 42 U.S.C. § 12101(a)(5) ("individuals with disabilities continually encounter various forms of discrimination, including . . . exclusionary qualification standards and criteria, [and] segregation"); ADA, 42 U.S.C. § 12101(a)(8) ("the Nation's proper goals regarding individuals with disabilities are to assure . . . full participation, independent living, and economic self-sufficiency"); ADA, 42

this congressional strategy as follows:[238]

> [As] Representative Schroeder observed: "The attitudes nondisabled persons have toward fellow citizens are often the most important factor leading to segregation, exclusion, discrimination, and unemployment." Congress understood that "[t]o be segregated is to be misunderstood, even feared. If we have learned any lessons in the last 30 years, it is that only by breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression," [quoting Representative Collins]. The whole idea behind the ADA was to "help break down the psychological barriers which disabled Americans face by fostering a spirit of familiarity and cooperation," [quoting Representative Levine].

The Bush administration endorsed this strategy to reshape prejudicial attitudes by integrating persons with disabilities into the mainstream. As the Attorney General testified before Congress:[239]

> Attitudes can only be reshaped gradually. One of the keys to this reshaping process is to increase contact between and among people with disabilities and their more able-bodied peers. And an essential component of that effort is the development of a comprehensive set of laws supported by a helpful set of regulations that all work together to promote the integration of people with disabilities into our communities.

Integrating persons with disabilities into mainstream society is a rational means of eliminating prejudice against them. The academic literature overwhelmingly substantiates the rationality of that strategy. Weber's work, for example, shows the pervasiveness of unconscious attitudes, unexamined stereotypes, and prejudices regarding persons with disabilities.[240] He has written: "Stereotypes and prejudices grow easily in the absence of day-to-day contact with human beings who are different. Research shows that employers who have no employees with disabilities have more negative attitudes towards workers with disabilities than those who have moderate or large numbers."[241] He continues: "attitudinal changes among

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U.S.C. § 12101(b)(1) ("[i]t is the purpose of this chapter . . . to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

238. Cook, *supra* note 184, at 440-41.

239. *See id.* at 441 & n.335 (quoting statement of Att'y Gen. Dick Thornburgh).

240. Weber, *supra* note 172, at 133 & n.48 (citing Sara D. Watson, *Applying Theory to Practice: A Prospective and Prescriptive Analysis of the Implementation of the Americans With Disabilities Act*, 5 J. DISABILITY POL'Y STUD. 1, 7 (1994) (collecting and evaluating attitudinal surveys)).

241. Weber, *supra* note 172, at 133 & n.49 (citing Sharon E. Walters & Clora Mae Baker, *Title I of the Americans With Disabilities Act: Employer and Recruiter Attitudes Toward Individuals with Disabilities*, 20 J. REHABILITATION ADMIN. 15, 20 (1996) (contrasting

employers take time.... Stereotyping is particularly hard to overcome.... If prejudices keep individuals with disabilities away from those without them, the very stereotypes that led to the exclusion are unlikely to be challenged."[242] Furthermore, the presence of persons with disabilities in the workplace "is crucial to dispelling myths about individuals with disabilities" because by working with such individuals, non-disabled persons can learn to recognize persons who are disabled as human beings who "do not in all ways conform to the norm."[243]

Summarizing an extensive body of research, Cook reports:

> The research shows, without doubt, what should be obvious, that prejudice is lessened through integration. When individuals, especially young people, associate with one another, learn one another's attributes, and are able to use those perceptions and facts, prejudice is lessened. The effect is increased the longer and greater the interaction between persons who are and are not disabled is.[244]

Integration erodes prejudice by improving the attitudes toward disability by the nondisabled—including teachers, employers, neighbors, and parents of persons with disabilities.[245] It also works by helping persons with disabilities to form bonds with other persons outside the disability community. These bonds may help persons with disabilities to conform to the cultural norms of mainstream society: enhancing skills, preparing for employment, and generally learning adaptive behavior.[246]

Moss and Malin also stress that integration is a valuable way to circumvent the self-reinforcing nature of prejudice. They have written:

> [O]ur extrapolations from what we know are not just randomly imperfect, but are systematically imperfect in particular directions that overstate certain risks, including those perceived via stereotypical proxies.... [E]xcessive use of stereotypes stems partially from [the reality that] stereotypical views [are] self-reinforcing.

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score on test instrument of employer representatives with varying degrees of contact with employees with disabilities)).

242. Weber, *supra* note 172, at 136-37.

243. *Id.* at 129 (citing the views of Sen. Robert T. Stafford). After reviewing the academic literature, Weber concluded it demonstrates that people who are isolated from work "are not part of the consciousness of those who are there. In a real sense, people with disabilities who are not integrated into society are invisible to the rest of society. This invisibility fosters social attitudes of fear and condescension. Integration fosters realistic attitudes, demonstrating that persons with disabilities are not threatening, helpless, or evil. Society at large benefits when false fears die out and truth prevails." *See id.* at 130.

244. Cook, *supra* note 184, at 441-42 & nn.336-338.

245. *See id.* at 448 & nn.375-80 (finding "when peers with and without disabilities receive accurate information about one another and are provided with opportunities to interact with one another on an ongoing basis, social acceptance occurs.") (citing extensive authority).

246. *Id.* at 450-55.

> Employers who believe persons with disabilities to be less productive workers hire fewer of them and thus see fewer productive disabled workers and effective accommodations. As is often the case, perception precedes reality, but then creates it.[247]

A related theory is what Moss and Malin call "confirmation bias." As they have explained, one thing that "insulates bigotry" is that "[p]eople are not equally open to all information, but more open to that which comfortably confirms their [pre-existing] views, more inclined to spin disconfirming evidence to fit those views, and more apt to seek confirmatory facts and opinions actively."[248] Because of confirmation bias theory and the self-reinforcing nature of prejudice, the "much-vaunted marketplace of ideas does not fully dispel stereotypes, but reinforces them."[249] Creating legal obligations that require the integration of qualified persons with disabilities into the workplace may challenge the very stereotypes that led to exclusion in the first place and that were likely to remain unchallenged without the aid of law.

Integration also breaks down prejudice through increasing the overall work performance of persons who are disabled. Discrimination lowers the performance of its victims with the self-fulfilling effect of reinforcing negative stereotypes.[250] Therefore, disability-based discrimination has the power to perpetuate negative stereotypes of disabled people by creating self-fulfilling predictions of inadequate performance. Bales argues that use of stereotypes is pernicious in several ways for members of the class who

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247. Scott A. Moss & Daniel A. Malin, *Public Funding for Disability Accommodations: A Rational Solution to Rational Discrimination and the Disabilities of the ADA*, 33 HARV. C.R.-C.L. L. REV. 197, 207 (1998).

248. *Id.* at 208.

249. *Id.*

250. Moss and Malin have explained the process this way:

> Workers in a group that is discriminated against . . . face . . . indirect costs due to their reduced labor market opportunities. Discrimination induces exits: those encountering discrimination learn to avoid situations in which they are likely to face it, which causes them to bear opportunity costs for foregoing otherwise profitable activity. [An employee who is discriminated against] spends less time, effort, and money amassing human capital, as discrimination lowers the rate of return on that capital. [Short of total exit from the labor market, discrimination induces other harmful market strategies;] low-risk behavior by creating a fear of making mistakes that could give a discriminatory employer an excuse for termination [or] induce[ment] of high-risk behavior aimed at maximizing the odds of a stellar, standout performance that could beat the odds. Either option, however, is a deviation from risk-neutrality, the risk orientation that maximizes expected outcome.
>
> Thus, to the extent that discrimination induces its victims to alter their approach to risk, it actually decreases their expected outcomes, and thus the average success of their group. This creates a cycle in which discrimination, however motivated, induces worker strategies that strengthen the basis for statistical discrimination by diminishing the group's average success.

Moss & Malin, *supra* note 247, at 205-06.

do not possess the negative attributes of the stereotype: 1) the discriminated-against group will underinvest in things such as education and training, verifying the premise of the stereotype and encouraging it; 2) assigning persons with disabilities to dead-end jobs hinders their skill development, reinforcing the stereotype that they cannot do the job or that persons with disabilities work less diligently; and 3) employers are more likely to "focus on substandard performance of some disabled individuals and disregard above-average performance of other disabled."[251] In sum, by requiring that persons with disabilities be integrated into the workplace, the law disrupts the self-perpetuating nature of disability-based discrimination.

The ADA sections that prohibit constitutional state action either ban conduct that screens out individuals with disabilities in various ways[252] or requires, under certain circumstances, that the employer provide reasonable accommodation to an otherwise qualified individual with a disability.[253] In either case, the common denominator is that these sections are designed to integrate persons with disabilities into the mainstream.[254]

These ADA sections balance the goal of integration with the state governments' competing interest in governing autonomously and maintaining discipline and efficient operations. For example, nothing in the ADA requires employers to hire unqualified individuals or to hire individuals with disabilities over others who are equally or more qualified.[255] Rather, the ADA prohibits only discrimination on the basis of disability and then only with regard to "qualified individuals with disabilities."[256] The Act defines this phrase as "an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires."[257] The EEOC Interpretive Guidance has suggested that to be "qualified," an individual

251. Bales, *supra* note 184, at 1211-12.

252. *See* ADA, 42 U.S.C. § 12112(b)(3)(A) (banning the use of discriminatory standards, criteria, or methods of administration); 42 U.S.C. § 12112(b)(6) (banning the use of qualification standards, employment tests or other selection criteria that tend to screen out individuals with disabilities unless job-related and consistent with business necessity); and 42 U.S.C. § 12112(b)(7) (requiring that tests concerning employment be selected and administered to reflect only the essential qualifications of the applicant or employee).

253. *See* ADA, 42 U.S.C. § 12112(b)(5). This Section also prohibits denying employment opportunities to such a person because the person may need a reasonable accommodation.

254. *See also* Lamb v. John Umstead Hosp., 19 F. Supp. 2d 498, 508 (E.D.N.C. 1998) (finding "Congress's imposition of affirmative conduct, such as reasonable accommodation. . . requirements[,] constitute only one of the means chosen by Congress to effectuate a substantive equal protection right—freedom from discrimination—to which the disabled are entitled.").

255. *See* EEOC Interpretive Guidance, Background, 29 C.F.R. § 1630 (1998) (finding "[t]he ADA seeks to ensure access to equal employment opportunities based on merit. It does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities.").

256. ADA, 42 U.S.C. § 121122(a).

257. ADA, 42 U.S.C. § 12111(8).

must "satisf[y] the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc."[258] Moreover, by requiring that the disabled employee perform the "essential functions" of the job, the Act guarantees the employer autonomy to exercise independent "business judgment with regard to production standards, whether qualitative or quantitative, [and does not] require employers to lower such standards."[259] In short, the Act predicates the notion of "reasonable accommodation" on a need to balance the goal of integration with the employer's need to maintain an efficient operation. Accordingly, "[a]n employer. . . is not required to reallocate essential functions" to other employees.[260] Nor is the accommodation required if it would produce an "undue hardship" for the employer, defined to include:

> an action requiring significant difficulty or expense, when considered in light of . . . the nature and cost of the accommodation . . ., the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation . . ., the overall financial resources of the [employer], . . . [and] the type of operation or operations of the [employer]."[261]

Moreover, the law does not require an employer to hire an individual with a disability who "pose[s] a direct threat to the health or safety of himself/herself or others."[262] To be a direct threat, the risk must "pose[ ] a significant risk, *i.e.,* high probability of substantial harm; a speculative or remote risk is insufficient."[263] This provision illustrates again Congress's attempt to balance the competing interests of integration with the state's legitimate interests.

The ADA's measured attempts to accommodate competing state and federal interests sharply distinguish it from RFRA. Recall that RFRA created "universal coverage"[264] that threatened "intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter,"[265] by providing a federal claim to "any individual who alleges a substantial burden on his or her free

258. EEOC Interpretive Guidance, 29 C.F.R. § 1630.2(m) (1998). *See also* Burgdorf, *Substantially Limited, supra* note 2, at 438 (clarifying that "the 'qualified individual with a disability' language of the . . . ADA . . . was to make crystal clear that it is not unlawful discrimination to exclude people with disabilities if they are unqualified to perform safely and efficiently.").

259. 29 C.F.R. at § 1630.2(n).

260. *Id.* at § 1630.2(o).

261. ADA, 42 U.S.C. § 12101(10).

262. 29 C.F.R. § 1630.2(r).

263. *Id.* Important factors are "[t]he duration of the risk; [t]he nature and severity of the potential harm; [t]he likelihood that the potential harm will occur; and [t]he imminence of the potential harm." *Id.*

264. Boerne, 521 U.S. at 532.

265. *Id.* at 516.

exercise of religion."[266] The ADA, in contrast, provides a cause of action to a narrowly defined class of "qualified" individuals with a disability who must be provided an accommodation only if it is "reasonable" and does not create an "undue hardship."[267] As demonstrated, the ADA is limited to furthering the integration of the disabled while including provisions that guarantee state employers the right to enforce policies that promote legitimate interests.[268]

Another distinction between the two statutes is that in RFRA, intrusions into states' autonomy were not offset by the benefit of preventing unconstitutional behavior.[269] As shown above, exactly the opposite is true with respect to the ADA, which is animated by empirical evidence of pervasive societal discrimination against persons with disabilities, including unconstitutional state-sponsored disability-based discrimination. In short, the ADA satisfies both the congruence and proportionality prongs of the *Boerne* test that RFRA failed. Congress possesses Section 5 power both to

266. *Id.* at 532.

267. See discussion *supra* notes 255-56 and accompanying text.

268. See discussion *supra* note 261 and accompanying text. *See also* Driesse v. Florida Bd. of Regents, 26 F. Supp. 2d 1328 (M.D. Fla. 1998) (discussing ADA provisions precluding the award of punitive damages for claims brought under the ADA against a state).

In *Boerne*, moreover, the Court noted the unlikelihood of litigation success by state and local governments sued under RFRA. The Court reasoned that given "[t]he stringent test RFRA demands of state laws[,] . . . 'many laws will not meet the test' [and] [e]ven assuming RFRA would be interpreted in effect to mandate some lesser test, . . . the statute nevertheless would require searching judicial scrutiny of state law with the attendant likelihood of invalidation." Boerne, 521 U.S. at 533-34. By contrast, the ADA's litigation record to date has been a resounding success for employers, public and private. For example, Peter Blanck and Mollie Marti report that "more than half of all Title I charges filed with the EEOC are dismissed because, among other reasons, the plaintiff alleging discrimination failed to show that he or she was qualified for the position." Peter David Blanck & Mollie Weighner Marti, *Attitudes, Behavior and the Employment Provisions of the Americans with Disabilities Act*, 42 VILL. L. REV. 345, 376 (1997). The most extensive study to date of ADA litigation results is John Parry, Ed., *American Bar Association Survey on Court Rulings Under Title I of the Americans With Disabilities Act*, 119 Daily Lab. Rep. 1 at AA-1 & E-1, 1998 (BNA) (June 22, 1998). That survey examined every reported and unreported ADA court case between FY 1992 through 1997. Of 1200 ADA court cases examined, the study found that employers prevailed in 92% of the cases where a final decision had been rendered. It also found that of the 83,000 ADA charges resolved by the EEOC during that period, 86.4% were resolved in the employer's favor. The primary reasons for the employer prevailing in the vast majority of cases were the "substantive and procedural provisions that are built into the Act . . . to prevent employers from being sued for specious reasons." *Id.* at E-1. Specifically, most cases are never considered on the merits either because an employee's impairment is not sufficiently limiting to qualify as a disability, or is so substantially limiting that the employee was not "otherwise qualified." The report characterized this as a "Catch-22." *Id.*

269. *See* Boerne, 521 U.S. at 534 (finding "[t]he substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith.*").

enact it and provide for a private damage remedy against the states in federal court to enforce it.[270]

THE NEW FEDERALISM AND THE ADA – STATE SOVEREIGN IMMUNITY FROM WHAT?

What legal consequences would follow if the above conclusions are erroneous and Congress lacks Section 5 authority to extend all of the ADA to the states? In other words, immunity Congress may not abrogate when enacting the ADA, or other regulatory statutes, is immunity from what? With respect to the ADA, clearly some private damage actions against the states in federal court could continue; some of what the ADA prohibits is unconstitutional behavior by states and Section 5 empowers Congress to prohibit unconstitutional state action.[271] But what about the ADA's prohibition of constitutional state action?

Were Congress not to possess Section 5 power to enact the ADA's proscription of state action that is constitutional, a plaintiff's initial task would be to establish an alternative source of constitutional authority, such as the power granted to Congress under the Commerce Clause. The argument that Congress exercised its commerce power in enacting the ADA[272] is supported by congressional findings that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis. . . and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity."[273] Providing that a rational basis exists for them, courts will defer to such findings.[274] No question has been raised in the lower courts that these congressional findings lack a rational basis.[275]

270. The above analysis has concentrated on Title I, the employment provisions of the ADA. The Section 5 analysis of the other three substantive titles, Title II (public services), Title III (public accommodations), and Title IV (telecommunications), is almost identical. The aim (congruence) is elimination of constitutionally impermissible discrimination and the means (proportionality) are to integrate persons with disabilities into the mainstream. The other titles differ from Title I only in focus, not in aim or strategy.

271. *See* Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168, 1173 (S.D. Ohio 1997) (holding the ADA unconstitutional to the extent that it provides persons with disabilities a right to a reasonable accommodation, but "[t]o the extent that these provisions [of the ADA] prohibit intentional discrimination based on a person's disability in hiring, termination and other conditions of employment, these provisions meet th[e] goal [of prohibiting unconstitutional discrimination against the disabled].).

272. *See* ADA, 42 U.S.C. § 12101(b)(4).

273. ADA, 42 U.S.C. § 12101(a)(9).

274. *See* Hodel v. Virginia Surface Min. & Reclamation Ass'n, 452 U.S. 308, 311 (1981) (upholding Surface Mining Control and Reclamation Act of 1977 against pre-enforcement challenge to its constitutionality under the Commerce Clause by finding Congress to have a rational basis for its belief that surface coal mining has substantial effects on interstate commerce.)

275. *See, e.g.*, Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574, 579 (S.D. Cal. 1993) (Congressional enactment of Title III of the ADA was well within Congress's power to regulate interstate commerce under the Commerce Clause).

Therefore, a successful challenge to Congress's authority to enact the ADA under its commerce powers, and to extend its provisions to the states, would need to be based on some theory grounded in federalism, limiting the reach of the commerce power. Two such theories offer themselves.

There exists a developing view that legislation enacted under the Necessary and Proper Clause "is not 'proper' if it violates the principle of state sovereignty reflected in various constitutional provisions."[276] Language in the Court's decision in *Printz v. United States*[277] lends some support to this interpretation.[278] Gardbaum summarizes the argument as follows: "if Section 5 imports such heightened protection for federalism as expressed in [*Boerne's*] more rigorous proportionality test, it is not easy to understand why the Necessary and Proper Clause would not."[279] Under that interpretation, *Boerne* explicitly constricted Section 5 and implicitly constricted the commerce power.

A related theory is the doctrine of intergovernmental immunity, which once flourished,[280] then floundered,[281] and is now in resurgence. That resurgence began in *New York v. United States*, where the Court reaffirmed intergovernmental immunity to the extent that "Congress may not 'commandee[r] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program .... Congress [lacks] the ability to require the States to govern according to Congress's instructions.'"[282] Five years later, in *Printz*, the Court extended its prohibition of Congressional commandeering to include commandeering state executive officers. It held in *Printz* that Congress may not "direct state law enforcement officers to participate. . . in the administration of a federally enacted regulatory scheme."[283]

276. Gardbaum, *supra* note 51, at 684 (citing Gary Lawson & Patricia B. Granger, *The "Proper" Scope of the Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 271-72, 289-97 (1993)).

277. 521 U.S. 898 (1997).

278. *Id.* at 923-34 (suggesting that "[w]hen a 'law . . . for carrying into execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a 'Law . . . proper for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such.'").

279. Gardbaum, *supra* note 51, at 685; (arguing that "[i]n the context where federal law threatens to displace primary state authority, affording state interests such increased weight in Congress's decision-making process seems a reasonable interpretation of the federalism principle that, at least as part of the 'spirit' of the Constitution, constrains the exercise of the power according to *McCulloch*").

280. *See* National League of Cities v. Usery, 426 U.S. 833 (1976) (reasoning Congress lacks commerce power to displace states' "'freedom to structure integral operations in areas of traditional governmental functions,' *id.* at 852, or 'to force directly upon the States [Congress's] choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.'" *Id.* at 854.

281. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 557 (1985) (holding "*National League of Cities* is overruled.").

282. New York v. United States, 505 U.S. 144, 161, 162 (1992).

283. *Printz*, 521 U.S. at 904.

Cases such as *Boerne*, *New York*, and *Printz* signal a judicial overhaul of federalism doctrine. This development, however, does not seem likely to deny Congress the commerce power to enact a statute such as the ADA. Reformulating the Necessary and Proper Clause into a Section 5 clone—by limiting the commerce power as *Boerne* has limited Section 5—would nullify the Court's guidance in *Printz* that Congress retains authority to regulate the states as part of "a program that affects States and private parties alike."[284] This problematic reversal of policy would, in effect, reverse *Garcia* and return federalism to the *National League of Cities* quagmire.[285]

Congress's ability to apply the ADA to the states through its commerce power becomes more precarious, however, the more the courts view the ADA as a cost-shifting and entitlement-producing mechanism. In *Printz*, the Court declared a federal law unconstitutional, in part, because its burden on the states undermined federal accountability.[286] In *Nihiser v. Ohio Environmental Protection Agency*, the district court applied this concern for accountability to the ADA, reasoning that the Act's accommodation provisions essentially create entitlements and shift costs to the states.[287] In addition, viewing the ADA as creating entitlements and an

284. *Id.* at 898 (citing New York v. United States, 505 U.S. at 160).

285. *Compare* Pryor v. Reno, 171 F.3d 1281 (11th Cir. 1999), *vacated and remanded*, No. 99-61, 2000 WL 29249, at *1 (U.S. Jan. 18, 2000) *petition for cert. filed*, (No. 99-61) (July 6, 1999) (relying on recent intergovernmental immunity cases to find the federal Driver's Privacy Protection Act (DPPA) unconstitutional because the statute, which regulates the dissemination and use of information contained in state motor vehicle records, is not a law of general applicability but rather applies only to the states); *and* Condon v. Reno, 155 F.3d 453, 461-62 (4th Cir. 1998), *rev'd*, No. 98-1464, 2000 WL 16317, at *1 (U.S. Jan. 12, 2000); *with* Oklahoma v. United States, 161 F.3d 1266 (10th Cir. 1998), *cert. denied*, No. 98-1760, 2000 WL 29326, at *1 (U.S. Jan. 18, 2000), (No. 98-1760) (May 3, 1999) (holding DPPA constitutional because it imposes restrictions directly on state activity rather than requiring states to enact or administer a federal regulatory program designed to address problems created by third persons); *and* Travis v. Reno, 163 F.3d 1000 (7th Cir. 1998), *cert. denied sub nom.* Wisconsin Dep't of Transp. v. Reno, No. 98-1818, 2000 WL 29345, at *1 (U.S. Jan. 18, 2000) (finding "states and private parties may be the object of regulation, although states may not be compelled to become regulators of private conduct."). *See also* Brzonkala v. Virginia Polytechnic Inst. and State Univ., 169 F.3d 820 (4th Cir. 1999) (en banc) (finding 1994 Violence Against Women Act's creation of a civil cause of action for victims of gender-motivated crimes of violence beyond Congress's commerce power, since statute regulates activities not substantially affecting interstate commerce), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

286. "By forcing state governments to absorb the financial burden of implementing a federal regulatory program, members of Congress can take credit for 'solving' problems without having to ask their constituents to pay for the solutions with higher federal taxes." Printz, 521 U.S. at 930.

287. Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168 (S.D. Ohio 1997). The court explained:

> [the ADA is] the product of a determination by Congress that, regardless of whether discrimination is present, employers, not disabled individuals, are better equipped financially to incur the costs of integrating disabled employees with special needs into the workplace . . . . [T]he court is troubled by the concept that Congress could transfer the costs of any social program to the states by the simple and circular expedient of defining as discrimination the failure on the part of the

unfunded federal mandate to the states could lead courts to conclude that the ADA commandeers the state's treasury, and governmental processes, contrary to the proscriptions of the intergovernmental immunity doctrine.[288] That would be an extension of the *Printz,* principle but hardly one that defies defense under *Printz*'s rationale.

But viewing the ADA as simply an entitlement-creating federal statute is a grievous misreading of the Act. Congress enacted the ADA to integrate persons with disabilities into the mainstream of American life as a means of both preventing invidious discrimination[289] and of unburdening interstate commerce from the exorbitant costs of discrimination.[290] Of course, ADA compliance necessitates financial expenditures by the states, as is true of many other federal regulatory programs whose constitutionality the Court has upheld. Examples include the Fair Labor Standards Act (FLSA),[291] railroad safety legislation,[292] civil rights legislation,[293] and labor relations legislation.[294] The ADA falls within the mainstream of these Commerce Clause-based statutes.[295] The ADA does not create an entitlement for a special group any more than does legislation providing for overtime pay, or assurances that state employees' chosen bargaining

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> state employer to provide benefits to members of special interest groups . . . . Congress has not only created substantive rights on the part of the disabled, but has charged the states as employers with the responsibility of bearing the costs of these newly-created entitlements. These provisions constitute a substantial infringement on a traditional area of state sovereignty . . . .

Id. at 1175-76.

288. *See* Thompson v. Ohio State Hosp., 5 F. Supp. 2d 574, 580-81 (S.D. Ohio 1998) (holding that the Family Medical Leave Act (FMLA) does not abrogate states' sovereign immunity because, *inter alia,* it "creates an entitlement . . . which is to be borne by employers [by] impos[ing] a significant financial burden. It would be the state employer which would either have to absorb the cost of decreased productivity or expend its resources in an attempt to replace absent employees while they enjoy their leave benefits under the FMLA . . . . This would be an inappropriate interference into a traditional area of state sovereignty . . . .").

289. See discussion *supra* notes 235-251 and accompanying text.

290. See discussion *supra* note 273 and accompanying text.

291. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (upholding application of the minimum-wage and overtime requirements of the FLSA to a municipally-owned transit system).

292. *See* United States v. California, 297 U.S. 175 (1936) (upholding application of the federal Safety Appliance Act to a state-owned railroad).

293. *See* EEOC v. Wyoming, 460 U.S. 226 (1983) (upholding the applicability of Age Discrimination in Employment Act (ADEA) to the states).

294. *See* United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982) (upholding application of the Railway Labor Act to the state-owned Long Island Railroad).

295. For example, in a study of the experience of Sears, Roebuck, and Co. from 1978-92, the average cost of providing a reasonable accommodation was $121.42 and 69% of the accommodations required no cost. *See* RUTH COLKER, THE LAW OF DISABILITY: CASES AND MATERIALS 86 (1995). Even these costs must be discounted by the substantial savings in workers' compensation benefits achieved by rapidly returning workers to their jobs after providing some accommodation. *See* Weber, *supra* note 172, at 136 n.61 (citing a study by James G. Frierson, *The Legality of Medical Exams and Health Histories of Current Employees Under the Americans with Disabilities Act,* 17 J. REHABILITATION ADMIN. 83, 86 (1993),

representative will be recognized as the exclusive bargaining representative of a particular craft or class.

Assuming that Congress's commerce power is sufficient to enact the ADA, the United States government could sue the states in federal court to redress ADA violations, even if Congress lacked Section 5 power to abrogate the states' Eleventh Amendment immunity. The Eleventh Amendment does not apply to suits against the states brought by the United States.[296] But what about the option of bringing a private ADA action for damages against a state in the state's own court?

Several lower federal courts, in dicta, had assumed that state court litigation survived even when *Seminole Tribe* precluded Congress from abrogating state sovereign immunity in federal court.[297] Clearly, a state may authorize its courts to hear ADA actions against the state in its own courts.[298] A more complex question arises when a state refuses to authorize its courts to hear private ADA damage suits against the state in state court.

The Eleventh Amendment itself only speaks to the judicial power of the United States, not to the judicial power of state courts. Moreover, the Supreme Court has clearly stated that "the Eleventh Amendment does not apply in state courts."[299] But the question cannot be dispatched so simply

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which described a $310,000 annual workers' compensation savings by one company, and $4 million savings by another). *See also,* Bales *supra* note 184, at 1194 (stating that "[i]ndications of cost-benefit analysis pervade both the [ADA] and its legislative history." This "is a far cry from the 'Thou shall' or 'Thou shall not' mandate of a [typical civil rights] statute . . . .").

296. United States v. Mississippi, 380 U.S. 128 (1965).

297. *See Coolbaugh*, 136 F.3d at 441 (5th Cir. 1998) (Smith, J., dissenting) (holding that Congress lacks Section 5 authority to enact the ADA will not "eviscerate the basic protections the ADA gives disabled individuals against discriminatory state action [because] the plaintiff could still sue a state in state court to enforce the obligations the state owes the disabled under the ADA."). *Accord* Chavez v. Arte Publico Press, 157 F.3d 282, 291 (5th Cir. 1998) (finding that while copyright suits against the states cannot be brought in federal court because Congress lacks Section 5 power to enact the copyright laws, the Eleventh Amendment does not shield states from being sued in state court).

298. Since the "Court begins with the presumption that state courts enjoy concurrent jurisdiction" to hear federal questions, there is no reason to believe that state courts may not hear ADA suits if they choose. Gulf Offshore Co. v. Mobile Oil Corp., 453 U.S. 473, 478 (1981). The presumption of concurrent federal and state court jurisdiction to hear federal questions can be rebutted only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." *Id. Accord* Tafflin v. Levitt, 493 U.S. 455 (1990) (establishing the concurrent jurisdiction of state courts to hear civil RICO claims). *See also* Yellow Freight Sys. v. Donnelly, 494 U.S. 820 (1990) (establishing the concurrent jurisdiction of state courts to hear claims under Title VII of the 1964 Civil Rights Act). Nothing in the ADA remotely suggests that state courts may not hear ADA claims. To the contrary, the ADA states that "[a] state shall not be immune under the eleventh amendment . . . in Federal *or State court of competent jurisdiction*," clearly signaling a congressional expectation that ADA suits may be brought in state court. 42 U.S.C. § 12202 (emphasis added).

299. Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 204-05 (1991) (quoting Will v. Michigan Dep't of State Police, 491 U.S. 58, 63-64 (1989)).

since the Court now interprets the Constitution as reaffirming an overarching sovereign immunity principle that transcends the literal language of the Eleventh Amendment.[300]

Until quite recently state courts had taken opposing viewpoints concerning a state's ability to refuse to be sued in its own court system. For example, in *Alden v. State*[301] (Alden I) a state employee filed an FLSA claim against the state of Maine in state court. A federal court had dismissed the identical claim because the FLSA does not abrogate the state's Eleventh Amendment sovereignty immunity.[302] In *Alden I*, the Maine Supreme Judicial Court also dismissed the state court claim, holding that "sovereignty immunity . . . protect[s] the State from suit by private parties in its own courts without its consent, even when the cause of action derives from federal law."[303] The court reasoned: "If Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against the same claims."[304] Impetus for this view is that "[t]o hold otherwise, by concluding that a state, immune from suit in federal court, must defend the same suit in its own courts, would effectively vitiate the Eleventh Amendment."[305] Or, as another court has put it, "[i]t would be anomalous if the 'States' rights' justices who authored *Seminole Tribe* and who had vigorously dissented in *Garcia*, acted to uphold [the] States' Eleventh Amendment immunity from suit but, at the same time, affirmed congressional

300. *See* discussion *supra* note 31 and accompanying text.

301. 715 A.2d 172 (Me. 1998), *aff'd*, 119 S. Ct. 2240 (1999).

302. The FLSA was enacted solely pursuant to the commerce power; since *Seminole Tribe*, the commerce power has been unavailable to Congress to abrogate states' sovereign immunity. *See* discussion *supra* notes 35-38 and accompanying text. The courts uniformly agree that FLSA minimum wage and overtime claims against the state may not be brought in federal court. *See, e.g.*, Powell v. Florida, 132 F.3d 677 (11th Cir.), *cert. denied*, 118 S. Ct. 2297 (1998); Aaron v. Kansas, 115 F.3d 813 (10th Cir. 1997); Close v. New York, 125 F.3d 31 (2d Cir. 1997); Mills v. Maine, 118 F.3d 37 (1st Cir. 1997); Quillin v. Oregon, 127 F.3d 1136 (9th Cir. 1997); Raper v. Iowa, 115 F.3d 623 (8th Cir. 1997); Wilson-Jones v. Caviness, 99 F.3d 203 (6th Cir. 1996). *See also* Varner v. Illinois State Univ., 150 F.3d 706, 711 n.5 (7th Cir. 1998) (noting that "all of the circuits to have addressed the issue following *Seminole Tribe* have held that the minimum wage and overtime provisions of the FLSA do not validly abrogate the States' Eleventh Amendment immunity"). *Cf. id.* at 712-17 (holding Equal Pay Act amendment to the FLSA to be a valid abrogation of states' Eleventh Amendment immunity); Ussery v. Louisiana, 150 F.3d 431 (5th Cir. 1998) (same); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833 (6th Cir. 1997) (same).

303. Alden I, 715 A.2d at 174. *See also* Jackson v. State, 544 A.2d 291, 298 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989) (holding that "the State may constitutionally interpose its sovereign immunity in state court as a bar to an award of damages under . . . the [federal] Rehabilitation Act.").

304. Alden I, 715 A.2d at 174. *See also* Morris v. Massachusetts Maritime Academy, 565 N.E.2d 422, 426 (Mass. 1991) (noting that "[a]lthough the Supreme Court has never addressed the question whether States may claim immunity in their own courts when the Eleventh Amendment bars suit in Federal Court, we think that, *absent congressional command to the contrary*, they may") (emphasis added).

305. Alden I, 715 A.2d at 174.

authority to overcome a state's own sovereign immunity under its state constitution."[306]

Most state courts that had decided the question took a contrary view. For example, in *Ahern v. State*,[307] plaintiff filed a state court action to enforce an FLSA claim. In response, the state offered what the court characterized as "its own creative construction of *Seminole Tribe*."[308] The State reasoned that "'[i]f, in the absence [of] a waiver, Congress lacks the power to abrogate state sovereign immunity from FLSA suits in federal court, then it must also lack the power to define or expand the conditions of a State's waiver of immunity to FLSA suits in the State's own courts.'"[309] The court disagreed, stating "[i]n *Seminole Tribe of Florida v. Florida*, the U.S. Supreme Court merely held that the 11th Amendment prevents a private party from suing a state in Federal court, not that Federal statutes do not apply equally to both non-state and state defendants."[310] The sovereign immunity principle animating the Eleventh Amendment, the Court continued, is immunity from federal court jurisdiction, not "immunity from suit in any forum."[311] Other states have taken similar positions.[312]

306. German v. Wisconsin Dep't of Transp., Case No 96-CV-1261 at 5 n.5 (Wis. Cir. Ct. Mar. 8, 1997) (cited in Bunch v. Robinson, 122 Md. App. 437, 453, 712 A.2d 585, 592 (Md. Court. Spec. App. 1998).

The leading academic proponent of the view is Carlos Manuel Vazquez. *See, e.g.*, Carlos Manuel Vazquez, *What is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683, 1717 (1997) ("summing up its holding overruling *Union Gas*, the Court in *Seminole Tribe* stated that 'even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states'") (citing Seminole Tribe, 517 U.S. at 71); *id.* at 1702-03 (noting that in *Seminole Tribe*, "[t]he majority stated that the Supreme Court may exercise appellate jurisdiction over suits arising in the state courts 'where a State has consented to suit'") (citing Seminole Tribe, 517 U.S. at 71 n.14); *id.* at 1717-1720 (discussing the "[i]ndications in *Seminole Tribe* of the Shift to the Immunity-from-Liability Interpretation"). *Id.* at 1702 n.92 (citing Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 39 (1994) (finding the effect of shielding states from suit in federal court is to "leav[e] the parties with claims against a State . . . if the State permits, in the State's own tribunals")). *But see* Jackson, *supra* note 127, at 544 n.176 (declaring that "[w]hile I agree [with Vazquez] that some language in *Seminole Tribe* and other opinions suggest that states may have some sovereign immunity in their own courts, and that these in turn could be read as consistent with an 'immunity from liability' understanding, I disagree that the Court does . . . understand the Eleventh amendment in these terms"); *id.* at 504 & nn.39-41 (same).

307. 676 N.Y.S.2d 232 (N.Y. App. Div. 1998).

308. *Id.* at 234.

309. *Id.*

310. *Id.*

311. *Id.* (citing Bartlett v. Bowen, 816 F.2d 695, 610 (D.C. Cir. 1987) (noting that in Eleventh Amendment cases, "only the availability of a federal forum is at issue").

312. *See* Whittington v. State, 966 P.2d 188 (N.M. App. 1998) (FLSA claim); Bunch v. Robinson, 712 A.2d 585 (Md. Ct. Spec. App. 1998) (same); Jacoby v. Arkansas Dep't of Educ., 962 S.W.2d 773 (Ark. 1998) (same), *vacated by* 119 S. Ct. 2387 (1999) (remanded for consideration in light of Alden v. Maine, 119 S. Ct. 2240 (1999)); Ribitzki v. School Bd. of Highlands County, 710 So. 2d 226 (Fla. App. 1998) (same). *See also* Aaron v. Kansas, 115 F.3d 813, 817 (10th Cir. 1997) (noting in dicta that although FLSA action for damages against the state may not be brought in federal court, "the employee can sue in state court

The Supreme Court resolved the issue in *Alden v. Maine* (Alden II).[313] The Court immunized state governments from damage suits brought in state court by state employees alleging violations of the overtime provisions of the Fair Labor Standards Act. The Court held that "the powers delegated to Congress under Article I of the . . . Constitution do not include the power to subject nonconsenting states to private suits for damages in state courts."[314]

Prior to its decision in *Alden II*, the Court had failed to provide a controlling or particularly compelling decision concerning this issue, although the Court had addressed related questions in both *Hilton v. South Carolina Public Railways Commission*,[315] and *Howlett v. Rose*.[316]

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for money damages under the FLSA as a state court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law").

313. 119 S. Ct. 2240 (1999).

314. *Id.* at 2246.

315. 502 U.S. 197 (1991). Plaintiff's Federal Employees Liability Act (FELA) state court damage claim against a state-operated railway was dismissed. The state court held Congress had not intended to create such a private right of action in state court. The majority of the Supreme Court in *Hilton* concluded that the question before it was "a pure question of statutory construction," i.e., whether Congress intended to create a cause of action against state-owned railways. *Id.* at 205. The Court concluded Congress did intend such causes of action, but it never addressed the question of whether Congress had the constitutional power to so provide, since that issue was never raised. More importantly, *Hilton* did not entail requiring a state to defend in state court a suit that could not be brought in federal court. When *Hilton* was decided, FELA suits against the states could not be brought in federal court, not because Congress was understood to lack power through the Commerce Clause to abrogate state sovereign immunity in federal court, *see* Parden v. Terminal Ry. Co. of Ala. Docks Dep't, 377 U.S. 184, 192 (1964) (holding that a state could be sued in federal court under FELA), but because Congress simply had failed adequately to manifest an intent to do so.

316. 496 U.S. 356 (1990). This case arose out of an action brought against a school board pursuant to 42 U.S.C. § 1983 (1994). Section 1983 suits can only be maintained against "persons," and an entity with Eleventh Amendment immunity is not a "person" within the meaning of the statute. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 71 (1989) (stating that neither the state nor its officers sued in their official capacity for damages are "persons"). But municipalities, counties, and school districts are subject to suit under § 1983, as they do not enjoy Eleventh Amendment immunity. *See* Monell v. New York Dep't of Soc. Serv., 436 U.S. 658, 663 (1978) (concluding that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies); Howlett, 496 U.S. at 376 (holding that "municipal corporations and similar governmental entities are 'persons . . .'"). In *Howlett*, the state court held that because, under state law, school boards are the beneficiaries of sovereign immunity, they are not "persons" under §1983 when sued in state court. Accordingly, the state court dismissed the § 1983 action against the school board. Writing for the Court, Justice Stevens stated the issue as "whether a state law defense of 'sovereign immunity' is available to a school board *otherwise subject to suit in a Florida court even though such a defense would not be available if the action had been brought in a federal forum.*" *Id.* at 359 (emphasis added). The Supreme Court reversed, based on the unexceptional principle that "[t]o the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law." *Id.* at 377-78. *Howlett* thus did not consider whether a state must entertain a private damage action against it in state court on a federal cause of action that could not constitutionally be brought in federal court.

Justice Kennedy's majority opinion in *Alden II* argued that the history and structure of the Constitution demonstrate that the Constitution deprives Congress of the authority to abrogate the states' sovereign immunity in their own courts. With respect to history, the majority reasoned that "[t]he generation that designed and adapted our federal system considered immunity from private suits central to sovereign dignity,"[317] and intended to preserve state sovereign immunity from suit without its consent.[318] The majority based this conclusion on the constitution's ratification debates,[319] the reaction to *Chisholm v. Georgia*,[320] and the Eleventh Amendment's ratification debates.[321] This conclusion also emerged from the understanding that states are to be accorded the "dignity and essential attributes inhering in [sovereign] status," and are to be sheltered from "'the concept of a central government that would act upon and through the States' in favor of 'a system in which the State and Federal governments would exercise concurrent authority over the people.'"[322] The Court dismissed the Supremacy Clause as circular,[323] and while conceding that the record stood silent with respect to the specific question of an intent to constitutionalize state immunity from suit in state court, the majority found support in that

317. *Alden II*, 119 S. Ct. at 2247. For this proposition, the opinion relies on English common law as understood from previous Supreme Court decisions and commentators such as Blackstone. *Id.* at 2247-48.

318. *Id.*

319. "The leading advocates of the Constitution assured the people in no uncertain terms that the Constitution would not strip the States of sovereign immunity." *Id.* at 2248 (referring to Hamilton, Madison, and Marshall). In addition, the records of the states' ratifying conventions were seen to demonstrate that "the Constitution [was] drafted to preserve the States' immunity from private suits." *Id.* at 2249 (citing ratification debates in Rhode Island and New York).

320. 2 U.S. (2 Dall.) 419 (1793). The Court cited a call by the Massachusetts legislature to its representatives in Congress to remove from the Constitution any basis for "'a decision, that, a State is compellable to answer in any suit by an individual or individuals in any Court of the United States.'" Alden II, 119 S. Ct. at 2250 (quoting 15 PAPERS OF ALEXANDER HAMILTON 314 (H. Syrett & J. Cooke eds., 1969)).

321. "The text and history of the Eleventh Amendment . . . suggest that Congress acted not to change but to restore the original constitutional design." Alden II, 119 S. Ct. at 2251. *See also id.* at 2252 (suggesting "[t]he more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits").

322. *Id.* at 2247 (citing Printz v. United States, 521 U.S. 898, 919-20 (1997)). The majority also cited precedent to support its conclusions but none was conclusive. *Id.* at 2253-54 (citing cases that conclude that states have inherent sovereignty but none that holds such sovereignty includes immunity from suit in state court that Congress cannot abrogate).

323. "This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . ., shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. *See also* Alden II, 119 S. Ct. at 2255 (stating that "[t]he Supremacy Clause enshrines as 'the supreme Law of the Land' only those federal Acts that accord with the constitutional design" (citing Printz, 521 U.S. at 924)). The Supremacy Clause thus leaves to be decided the issue of which acts of Congress are in accord with constitutional limits. *Id.*

silence.[324] The Court concluded that "in light of the historical record it is difficult to conceive that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and cede to the Federal Government a power to subject nonconsenting States to private suits in these fora."[325]

The Kennedy opinion also relied on structure. The opinion found "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties exists regardless of the forum,"[326] because a state may be "thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury."[327] Such a result would result in "substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States."[328] It also could "threaten the financial integrity of the States,"[329] and create the anomaly of the "National Government . . . wield[ing] greater power in the state courts than in its own judicial instrumentalities."[330] The fact that this unanticipated intervention in government processes results from the initiative of individuals only serves to exacerbate the situation. This sacrifices political accountability, because democratic governance requires that judgments regarding the allocation of scarce resources be made through each states' political process, "not by judicial decree mandated by the Federal Government and invoked by the private citizen."[331]

Seminole Tribe, *Boerne*, and *Alden II* raise the troubling question whether their operation, in combination, creates the anomaly of Congress being authorized to create rights but not federal remedies to enforce them. As noted, the federal government may enforce federal rights against the states in federal court.[332] But, given *Seminole Tribe* and *Alden II*, what private remedies would be available to enforce the ADA were the Court to conclude that Congress lacks Section 5 authority to enact it?

Private parties could still bring an ADA action in federal court against a state officer in his or her official capacity to obtain prospective relief from

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324. "[T]he founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity [from suit in their own courts]. . . . [Silence] suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution." Alden II, 119 S. Ct. at 2260.

325. *Id.* at 2261.

326. *Id.* at 2264 (quoting *In re* Ayers, 123 U.S. 443, 505 (1887)).

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.* at 2265.

331. *Id.* The *Alden II* Court goes on to note that federal governmental assertion of control "over a State's most fundamental political processes . . . strikes at the heart of political accountability." *Id.*

332. *See* discussion *supra* note 33 and accompanying text.

continuing violations of the statute,[333] but such suits may not be used to bring state law claims pursuant to a federal court's supplemental jurisdiction.[334] Nor may private parties bring an ADA suit in federal court against a state officer in his or her official capacity to obtain money damages.[335] Even though injunctive relief is available, it does not deter violations of the ADA until litigation is brought and injunctive relief is granted. Nor does it make plaintiffs whole for past violations of federal rights, an outcome that seems particularly unacceptable with respect to federal laws that create a private right of action and provide for damage remedies. Moreover, limiting public employees to injunctive relief while permitting private sector employees to bring damage actions against employers that violate the ADA creates two classes of covered employees. Each has identical substantive federal rights but the two classes have decidedly different remedial rights. While it has been suggested that federal courts remain available to private parties to bring damage actions against state officers sued in their individual capacities,[336] this option is not likely to be available in ADA litigation against state officers because the ADA's employment provisions do not provide a cause of action against individual state officers.[337] In short, were the Court to find that Congress is without authority to enact the ADA pursuant to its Section 5 powers, individuals would continue to have

333. *See* Armstrong v. Wilson, 942 F. Supp. 1252 (N.D. Cal. 1996) (granting prospective relief against ADA violation against state official sued in official capacity). *See also* Chavez v. Arte Publico Press, 157 F.3d 282, 291 (5th Cir. 1998) (holding that even if copyright claim cannot be brought against a state in federal court because Congress lacks Section 5 authority to enact the copyright laws, "[t]he *Ex parte Young* doctrine [209 U.S. 123 (1908)] permits suits for prospective injunctive relief").

334. In *Pennhurst State Sch. & Hosp. v. Halderman (II)*, 465 U.S. 89 (1984), the *Ex parte Young* rule was held also not to apply to prospective relief based on state law. That outcome is the application of the broader principle that "[t]he Eleventh Amendment forecloses . . . the application of normal principles of ancillary and pendent jurisdiction where claims are pressed against the State." County of Oneida, N.Y. v. Oneida Indian Nation of N.Y., 470 U.S. 226, 251 (1985). *See also* Pennhurst, 465 U.S. at 121 (dictating that "[a] federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment."). Accordingly, in ADA litigation, state causes of action routinely are dismissed from suits brought in federal court, even when the ADA claim can be pursued. *See, e.g.*, Kimel, 139 F.3d at 1433 n.17; Mayer v. University of Minn., 940 F. Supp. 1474, 1477-80 (D. Minn. 1996).

335. *See* Edelman v. Jordan, 415 U.S. 651 (1974) (confining *Ex parte Young* rule to awards of prospective relief).

336. *See* Alden II, 119 S. Ct. at 2267-68 (reasoning that "a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself."); Scheuer v. Rhodes, 416 U.S. 232 (1974) (noting that "when a state officer acts under state law in a manner violative of the Federal Constitution he 'comes into conflict with the superior authority of the Constitution and is stripped of his official or representative character and subjected in his person to consequences of his individual conduct'" (citing Ex parte Young, 209 U.S. 123, 159 (1908))).

337. *See, e.g.*, Alsbrook v. City of Maumelle, 156 F.3d 825, 832 (8th Cir. 1998) (finding "state officials may not be sued in their individual capacities directly under the provisions of the ADA. . . [and] a [§] 1983 remedy against state officials in their individual capacity for violating the ADA, 'would be inconsistent with the overall legislative scheme'" (quoting DeYoung v. Patten, 898 F.2d 628, 635 (8th Cir. 1990)).

the ADA's substantive protections with virtually no effective way to enforce them against the state.

The gravity of the problem of individuals possessing federal rights with no remedies depends on how extensively *Boerne* will curtail Congress's ability to abrogate through Section 5. Some clarity is emerging from the lower court decisions, but much remains uncertain. Private FLSA damage claims against the states no longer may be brought in federal court[338] or, after *Alden II*, in state court. By contrast, federal courts generally have upheld Congress's Section 5 power to enact statutes providing protection from discrimination. That appears to be the trend with respect to the ADA,[339] the Equal Pay Act,[340] Title VII of the Civil Rights Act 1964,[341] and the federal statutes prohibiting discrimination in federally-financed

338. *See* discussion *supra* note 302 and accompanying text.

339. *See* discussion *supra* notes 19-24 and accompanying text.

340. The Equal Pay Act of 1963, 29 U.S.C. § 206(d), was enacted in 1963 and extended to the states in 1974. *See* Fair Labor Standards Act Amendments of 1974, 29 U.S.C. § 663(a) (1999). The Equal Pay Act has survived most, but not all *Boerne* attacks. *Compare* Varner v. Illinois State Univ., 150 F.3d 706 (7th Cir. 1998) (holding EPA abrogates states' immunity although it does not require proof of intentional discrimination), *and* Ussery v. Louisiana, 150 F.3d 431 (5th Cir. 1998) (same, without *Boerne* analysis), *and* Timmer v. Michigan Dep't of Commerce, 104 F.3d 833 (6th Cir. 1997) (same, but decided pre-*Boerne*), *and* Perdue v. City Univ. of N.Y., 13 F. Supp. 2d 326 (E.D.N.Y.1998) (same, without *Boerne* analysis), *with* Timmer, 104 F.3d. at 845-847 (Boggs, J., concurring in part dissenting in part) (holding federal courts lack jurisdiction to hear Equal Pay Act claims against the states because Congress did not unequivocally manifest an intent to legislate under its Section 5 power when enacting the EPA); Larry v. Board of Trustees of Univ. of Ala., 975 F. Supp. 1447, 1450 (N.D. Ala. 1997), *aff'd*, 996 F. Supp. 1366 (1998) (noting that "it makes no sense to say that Congress has the power to override the Eleventh Amendment and enforce the Equal Protection Clause against a state by applying to the state a cause of action under the Equal Pay Act which does not include the element of intent").

341. 42 U.S.C. §§ 2000e, *et seq.* (1994). It might seem unusual that the question of Congress's power to abrogate state sovereign immunity through enactment of Title VII remains unresolved, given that *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), in which the Supreme Court established the abrogation potential of Section 5, was itself a Title VII case. *Fitzpatrick* only addressed the question of whether the Eleventh Amendment bars a damage remedy against the state. It did not litigate whether Congress had Section 5 power to enact Title VII's substantive provisions. *See Fitzpatrick*, 427 U.S. at 456 n.11 (finding that "[a]part from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondent state officials do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under [Section] 5 of the Fourteenth Amendment"). Nor did subsequent Title VII cases involving state defendants litigate the question. *See* Connecticut v. Teal, 457 U.S. 440 (1982) (finding under Title VII, employees can establish prima facie case of an employer's racial discrimination by showing disparate impact, even if the result of the promotional process was "an appropriate racial balance"); Dothard v. Rawlinson, 433 U.S. 321 (1977) (holding that Congress's Title VII legislation prohibits Alabama's minimum height and weight requirements for prison guards, where requirement has disparate impact upon women; Congress intended this prohibition to apply to government employers, as well as private ones).

The Courts that have considered the issue of Congress's Section 5 power to enact Title VII and apply it to the states have found Congress possesses such power. *See* Reynolds v. Alabama Dep't of Transp., 4 F. Supp. 2d 1092 (M.D. Ala. 1998) (determining Congress did not exceed its Section 5 power when it subjected the states to liability for Title VII disparate impact claims of discrimination); *see also* Carmen v. San Francisco Unified Sch. Dist., 982 F.

programs—Title VI of the 1964 Civil Rights Act,[342] the Rehabilitation Act of 1973,[343] Individuals With Disabilities Education Act (IDEA),[344] and Title IX of the Education Amendments of 1972.[345] Private litigants in Age

Supp. 1396, 1405 (N.D. Cal. 1997) (concluding Congress possesses Section 5 power to abrogate state sovereign immunity from Title VII claims in federal court).

342. 42 U.S.C. § 2000d (1994). *See* Lesage v. Texas, 158 F.3d 213, 217 (5th Cir. 1998) (finding Congress validly abrogated the states' Eleventh Amendment immunity from suit in federal court when enacting Title VI: although enacted as a spending statute, Title VI could also have been enacted pursuant to the Section 5 power); Sandoval v. Hagan, 7 F. Supp. 2d 1234 (M.D. Ala 1998) (holding Title VI abrogates whether it is enacted pursuant to spending power or Section 5 power); Bryant v. New Jersey Dep't of Transp., 1 F. Supp. 2d 426 (D.N.J. 1998) (holding Title VI is authorized by Section 5).

343. 29 U.S.C. § 794 (1994). *See* Clark v. California, 123 F.3d 1267, 1270 (9th Cir 1997) (finding Congress abrogated states' immunity when it amended § 504 of the Rehabilitation Act); Armstrong v. Wilson, 942 F. Supp. 1252, 1262-63 (N.D. Cal. 1996) (finding Rehabilitation Act enacted pursuant to both the spending power and Section 5 power). *But see* Nihiser, 979 F. Supp. at 1176 (S.D. Ohio 1997) (finding Congress enacted Rehabilitation Act pursuant to Section 5 power but its accommodation provisions "are not a valid exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment [because] Congress has not legally abrogated the sovereign immunity of states from suit by private persons.").

344. 20 U.S.C. §§ 1400-1491 (1998). *See* Little Rock Sch. Dist. v. Mauney, 183 F.3d 816 (8th Cir. 1999) (finding IDEA to be within Congress's Section 5 power based on an analysis of the *Boerne* congruence and proportionality test); Board of Educ. v. Illinois State Bd. of Educ., 979 F. Supp. 1203, 1208 (N.D. Ill. 1997) (same, without *Boerne* analysis); Peter v. Johnson, 958 F. Supp. 1383 (D. Minn. 1997), *rev'd on other grounds*, 155 F.3d 992 (8th Cir. 1998) (same, without *Boerne* analysis).

345. 20 U.S.C. §§ 1681-1688 (1994). In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 n.8 (1992), the Supreme Court explicitly reserved the question whether Title IX was enacted pursuant to the spending or Section 5 power. The prevailing view is that Title IX is an exercise of the spending power. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1397-99 (11th Cir. 1997) (*rev'd on other grounds*, 526 U.S. 629 (1999)); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1012-13 & n.4 (5th Cir.1996); Litman v. George Mason Univ., 5 F. Supp. 2d 366, 373 (E.D. Va. 1998). The Section 5 authority of Congress to enact Title IX has been seriously questioned. *See id.* at 373-74. Yet, Title IX has been held to abrogate states' sovereign immunity on the theory that by accepting the federal funds referred to in Title IX, states have unambiguously waived their immunity. *Id.* at 375 (declaring the language of Title IX "is a clear and unequivocal expression of Congress's intent to condition the acceptance of federal funds on the states' agreeing to submit to the jurisdiction of the federal courts"); *see also* Beasely v. Alabama State Univ., 3 F. Supp. 2d 1304, 1308 (M.D. Ala. 1998). The *Beasely* court held that "the fact that [Title IX] is a spending clause enactment and therefore does not thrust abrogation upon potentially unwilling states, but rather conditions the receipt of federal funds for education upon the states' *voluntary* waiver of sovereign immunity, renders the parties' [*Seminole Tribe*] approach inapt. Instead . . . the appropriate approach to the issue involves an assessment of whether Congress may constitutionally condition the receipt of education funds by states on such a waiver, [(the Court answers yes)] and, if so, whether it provided the states with sufficient notice that their acceptance of federal education funds would result in the waiver of their eleventh amendment immunity for private damages actions brought pursuant to Title IX [(also answered yes by the Court)] . . ." (emphasis in original). Furthermore, the *Beasely* court concluded by noting that "the Supreme Court's adequacy-of-notice concerns apply only to the substantive provisions of the spending clause legislation at issue, where the conditions governing recipients' conduct are set forth. There is no suggestion in [previous Supreme Court decisions] that the Court's concerns extend to the adequacy of notice provided regarding the form of relief . . . . Moreover, even if such notice were required, the requirement has been met." *Id.* at 1322.

Discrimination in Employment Act (ADEA) damage actions against the states have encountered stiff resistance in overcoming the states' *Boerne* challenges, though the majority of courts still sustain Congress's Section 5 power to enact the ADEA.[346]Enforcement of the Family Medical Leave Act of 1993 (FMLA) against the states in federal court is problematic, but there are too few cases at this point to predict an outcome.[347] Enforcement of the patent, trademark and copyright laws against the states in federal

346. 29 U.S.C. §§ 621-634 (1994). In EEOC v. Wyoming, 460 U.S. 226, 243 (1983), the Supreme Court explicitly left open whether the 1974 amendment extending the ADEA to the states may be upheld as a valid exercise of the Section 5 power. The circuit courts of appeal are split on the question. *Compare* Cooper v. New York State Office of Mental Health, 162 F.3d 770 (2d Cir. 1998) (upholding Congress's power to abrogate when enacting the ADEA), *and* Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998), *vacated and remanded sub nom.* Board of Regents of the Univ. of N.M. v. Migneault, No. 98-1178, 2000 WL 3496 (U.S. Jan. 18, 2000) (same, based on its earlier decision in Hurd v. Pittsburgh State Univ., 109 F.3d 1540 (10th Cir. 1997)), *and* Coger v. Board of Regents of Tenn., 154 F.3d 296 (6th Cir.1998) (finding that ADEA represents a valid exercise of Section 5 authority), *and* Keeton v. University of Nev. Sys., 150 F.3d 1055 (9th Cir. 1998) (same), *and* Scott v. University of Miss., 148 F.3d 493, 503 (5th Cir. 1998) (holding that "the ADEA represents a valid exercise of Congress's [Section] 5 enforcement power [and] the University is not entitled to Eleventh Amendment immunity"), *and* Goshtasby v. Board of Trustees of the Univ. of Ill., 141 F.3d 761 (7th Cir. 1998) (holding Congress abrogated states' Eleventh Amendment immunity when enacting the ADEA), *with* Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822 (8th Cir. 1998) (determining that the ADEA exceeds Congress's Section 5 power as defined in *Boerne*), *and* Kimel, 139 F.3d 1426 (11th Cir. 1998), *cert. granted,* 119 S. Ct. 901 (1999) (holding ADEA not a valid exercise of the Section 5 power). *See also* Scott v. University of Miss., 148 F.3d 493, 499 n.3 (noting "[d]istrict courts have split on the issue, with the minority reaching the . . . result [of no abrogation]" (citations omitted)).

347. 29 U.S.C. §§ 2601 et seq. (1994). The lower courts are in substantial disagreement over whether the FMLA is a valid exercise of congressional authority to abrogate. Many lower courts, including most of the recent decisions, have found that FMLA actions against the state may not be brought in federal court. Some courts cite Congress's lack of a clear statement in the FMLA of intent to abrogate State's Eleventh Amendment immunity. *See, e.g.,* Driesse v. Florida Bd. of Regents, 26 F. Supp. 2d 1328, 1332 (M.D. Fla. 1998) ("Congress did not clearly express an intention to abrogate immunity in the FMLA . . . ."). A more persuasive argument rebukes the theory that "an affirmative entitlement to twelve weeks of leave . . . is necessary under the Equal Protection Clause in order to prevent discrimination." The Court held that "[t]his is patently the sort of substantive legislation that exceeds the proper scope of Congress's authority under [Section] 5." *Id.* at 1333 (citing Thompson v. Ohio State Univ. Hosp., 5 F. Supp. 2d 574, 579 (S.D. Ohio 1998)). In addition, FMLA's cost-shifting to the states is an unconstitutional "interference into a traditional area of state sovereignty which runs afoul of the spirit of the Constitution and the concepts of federalism which it contains." *Id.* at 1334. *Accord* Sims v. University of Cincinnati, 46 F. Supp. 2d 736, 739 (S.D. Ohio 1999) (reasoning the FMLA cannot be understood as an appropriate means of preventing or remedying gender discrimination because FMLA "does not merely make it illegal for employers to treat requests for [family medical] leave differently on the basis of gender, but instead mandates that employers provide [all] employees with a new and valuable benefit"); Post v. State, No. 98-1238-JMT, 1998 WL 928677 (D. Kan. Dec. 10, 1998); McGregor v. Goord, 18 F. Supp. 2d 204 (N.D.N.Y. 1998); Garrett v. Board of Trustees of the Univ. of Ala., 989 F. Supp. 1409 (N.D. Ala. 1998). *But see* Jolliffe v. Mitchell, 986 F. Supp. 339 (W.D. Va. 1997) (finding Congress unequivocally expressed its intent to abrogate and to enact the FMLA pursuant to a valid exercise of its Section 5 power); Biddlecome v. University of Tex., No. Civ.A.96-1872, 1997 WL 124220 (S.D. Tex. Mar. 13, 1997); Knussman v. State, 935 F. Supp. 659, 662 (D. Md. 1996).

court is unavailable.[348] There have been some attempts by private litigants since *Seminole Tribe* to enforce the bankruptcy laws[349] and environmental laws[350] against the states in federal court, but none of these efforts has been successful.[351] It appears that any effort to enforce the antitrust laws against

348. The copyright laws clearly are not designed to eradicate violations of the equal protection guarantees of the Fourteenth Amendment. Therefore, one could not successfully advance a *Boerne* "congruence and proportionality" argument focusing on equal protection to find Section 5 power to enact the copyright laws and apply them to the states. A different approach reasons that the federal copyright statutes create a property right in one's copyright and therefore state infringement constitutes uncompensated deprivations of this property right without due process of law. Accordingly, under this theory, Congress's Section 5 power is sufficient to abrogate state sovereign immunity to provide a federal forum to remedy and prevent this Fourteenth Amendment violation. In *College Savings Bank I*, 119 S. Ct. 2199, the Supreme Court rejected this reasoning. There, the Court reasoned that "[d]eprivation" does not include negligent acts. Denial of due process of law arises only when state remedies are unavailable or inadequate. Since the federal copyright infringement statute is not limited to these two contexts, it cannot be seen as a congruent and proportional method for enforcing the Due Process Clause of the Fourteenth Amendment. In *College Savings Bank II*, 119 S. Ct. 2219, the Court was presented with a similar theory with respect to the false advertising provisions of the Trademark Act of 1946 (Lanham Act), 60 Stat. 441, 15 U.S.C. § 1125(a), which was made applicable to the states through the Trademark Remedy Clarification Act (TRCA), 106 Stat. 3567. In *College Savings Bank II*, the Court did not reach the *Boerne* issue. The Court held that while the trademark protections in the Lanham Act "may well contain provisions that protect constitutionally cognizable property interests—notably, its provisions dealing with infringement of trademarks[,] . . . [t]he Lanham Act's false-advertising provisions [do not create any property interests because they] bear no relationship to any right to exclude, . . . [which is the] hallmark of a protected property interest." College Savings Bank II, 119 S. Ct. at 2224-25.

349. *See* Sacred Heart Hosp. of Norristown v. Pennsylvania., 133 F.3d 237 (3d Cir. 1998) (rejecting the Bankruptcy Clause as a source of abrogation authority and finding bankruptcy statutes not enacted pursuant to any other constitutional authority). The other courts that have considered the question are in accord. *See id.* at 244 (citations omitted); United States v. Nebraska Dep't of Revenue (*In re* Doiel), 228 B.R. 439 (Bankr. D.S.D. 1998). *See also* Teresa K. Goebel, *Obtaining Jurisdiction Over States In Bankruptcy Proceedings After* Seminole Tribe, 65 CHI. L. REV. 911 (1998) (declaring that "Congress's blanket abrogation of Eleventh Amendment immunity in Section 106 of the Bankruptcy Code is unconstitutional."). *But see* Mather v. Oklahoma Sec. Comm'n (*In re* Southern Star Foods, Inc.), 190 B.R. 419 (Bankr. E.D. Okla. 1995) (finding bankruptcy laws to create liberty interests enforceable through the Fourteenth Amendment); Headrick v. Georgia (*In re* Headrick), 200 B.R. 963 (Bankr. S.D. Ga. 1996), *aff'd on other grounds*, 146 F.3d 1313 (11th Cir. 1998); Wyoming Dep't of Transp. v. Straight (*In re* Straight), 209 B.R. 540 (D. Wyo. 1997), *aff'd on other grounds*, 143 F.3d 1387 (10th Cir. 1998).

350. *See* Froebel v. Meyer, 13 F. Supp. 2d 843 (E.D. Wis. 1998) (dismissing environmental citizen suit for damages brought under the Clean Water Act (CWA) because the CWA does not abrogate state sovereign immunity); *id.* at 849 (finding "after *Seminole Tribe of Florida*. . . the abrogation claim for an environmental statute such as the CWA appears difficult, if not impossible, to maintain.").

351. The one business regulation that has fared well against *Boerne* attacks is the Railroad Revitalization and Regulatory Reform Act (RRRRA), Pub. L. No. 94-210, 90 Stat. 31. This statute creates federal court jurisdiction to prevent certain burdens and discriminatory acts against railroads by the states. In *Oregon Short Line Railroad*, 139 F.3d 1259 (9th Cir. 1998), the court considered a railroad's allegation that a state taxing scheme discriminated against it in violation of RRRRA. The court stated that "[w]hile the area of taxation might not immediately leap to mind when one thinks of equal protection problems, there can be little doubt that discriminatory state taxation can implicate equal protection concerns." *Id.*

the states would similarly fail.[352] "[I]n the post-*Seminole Tribe* era, there [may] exist [some] Article I powers sufficiently powerful to abrogate state sovereign immunity"[353] but it is difficult to imagine that many, if any, will escape the combined grip of *Seminole Tribe* and *Boerne.*

Who would have guessed that an Indian gaming statute and a zoning decision regarding a small church in Texas would have come to this?

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at 1266. The court held that RRRRA "is a constitutionally sound enactment, which abrogated the State's Eleventh Amendment immunity" even though the statute "eliminated more practices than the Supreme Court itself would have done." *Id.* at 1267. *Accord* CSX Transp., Inc. v. Board of Pub. Works, 138 F.3d 537 (4th Cir.1997).

352. *See* Susan Beth Farmer, *Altering The Balance Between State Sovereignty And Competition: The Impact of* Seminole Tribe *on the Antitrust State Action Immunity Doctrine*, 23 OHIO N.U. L. REV. 1403, 1404 (1997) (arguing "[t]he *Seminole Tribe* decision . . . immunizes states from private antitrust suits in federal court without any inquiry into whether the state was acting as a true sovereign or whether application of the antitrust laws would interfere with governmental interests.").

353. Sacred Heart Hosp. of Norristown v. Pennsylvania, 133 F.3d 237, 245 (3d Cir. 1998) (Roth, J., concurring) (citing Diaz-Gandia v. Daapena-Thompson, 90 F.3d 609, 616 (1st Cir. 1996) ("reaffirming that Congress, acting pursuant to its War Powers . . . abrogated state sovereign immunity to damages actions brought under the Veterans' Reemployment Rights Act")). *Accord* Peel v. Florida Dep't of Transp., 600 F.2d 1070 (5th Cir. 1979) (holding that neither the Tenth nor the Eleventh Amendment acts as a bar to remedy under the Veterans' Reemployment Rights Act, enacted pursuant to Congress's war powers). *But see* Velasquez v. Trustees of Ind. Univ., 994 F. Supp. 993 (S.D. Ind.) *aff'd* 994 F.3d 993 (7th Cir.1998) (Federal Uniformed Services Employment & Reemployment Act of 1994 (USERA), 38 U.S.C. § 4311 (1994), which prohibits discrimination in employment based upon an employee's membership or service in the uniformed services, does not abrogate states' Eleventh Amendment immunity because *Seminole Tribe* applies to the war power, which is the power used to enact USERA), *vacated in part* 165 F.3d 593 (1999) (USERA amended by Congress on November 11, 1998 to give state courts exclusive USERA jurisdiction in suits against the states); Palmatier v. Michigan Dep't of State Police, 981 F. Supp 529, 531-32 (W.D. Mich. 1997) (asserting that "Congress could not effectively abrogate the states' Eleventh Amendment immunity in USERA.").