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Whose Federalism

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WHOSE FEDERALISM?

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INTRODUCTION

In his Article, *Sounds of Sovereignty*, Professor John Yoo makes a persuasive argument based on recent jurisprudence that the Supreme Court is once again reviewing federal legislation for federalism concerns.[1] Professor Yoo applauds this trend, which he believes will lead to greater protection for individual liberty and state autonomy, and contends that the Court should continue to review congressional statutes for compliance with federalism mandates.

Though he favors the renewed emphasis that the Supreme Court has placed on protecting state autonomy, Professor Yoo concedes that there could be a flaw in the Court's jurisprudence—specifically, its failure to define coherently a comprehensive yet viable federalism theory. He is correct to recognize the need for a complete theory. The Court's failure to develop a workable federalism theory was a principle reason the Court for many years stopped reviewing legislation for federalism concerns.[2] In the absence of established guidelines for reviewing legislation, the Court was and will be vulnerable to the charge that it makes decisions based on the desired political outcome. Relying on his extensive study of the writings of the early federalists, Professor Yoo argues that the Court's theory should be based on an underlying value, the protection of individual liberty. This presumes that the Court's new approach actually supports this underlying concern. Unfortunately, the current federalism cases appear to undermine individual liberty, and thus Professor Yoo's argument as well.[3]

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1. John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998) [hereinafter *Sounds of Sovereignty*]; *see also* John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) [hereinafter *Judicial Safeguards*].

2. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-551 (1985) (discussing lack of federalism theory under, and overruling, *National League of Cities v. Usery*, 426 U.S. 833 (1976)). *See also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 10-11 (1988) (asserting Supreme Court's recent failure in protecting state sovereignty stems from inconsistent rulings); William W. Van Alstyne, Comment, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1713, 1732-33 (1985) (recognizing Supreme Court's long period of refusal to strike down acts of Congress on pure federalism grounds).

3. *Sounds of Sovereignty*, *supra* note 1, at 28, 34-38, 42-44. In *Gregory v. Ashcroft*, 501 U.S. 452, 467 (1991), the Court held that Missouri state court judges were "appointees on the policymaking level," and, thus, were excluded from the Age Discrimination Employment Act ("ADEA"). Before reaching this conclusion, the Court described its view on the role of the states in the federal system. The Court, speaking through Justice O'Connor, declared that the "principal

I agree with much of Professor Yoo's argument. The *Garcia*[4] Court's complete abandonment of federalism concerns left little protection for the states against an increasing number of federal legislative mandates.[5] It is right that the Court should develop a comprehensive federalism theory when determining whether federal legislation is applicable to the states.

I disagree, however, with Professor Yoo's contention that support for individual liberty is the basis for or supported by the current federalism jurisprudence. As a result of the Court's new federalism, state governments have a strong argument that many civil rights laws no longer apply to them.[6] Those individuals who benefit from these laws, e.g., the aged,[7] the disabled,[8] and hourly wage earners[9] have actually seen individual liberty suffer under the new

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benefit of the federalist system is a check on abuses of government power." *Id.* at 458. For this system to be effective, "there must be a proper balance between the States and the Federal Government." *Id.* at 459. The employee, like that in *Gregory*, challenging a state's decision to terminate her employment because of her age, faces this Court's conviction about federalism. *See also* Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 292 (O'Connor, J., concurring) (stating that "the more challenging task of crafting appropriate procedures for safeguarding [a class of persons'] liberty interests is entrusted to the 'laboratory' of the States in the first instance.") (citation omitted).

4. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

5. *See generally* Michael E. Solimine & James L. Walker, *Federalism, Liberty and State Constitutional Law*, 23 OHIO N.U. L. REV. 1457 (1997) (reviewing the rise of state constitutional law and its impact on individual liberty enhancement and federalism).

6. Justice Stevens, dissenting in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), read the Court's decisions as preventing "Congress from providing a federal forum for a broad range of actions against States, from those sounding in copyright and patent law, to those concerning bankruptcy, environmental law, and the regulation of our vast national economy." *Id.* at 77 (Stevens, J., dissenting). He pointed out that in areas of exclusive federal jurisdiction—copyright, bankruptcy and antitrust—affording the states Eleventh Amendment immunity from federal court liability effectively leaves persons injured by state violations without a judicial remedy. *Id.* at 77 n.1.

7. *See* Humenansky v. Regents of the Univ. of Minn., 152 F.3d 822 (8th Cir. 1998) (holding that the Eleventh Amendment bars ADEA suits filed in federal court against state entities); Kimel v. Florida Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998) (holding that states are immune from suit under the ADEA because of the Eleventh Amendment); *but see* Keeton v. University of Nev. Sys., 150 F.3d 1055, 1058 (9th Cir. 1998) (holding that "Congress abrogated the states' immunity in amending the ADEA pursuant to its Fourteenth Amendment enforcement authority"); Goshtasby v. Board of Trustees, 141 F.3d 761 (7th Cir. 1998) (holding that the ADEA abrogates state's immunity from suit); Hurd v. Pittsburgh State Univ., 109 F.3d 1540 (10th Cir. 1997) (holding that the state's immunity from suit was abrogated under the ADEA).

8. *See* Garrett v. Board of Trustees of the Univ. of Ala., 989 F. Supp. 1409 (N.D. Ala. 1998); Brown v. North Carolina Div. of Motor Vehicles, 987 F. Supp. 451 (E.D.N.C. 1997); Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168 (S.D. Ohio 1997).

9. *See* Mills v. Maine, 118 F.3d 37, 48 (1st Cir. 1997) (holding that the Fair Labor Standards Act does not apply against the states); Larry v. Board of Trustees of the Univ. of Ala.,

federalism. The Court appears to have forgotten that the federal government can play an important role in safeguarding liberty by helping prevent discrimination. These laws must necessarily be valid against state governments in order to provide equivalent protection of basic rights for all citizens. The new federalism decisions limit Congress' ability to deter discrimination by state or local government.

To highlight the harmful effects of the new jurisprudence, this Article examines some of the recent state challenges to the applicability of the Americans with Disabilities Act ("ADA").[10] Some state governments have already successfully challenged the applicability of the ADA to state entities.[11] Although the ADA's application to private actors is not in doubt,[12] lower courts have begun to split over whether it can be enforced against states.[13] States have argued that they are immune from the ADA's nondiscrimination and accommodation requirements because Congress did not have the power to abrogate the states' Eleventh Amendment immunity from suit in federal court. Congress' power to override state Eleventh Amendment immunity has been seriously limited by two of the recent Supreme Court federalism decisions: *Seminole Tribe of Florida v. Florida*[14] and *City of Boerne v. Flores*.[15] Although

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975 F. Supp. 1447, 1450 (N.D. Ala. 1997) (holding that the Equal Pay Act does not apply against the states); *but see* Varner v. Illinois State Univ., 150 F.3d 706 (7th Cir. 1998) (holding that Congress acted within its authority under Section 5 of the Fourteenth Amendment when it abrogated states' Eleventh Amendment immunity from suits under the Equal Pay Act); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833 (6th Cir. 1997) (holding that congress validly abrogated state's immunity from suit under the Equal Pay Act).

10. Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified primarily at 42 U.S.C. §§ 12101-12213 (1994 & Supp. I 1995 & Supp. II 1996)).

11. *See supra* note 8 and accompanying text.

12. *See* Abbott v. Bragdon, 118 S. Ct. 2196 (1998) (holding Title III valid under the Commerce Clause as applied to a dentist); United States v. Morvant, 898 F. Supp. 1157, 1168 (E.D. La. 1995) (enjoining defendant dentist from refusing treatment on basis of HIV status); Pinnock v. International House of Pancakes Franchisee, 844 F. Supp. 574, 579 (S.D. Cal. 1993) (holding that Title III of the ADA, which regulates public accommodations, is a proper exercise of the Commerce Clause power as applied to a restaurant).

13. *See Garrett*, 989 F. Supp. at 1410 (agreeing with the court in *Nihiser*); *Brown*, 987 F. Supp. at 457-59 (holding that the ADA as a whole is not valid under the Fourteenth Amendment); *Nihiser*, 979 F. Supp. at 1176 (holding that the ADA's reasonable accommodation requirement is not valid under the Fourteenth Amendment). *But see* Autio v. AFSCME, Local 3139, 140 F.3d 802 (8th Cir. 1998) (holding enactment of the ADA was attempt by Congress to *enforce* Fourteenth Amendment equal protection, and is clearly adapted to that end); Clark v. California, 123 F.3d 1267, 1270 (9th Cir. 1997) (holding that the ADA is valid under the Fourteenth Amendment), *cert. denied*, 118 S. Ct. 2340 (1998); Martin v. Kansas, 978 F. Supp. 992, 996 (D. Kan. 1997) (concluding Congress validly exercised its enforcement power under the Fourteenth Amendment in abrogating states' immunity under ADA).

14. 517 U.S. 44 (1996).

15. 117 S. Ct. 2157 (1997).

these two cases deal with the power of the federal courts to enforce federal law against state government, they also concern the power of individuals to vindicate federally-mandated rights in federal court. Though they may ease states' burdens, these decisions also constrict the individuals' ability to go to federal court to protect themselves under federal law against state discrimination.

This Article examines briefly the *Seminole Tribe* and *City of Boerne* decisions. Part II then focuses on the ADA and the reasons why Congress made it applicable to government conduct as well as private conduct. Finally, Part III examines the argument, based on the new federalism, that the ADA should not apply to state entities. It does not appear that the Court's new federalism has had a liberty-enhancing effect for some of the most vulnerable persons in our society. The Court's revitalized federalism jurisprudence has led to questions about the continuing validity of many of our civil rights statutes as applied against the states.

I. THE SUPREME COURT'S NEW NEW FEDERALISM—LIMITING CONGRESS' POWER TO ABROGATE STATE IMMUNITY

In light of recent Supreme Court decisions, the Eleventh Amendment may now be a barrier to ADA suits brought against state governments. The 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 Sate, or by Citizens or Subjects of any Foreign State."[16] Although a literal reading of the Amendment would not appear to bar a citizen from bringing suit against his state in federal court,[17] the Supreme Court has long held the Amendment indeed prohibits such suits.[18] By granting state immunity from suit in federal court, the Eleventh Amendment limits the ability of Congress to regulate state conduct.

The Supreme Court's interpretation of the Eleventh Amendment does not entirely bar the litigation of discrimination claims against the states in federal courts. The Eleventh Amendment does not bar suits in federal court against individuals who are state officials, although the extent of this limitation depends to some degree on whether the individuals are sued in their "personal" or

16. U.S. CONST. amend. XI.

17. The Amendment refers only to citizens of other states and foreign citizens. U.S. CONST. amend. XI.

18. *See* Hans v. Louisiana, 134 U.S. 1, 21 (1890). Similarly, although the Eleventh Amendment refers only to suits in law and equity, the Court has also held that the Amendment bars suits in admiralty. *See* New York Pet. of Walsh, 256 U.S. 490, 497 (1921) (barring *in personam* suit in admiralty); New York Pet. of The Queen City, 256 U.S. 503, 510 (1921) (barring *in rem* suit against vessel owned by the state).

"official" capacities.[19] "Since *Ex parte Young*,[20] . . . it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law."[21] Also, the Eleventh Amendment only bars retrospective relief, not prospective injunctive relief.[22]

Because the Eleventh Amendment aims to preserve the sovereign immunity of the states, it is no broader than the sovereign immunity asserted by a state. To the extent that a state has waived its immunity, the state is subject to suit in federal court.[23]

Of most significance in the context of the ADA, Congress has historically had the power to abrogate Eleventh Amendment immunity by a sufficiently clear legislative statement,[24] when it acted within power conferred by the U.S.

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19. *See* Hafer v. Melo, 502 U.S. 21, 29 (1991) (explaining relationship between 42 U.S.C. § 1983 (Supp. II 1996) and Eleventh Amendment; liability of public officials sued in their personal capacities under section 1983 and Eleventh Amendment is not limited to acts outside their authority or not essential to state government but also extends to official acts).

20. 209 U.S. 123 (1908).

21. *Hafer*, 502 U.S. at 30 (quoting Scheuer v. Rhodes, 416 U.S. 232, 237 (1974), *overruled on other grounds by* Davis v. Scherer, 468 U.S. 183 (1984)). The application of the Amendment is guided by its purpose, which is to prevent "private parties seeking to impose a liability which must be paid from public funds in the state treasury." *Id.* (quoting Edelman v. Jordan, 415 U.S. 651, 663 (1974)).

22. *See* Clemes v. Del Norte County Unified Sch. Dist., 843 F. Supp. 583, 594 (N.D. Cal. 1994).

23. *See* Blatchford v. Native Village of Noatak, 501 U.S. 775, 778-82 (1991) (reviewing relationship between Eleventh Amendment and sovereign immunity); *see also* Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997) (holding that state waives Eleventh Amendment immunity by accepting federal funds where the funding statute manifests a clear intent to waive constitutional immunity), *cert. denied*, 118 S. Ct. 2340 (1998). *Cf.* Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168, 1169 (S.D. Ohio 1997) (finding mere fact that state participates in program through which United States government provides funding to state is not sufficient to establish state's consent to suit).

24. *See* Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242-43 (1985) (refusing even to consider evidence from the legislative history of the Rehabilitation Act suggesting that Congress intended that statute to constitute an exercise of its Section 5 abrogation power, and stating that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."). The year following the Court's decision in *Atascadero*, Congress passed the Rehabilitation Act Amendments of 1986, expressly indicating its intent to subject the states to suit under the Rehabilitation Act as well as "any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1) (1994). For commentary critical of the clear statement rule, see, for example, William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 621-23, 629-45 (1992) (criticizing clear statement rules in general, and also noting that the Court "played a kind of 'bait and switch' trick on Congress" by applying *Atascadero's* clear statement rule even to older federal

Constitution.[25] The abrogation power is strongest when Congress legislates under the power given it by Section 5 of the Fourteenth Amendment.[26] In *Pennsylvania v. Union Gas Co.*,[27] the Supreme Court, in a plurality opinion, held that Congress also has the authority under the Commerce Clause to abrogate Eleventh Amendment immunity.[28] It is this holding that the Court reversed in *Seminole Tribe of Florida v. Florida*.[29]

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statutes); Vicki C. Jackson, *One Hundred Years of Folly: The Eleventh Amendment and the 1988 Term*, 64 S. CAL. L. REV. 51, 77-91 (1990). *But cf.* George D. Brown, *State Sovereignty Under the Burger Court—How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of* Atascadero State Hospital v. Scanlon, 74 GEO. L.J. 363, 388 (1985) (defending the clear statement rule because it "ensures that Congress knew what it was doing" in the abrogation context, and, in the case of implied waiver, "provides the additional assurance that the state knows what it is getting into"); Michael E. Solimine, *Rethinking Exclusive Federal Jurisdiction*, 52 U. PITT. L. REV. 383, 401-19 (1991) (defending the clear statement rule on a number of grounds).

25. *See Blatchford*, 501 U.S. at 788 (rejecting argument that 28 U.S.C. § 1362 (1994) did not abrogate Eleventh Amendment immunity for suits by Indian tribes). The Supreme Court first recognized Congress' power to abrogate the states' Eleventh Amendment protection without their consent in its 1976 decision in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). In that case, a sex discrimination suit brought by state employees under Title VII of the Civil Rights Act of 1964, the Court unanimously held that "the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment" and that Congress therefore has the power to abrogate the Eleventh Amendment when acting pursuant to Section 5. *Fitzpatrick*, 427 U.S. at 456 (citations omitted). The Court reasoned that the Fourteenth Amendment, enacted as part of the wholesale restructuring following the Civil War, contemplated a "shift in the federal-state balance" and thus "sanctioned intrusions by Congress . . . into the judicial, executive, and legislative spheres of autonomy previously reserved to the States"—including the authorization of suits that would be "constitutionally impermissible in other contexts." *Id.* at 455-56. The Court explained:

> When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials.

Id. at 456 (citations omitted).

26. *See Fitzpatrick*, 427 U.S. at 456. Congress has the power to enforce the provisions of the Fourteenth Amendment "by appropriate legislation." U.S. CONST. amend. XIV, § 5.

27. 491 U.S. 1 (1989).

28. *Id.* at 13-14.

29. 517 U.S. 44, 63-64, 66 (1996). *See* U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to "regulate Commerce with foreign Nations, and among the several States"); *see also* Pennsylvania v. Union Gas Co., 491 U.S. 1, 14-15 (1989) (plurality opinion), *overruled by* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). In *Seminole Tribe*, the Court overturned the seven-year-old ruling in *Union Gas*, holding this time that Congress does not have the power to abrogate the states' Eleventh Amendment immunity when acting under Article I. Noting that "we

In *Seminole Tribe*,[30] Chief Justice Rehnquist, writing for a five-to-four majority,[31] held that Congress could not abrogate state immunity under any of its Article I powers, including the Indian Commerce Clause and the Commerce Clause.[32] Specifically, the Court struck down a provision in the Indian Gaming Regulatory Act ("IGRA")[33] that authorized Native American tribes to bring suit in federal court against states that failed to negotiate in good faith with tribes seeking to enter into compacts governing the operation of certain gambling activities.[34]

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always have treated stare decisis as a 'principle of policy,' and not as an 'inexorable command,'" the *Seminole Tribe* majority dismissed *Union Gas* as a "deeply fractured decision" and "a solitary departure from established law." Seminole Tribe of Fla. v. Florida, 517 U.S. at 63-64, 66 (citations omitted). Specifically, the Court held that "'the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III'" that is "not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government." *Id.* at 68, 72 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 98 (1984)).

30. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996). *Seminole Tribe* involved legislation passed pursuant to the Indian Commerce Clause. U.S. CONST. art. I, § 8, cl. 3. The Seminole Tribe filed suit against the states of Florida and Alabama to compel negotiations under the Indian Gaming Regulatory Act. *See* Seminole Tribe of Fla. v. Florida, 11 F.3d 1016, 1018 (11th Cir. 1994). The U.S. District Court for the Southern District of Florida denied that state's motion to dismiss, while the District Court for the Southern District of Alabama granted the motion to dismiss. *Id.* The Court of Appeals held that Congress could not abrogate the states' sovereign immunity under the Indian Commerce Clause, distinguishing Congress' power under the Indian Commerce Clause from the Commerce Clause. *Id.* at 1028.

31. Chief Justice Rehnquist wrote the opinion for the Court, which was joined by Justices O'Connor, Scalia, Kennedy and Thomas. Justice Souter filed a lengthy dissenting opinion in which Justices Ginsburg and Breyer joined. *Seminole Tribe*, 517 U.S. at 100 (Souter, J., Ginsburg, Breyer, JJ., dissenting). Justice Stevens wrote a separate dissenting opinion. *Id.* at 76 (Stevens, J., dissenting).

32. *Id.* at 72-73. The Court also dismissed the portion of the Tribe's suit naming the Governor as a defendant. *Id.* at 76. Although the *Ex parte Young* exception to the Eleventh Amendment does not bar a suit against a state official seeking prospective injunctive relief, *see supra* notes 23-25 and accompanying text, the Court explained that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe*, 517 U.S. at 74. Given the statute's repeated references to "the State," the Court concluded that Congress did not intend to create a cause of action against individual state officials. *Id.* at 75 n.17. This portion of the *Seminole Tribe* decision has received mixed reviews. *Compare* David P. Currie, Ex Parte Young *After* Seminole Tribe, 72 N.Y.U. L. REV. 547 (1997) (defending the Court's position), *with* Vicki C. Jackson, Seminole Tribe, *The Eleventh Amendment, and the Potential Evisceration of* Ex Parte Young, 72 N.Y.U. L. REV. 495, 510-41 (1997) (criticizing the Court).

33. 25 U.S.C. §§ 2701-2721 (1994).

34. *Id.* § 2710(d)(3)(A).

To determine if federal legislation abrogated a state's sovereign immunity, the *Seminole Tribe* opinion required two determinations: "first, whether Congress has 'unequivocally expresse[d] its intent to abrogate the immunity,' and second, whether Congress has acted 'pursuant to a valid exercise of power.'"[35] The Court answered the first inquiry in the affirmative. The Court observed that the IGRA's statutory language indicated a clear congressional intent to abrogate the Eleventh Amendment, thereby satisfying the clear statement rule.[36] However, the Court concluded that Congress lacked the power to abrogate the Eleventh Amendment when legislating under its Article I powers.[37]

Given the centrality of the Commerce Clause to Congress' expansive legislative reach,[38] the *Seminole Tribe* precedent seriously curtailed federal legislative authority.[39] After *Seminole Tribe*, the Fourteenth Amendment Section 5 enforcement power stands as the sole recognized source of congressional authority to abrogate state immunity.[40]

The Fourteenth Amendment provides, in relevant part, that no state may "deny to any person within its jurisdiction the equal protection of the laws."[41]

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35. *Seminole Tribe*, 517 U.S. at 55 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

36. *Id.* at 56.

37. *Seminole Tribe*, 517 U.S. at 72-73.

38. *See* Perez v. United States, 402 U.S. 146, 150 (1971) (explaining that the Commerce Clause gives Congress the power to regulate the channels and instrumentalities of interstate commerce, people, and articles moving in interstate commerce, and activities affecting commerce); Vincent A. Cirillo & Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 TEMP. L. Q. 901, 912 (1987) (describing the expansion of Congress' power under the Commerce Clause). *But see* United States v. Lopez, 514 U.S. 549, 559 (1995) (explaining that Congress cannot regulate intrastate activities under the Commerce Clause unless they "substantially affect" interstate commerce).

39. For a discussion of the dramatic impact that Seminole Tribe has had on the enforcement of the ADEA in federal courts against the states, see Edward P. Noonan, *The ADEA in the Wake of* Seminole, 31 U. RICH. L. REV. 879 (1997).

40. In fact, the *Seminole Tribe* Court distinguished the Fourteenth Amendment on three grounds: it was adopted "well after the adoption of the Eleventh Amendment," its prohibitions are "expressly directed at the States," and it "fundamentally altered the balance of state and federal power struck by the Constitution." *Seminole Tribe*, 517 U.S. at 59, 65. *See also* Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168, 1170 (S.D. Ohio 1997) ("[T]he only currently recognized authority for Congress to abrogate the states' sovereign immunity . . . consists of Congress' enactment of legislation pursuant to its enforcement powers under § 5 of the Fourteenth Amendment."). *But see* Diaz-Gandia v. Dapena-Thompson, 90 F.3d 609, 616 n.9 (1st Cir. 1996) (holding that Congress has the power to abrogate the Eleventh Amendment when acting under its war powers, U.S. CONST. art. I, § 8, cls. 1, 11-16, concluding, without explanation, that *Seminole Tribe* "does not control the War Powers analysis.").

41. U.S. CONST. amend. XIV, § 1. The original purpose of the Fourteenth Amendment was to abolish the official practice of racial discrimination. *See* McLaughlin v. Florida, 379 U.S. 184, 192 (1964). The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439

Section 5 of the Fourteenth Amendment provides Congress with explicit authority to enforce the guarantees of that amendment and to enact legislation specifically addressing conduct that violates the Equal Protection Clause.[42] Prior to *City of Boerne v. Flores*,[43] the Supreme Court had been divided over the scope of Congress' Section 5 enforcement power.[44] In *Katzenbach v. Morgan*,[45] Justice Brennan, writing for the majority, interpreted Section 5 to authorize Congress to provide protection for substantive rights that the Fourteenth Amendment, as interpreted by the Supreme Court, did not require.[46] The Court held that Section 4(e) of the Voting Rights Act of 1965,[47] which invalidated English literacy requirements, was a valid exercise of Section 5.[48] The Court upheld the Act despite its earlier holding in *Lassiter v. Northampton County Board of Elections*,[49] that such literacy tests did not violate the Fourteenth Amendment.[50] The *Morgan* Court explained that it was upholding Congress' power to define a violation of the Equal Protection Clause because Section 5 is a "positive grant of legislative power" that allows Congress to determine independently what legislative action is necessary to enforce the Fourteenth Amendment.[51] This approach has been called the "ratchet" theory because it permits Congress to increase, but not decrease, the Fourteenth Amendment's protections.[52] The *Morgan* Court reasoned,

> It was for Congress, as the branch that made this judgment, to assess and

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(1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)). In other words, the clause limits the ability of legislatures to classify individuals into groups for the purposes of subjecting them to dissimilar treatment under the law. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2, at 1439 n.22 (2d ed. 1988) (noting that legislative classifications are the focus of equal protection); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); John E. Nowak, *Federalism and the Civil War Amendments*, 23 OHIO N.U. L. REV. 1209 (1997).

42. U.S. CONST. amend. XIV, § 5.

43. 117 S. Ct. 2157 (1997).

44. *See* Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966).

45. 384 U.S. 641 (1966).

46. *Id.* at 653-56.

47. 42 U.S.C. §§ 1971, 1973-1973gg-8 (1994).

48. *Morgan*, 384 U.S. at 643.

49. 360 U.S. 45 (1959).

50. *Morgan*, 384 U.S. at 649.

51. *Id.* at 651. *See* Jesse H. Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil Warm Amendments*, 67 MINN. L. REV. 299, 302 (1982).

52. *Morgan*, 384 U.S. at 651 n.10 (explaining that Congress may act only to enforce, not "restrict, abrogate or dilute" the Fourteenth Amendment). *See also* Robert E. Rains, *A Pre-History of the Americans with Disabilities Act and Some Initial Thoughts as to Its Constitutional Implications*, 11 ST. LOUIS U. PUB. L. REV. 185, 202 (1992) (explaining the ratchet theory as applied to the ADA).

> weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected . . . . It is not for us to review the congressional resolution of these factors. It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did.[53]

Although the "ratchet" theory had been criticized in subsequent Supreme Court decisions, it had not been expressly rejected by a majority of the Court.[54] In *City of Boerne v. Flores*,[55] the Court clearly indicated that Congress could not alter the substantive protections of the Fourteenth Amendment.[56] *City of Boerne* addressed the constitutionality of the Religious Freedom Restoration Act ("RFRA"),[57] which directed courts to apply a strict scrutiny standard to laws that substantially burden an individual's exercise of religion.[58] Congress enacted RFRA in response to the Supreme Court's holding in *Employment Division v.*

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53. *Morgan*, 384 U.S. at 653.

54. *See* EEOC v. Wyoming, 460 U.S. 226, 261-62 (1983) (Burger, C.J., dissenting) (arguing that the ADEA was invalid under Section 5 of the Fourteenth Amendment because the Court had expressly ruled that age is not a suspect class and thus, Congress could not override state laws that satisfy the rational basis test as age discriminatory); Oregon v. Mitchell, 400 U.S. 112, 296 (1970) (Stewart, J., concurring in part and dissenting in part) (arguing that the Voting Rights Act provision that lowered the voting age in national and state elections to 18 would be "valid only if Congress has the power not only to provide the means of eradicating . . . a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause").

55. 117 S. Ct. 2157 (1997). The *City of Boerne* case arose when St. Peter Church outgrew its facility, a 1920s imitation Spanish mission style structure in the City of Boerne, Texas. *Id.* at 2160. Although the church itself is not a historic landmark, the front facade is located within a historic district. The city refused to approve any plan of expansion that would require demolition of any part of the church building, whether inside or outside the historic district. Raising claims under both RFRA and the First Amendment, the Archbishop of San Antonio sued the city on behalf of the church. Flores v. City of Boerne, 73 F.3d 1352, 1354 (5th Cir. 1996).

56. *City of Boerne*, 177 S. Ct. at 2167. ("Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law."). The court emphasized this point later at the end of its opinion:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later case and controversies the Court will treat its precedents with the respect due them under settled principles . . . and contrary expectations must be disappointed.

Id. at 2172.

57. 42 U.S.C. §§ 2000bb to 2000bb-4 (1994).

58. *Id.* § 2000bb-1.

Smith,[59] which upheld a state law criminalizing the use of peyote for any purpose, including religious ceremonies.[60] In *Smith*, the Court held that absent any intent to discriminate on the basis of religion, state laws of general applicability are valid even when they interfere with religious practices.[61]

In *City of Boerne*, with a 6-3 opinion written by Justice Kennedy, the Supreme Court held RFRA was beyond Congress' power under the Fourteenth Amendment.[62] Based on the Court's reading of the Fourteenth Amendment's history,[63] the Court put to rest *Morgan's* implication that Congress had the power to expand the rights guaranteed by the Fourteenth Amendment.[64] Instead, the Court explained, the enforcement power is remedial, and therefore must be limited to preventing or alleviating actual constitutional violations.[65] To prevent Congress from using this power to enact general legislation unrelated to enforcement of the Fourteenth Amendment, the Court announced that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[66] In so doing, the Court recognized that there is no clear categorical difference between legislation that prevents Fourteenth Amendment violations and legislation that creates new rights not found in the Constitution.[67] *City of Boerne* imposes a balancing test that requires a comparison of two factors: the extent of the constitutional injury a law is meant to address and the level of intrusion that the law imposes on states.[68]

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59. 494 U.S. 872 (1990).

60. *Id.* at 878-79.

61. *Id.*

62. City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997).

63. *Id.* at 2164-66 (noting that an earlier draft of the Fourteenth Amendment encountered broad opposition because it granted too much power to Congress).

64. *Id.* at 2168.

65. *Id.* at 2164.

66. *Id.* Such a relationship is needed, the Court said, because "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." *Id.*

67. The Court reaffirmed the proposition, however, that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 2163. Although Congress' legislative reach under the Fourteenth Amendment is thus somewhat broader than the Amendment itself, the Supreme Court has not expressly held that Congress' power to enforce the Fourteenth Amendment extends to regulating private conduct. *See* Jack M. Beermann, *The Supreme Court's Narrow View on Civil Rights*, 1993 SUP. CT. REV. 199, 210 & n.46 (discussing Congress' expansive Fourteenth Amendment power). The Fourteenth Amendment itself only applies to state action. *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883). In the *Civil Rights Cases*, the Court held that Congress cannot reach private conduct when enacting laws pursuant to the Fourteenth Amendment. *Id.*

68. *City of Boerne*, 117 S. Ct. at 2170. Under *City of Boerne*, therefore, the reach of the enforcement power depends on the prevalence of constitutional violations. The Court explained: "The appropriateness of remedial measures must be considered in light of the evil presented . . . .

Noting that the congressional record contained little mention of state laws enacted for the purpose of discriminating on religious grounds and few instances of purposeful religious discrimination, the Court concluded that RFRA bore little relation to any constitutional injury.[69] The Court concluded that Congress was not primarily concerned about intentional discrimination when it enacted RFRA.[70] Instead, the Court determined that Congress' principal desire was to alleviate the incidental burdens on religious practice that otherwise valid laws may impose.[71] Lacking a connection to a constitutional injury, the Court concluded that the right created by RFRA, to be free from the application of burdensome state laws, was a new right not found in the Constitution.[72] After *City of Boerne*, Section 5 of the Fourteenth Amendment apparently only authorizes Congress to provide remedies for judicially-determined constitutional violations. In addition, in preparing legislation to remedy Fourteenth Amendment violations, Congress must make fairly detailed findings in the legislative record of unconstitutional behavior to satisfy the new *City of Boerne* congruence and proportionality standard.[73]

II. AMERICANS WITH DISABILITIES ACT

When Congress passed the Americans with Disabilities Act[74] in 1990, it

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Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one," and "[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." *Id.* at 2169-70.

69. *Id.*

70. *Id.* at 2169. In holding the RFRA congressional record inadequate, the Court distinguished the earlier Voting Rights cases, "[i]n 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.*

71. *Id.*

72. *Id.* at 2170.

73. *Id.* at 2164 (requiring "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end").

74. Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified primarily at 42 U.S.C. §§ 12101-12213 (1994 & Supp. I 1995 & Supp. II 1996)). Congress set forth its findings in the text of the statute that:

> individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. § 12101(a)(5) (1994). For an excellent overview of the ADA, see LAURA F. ROTHSTEIN, DISABILITIES AND THE LAW §§ 1.05, 4.06 (2d ed. 1997).

noted that there were 43 million Americans with physical or mental disabilities.[75] After fourteen hearings held by the Congress on the ADA, and as a result of the sixty-three field hearings and the hundreds of discrimination diaries submitted for the legislative record by persons with disabilities,[76] Congress found that these disabled persons suffered severe prejudice and discrimination.[77] In addition, Congress observed that people who suffered discrimination because of a disability often had no legal remedies,[78] unlike members of other constitutionally

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75. 42 U.S.C. § 12101(a)(1) (1994).

76. *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Resources and the Subcomm. on the Handicapped*, 101st Cong. 253-54 (1989) (testimony of Justin Dart, Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities).

77. The Senate report resulting from hearings on the ADA, *see supra* note 77 and accompanying text, acknowledged that

> [o]ur society is still infected by the 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.

S. Rep. No. 101-116, at 8-9 (1989) (referring to previous testimony by Justin Dart, Chairperson of the Task Force on the Rights and Empowerment of Americans with Disabilities). For persons with mental disabilities in particular, the extensive history of discrimination is even more disturbing. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 461- 64 (1985) (Marshall, J., concurring in part and dissenting in part) (summarizing history of purposeful discrimination against individuals with mental disabilities); ALBERT DEUTSCH, THE MENTALLY ILL IN AMERICA 353 (2d ed. 1949) (noting that at the turn of the century "the feebleminded person was looked upon as a parasite on the body politic who must be mercilessly isolated or destroyed for the protection of society"). *See generally* Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 399-414 (1991) (discussing the historical segregation, isolation, and degradation of the disabled in this country).

78. Prior to enactment of the ADA, the rights of persons with disabilities were protected incompletely. *See* Dick Thornburgh, *The Americans with Disabilities Act: What It Means to All Americans*, 64 TEMPLE L. REV. 375, 377 (1991) ("The ADA overcomes our past failure to eliminate attitudinal, architectural, and communication barriers in employment, transportation, public accommodations, public services, and telecommunications."). For example, the Rehabilitation Act of 1973 only provided disabled persons with protection against discrimination by federally funded entities, and was not enforceable against state or local governments or private entities that did not receive federal funds. Pub. L. No. 93-112, 87 Stat. 390 (1973) (codified as amended at 29 USC § 790 (1994), *repealed by* Pub. L. No. 102-569, 106 Stat. 4424 (1992), and 29 U.S.C. §§ 791-794 (1994 & Supp. II 1996), *amended by* Pub. L. No. 105-220, 112 Stat. 936 (1998)). Thus, persons with disabilities had no protection from discrimination in many areas, including state and local activities and services. *See* Thornburgh, *supra* at 377 n.9 (Title V of the Rehabilitation Act expressly applies only to recipients of federal funds, federal employers, and federal contractors); *see also* Nancy Lee Jones, *Overview and Essential Requirements of the Americans With Disabilities Act*, 64 TEMPLE L. REV. 471, 475-76 (1991).

or statutorily protected groups.[79] Congress also learned that the discrimination disabled persons suffered was many times intentional, and implemented through official state action that legislatively deemed persons with disabilities "unfit for citizenship."[80]

Based on this data, Congress set forth detailed legislative findings in the ADA, asserting that disabled individuals are a "discrete and insular minority who have been . . . subjected to a history of purposeful unequal treatment . . . based on characteristics that are beyond the control of such individuals."[81] To eradicate this discrimination, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate

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79. 42 U.S.C. § 12101(a)(4) (1994).

80. Cook, *supra* note 77, at 400 (citing 1920 Miss. Laws 294, ch. 210, § 17) (noting that chancery courts have jurisdiction in cases of legal inquiry in regard to feeble-mindedness which renders persons unfit for citizenship). Many states had laws that officially required the segregation of persons with disabilities, allegedly for the benefit of society, and "to relieve society of 'the heavy economic and moral losses arising from the existence at large of these unfortunate persons.'" *City of Cleburne*, 473 U.S. at 462-63 n.9 (Marshall, J., concurring in part and dissenting in part) (quoting Act of March 22, 1915, ch. 90, 1915 Tex. Gen. Laws 143, (repealed 1955)). *See also* 1919 Fla. Laws 231, 234, ch. 7887, § 8 (purpose of Florida Farm Colony is segregation of feeble-minded); 1919 Ga. Laws 377, 379, No. 373, § 3 (segregation permitted "for his own protection or the protection of others"); 1918 Ky. Acts 156, ch. 54; *id.* at 171, § 30 (provision for segregation and custody of feeble-minded, epileptic, and insane persons); 1921 Neb. Laws 843, ch. 241, § 1 para. 7221 (object of state institution for feeble-minded is "to segregate them from society"); 1905 N.H. Laws 413, ch. 23, § 1 (provision for detention of feeble-minded females over age 21, if in best interest of community); 1917 N.H. Laws 645, ch. 141, § 1 (provision for detention of feeble-minded females over age 21, if in best interest of community); 1911 Pa. Laws 927, preamble & § 1 (commission established to investigate plan for segregation, care, and treatment of feeble-minded); 1913 Pa. Laws 494-95, No. 328, § 1 (state institution devoted to segregation and care of epileptics and feeble-minded); 1921 S.D. Sess. Laws 344, ch. 235, §§ 1-3 (state commission granted power to make regulations for care and segregation of feeble-minded); 1914 Va. Acts 242, ch. 147, § 1 (state board to develop scheme for training and segregation of feeble-minded); 1916 Va. Acts 662, ch. 388 (purpose of act to define feeble-mindedness and provide for care and segregation of feeble-minded in institutions); 1909 Wash. Laws 260, tit. II. ch. 6, § 2 (idiotic children to be segregated in suitable accommodations).

81. 42 U.S.C. § 12101(a)(7) (1994). Based on this statutory language, some courts and commentators have argued that the ADA overruled *Cleburne*. *See* Martin v. Voinovich, 840 F. Supp. 1175, 1209 (S.D. Ohio 1993) (finding that the ADA overruled *Cleburne*); Rains, *supra* note 53, at 201 (arguing that the ADA is intended to mandate heightened scrutiny); James B. Miller, Note and Comment, *The Disabled, the ADA, & Strict Scrutiny*, 6 ST. THOMAS L. REV. 393, 393 (1994) (arguing that the ADA overturned *Cleburne*). *But see* Bartlett v. New York State Bd. of Law Exam'rs, 970 F. Supp. 1094, 1134 (S.D.N.Y. 1997) ("[A]t the very least, *Boerne* tells us that Congress may not, under the ADA, directly alter the level of scrutiny afforded the disabled under the Equal Protection Clause."), *vacated in part*, No. 97-9162, 1998 WL 611730 (2d Cir. Sept. 14, 1998).

commerce."[82] In addition, the ADA specifically abrogates the states' sovereign immunity under the Eleventh Amendment.[83]

The protections of the ADA apply to every "qualified individual with a disability."[84] A disability is defined as a "physical or mental impairment[85] that substantially limits[86] one or more . . . major life activities of [an] individual," including "functions such as caring for one's self, performing

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82. 42 U.S.C. § 12101(b)(4) (1994). As noted above, however, courts have begun to question whether Title II is a valid exercise of Congress' Fourteenth Amendment power. *See supra* notes 13-14 and accompanying text; Pierce v. King, 918 F. Supp. 932, 940 (E.D.N.C. 1996) ("Unlike traditional anti-discrimination laws, the ADA demands entitlement in order to achieve its goals. This the Fourteenth Amendment cannot authorize.").

83. The ADA includes a clause expressly abrogating states immunity. "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." 42 U.S.C. § 12202 (1994). As a result, courts have had no difficulty recognizing that Congress met the requirement of "unmistakable" intent to abrogate immunity in the ADA. *See* Clark v. California, 123 F.3d 1267, 1269-70 (9th Cir. 1997); Autio v. AFSCME, Local 3139, 968 F. Supp. 1366, 1368 (D. Minn. 1997), *aff'd*, 140 F. 3d 802 (8th Cir. 1998).

84. 42 U.S.C. § 12132 (1994).

> The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id. § 12131(2).

85. Physical and mental impairments means:

> (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine;
>
> (B) Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

28 C.F.R. § 35.104 (1998).

86. Substantially limits means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (1998).

The regulations also list a number of factors to consider in determining whether a major life activity is substantially limited: "(i) The nature and severity of the impairment; (ii) The duration or expected duration of the impairment; and (iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* § 1630.2(j)(2).

manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[87] The definition of "disability" also requires that individuals have "a record of . . . an impairment"[88] or are "regarded as having . . . an impairment."[89] In addition, the ADA protects nondisabled people who associate with disabled people.[90]

The ADA is divided into several titles and governs a broad range of activities, including employment,[91] government services,[92] and public accommodations.[93] This Article focuses on Title II of the ADA, which prohibits discrimination and segregation by public entities.[94] "Public entity" is broadly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government."[95]

Title II of the ADA expanded federal civil rights protection for the disabled by establishing that all state and local government[96] services be provided effectively, with necessary accommodations and aides, in integrated settings.[97]

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87. 28 C.F.R. § 35.104 (1998).

88. 42 U.S.C. § 12102(2)(B) (1994).

89. *Id.* § 12102(2)(C). Individuals may be "regarded as" disabled in one of three ways: (1) having an impairment that does not substantially limit a major life activity but is treated as if it did; (2) having an impairment that substantially limits a major life activity because of the attitudes of others; or (3) being treated as having an impairment where no such impairment exists. *See* 29 C.F.R. § 1630.2(l) (1998).

90. 42 U.S.C. § 12112(b)(4) (1994) (applying to employment); *see also* 28 C.F.R. § 35.130(g) (1998) (applying to public entities).

91. 42 U.S.C. §§ 12111-12117 (1994).

92. *Id.* §§ 12131-12165.

93. *Id.* §§ 12181-12189. Congress has also created a law to provide telecommunications services to individuals with speech or hearing impairments. 47 U.S.C. § 225 (1994).

94. 42 U.S.C. §§ 12131-12165. For a thorough discussion of Title II, see RUTH COLKER & BONNIE POITRAS TUCKER, THE LAW OF DISABLING DISCRIMINATION, ch. 6 (2d ed. 1998); Anne B. Thomas, *Beyond the Rehabilitation Act of 1973: Title II of the Americans with Disabilities Act*, 22 N.M. L. REV. 243 (1992).

95. 42 U.S.C. § 12131(1) (1994).

96. "[T]itle II applies to anything a public entity does. . . . [C]overage, however, is not limited to 'Executive' agencies but includes activities of the legislative and judicial branches of State and local governments." 28 C.F.R. § 35, app. A at 446 (1998). Neither the statute nor its implementing regulations list specific state entities or agencies that are exempted from or included in Title II's coverage. In contrast, Title I, dealing with employment, contains explicit exceptions to its broad applicability including the federal government, Indian tribes, and tax-exempt private clubs. 42 U.S.C. § 12111(5)(B) (1994). Likewise, Title III, dealing with accommodations, lists twelve categories of covered private entities. *Id.* § 12181(7)(A)-(L).

97. 42 U.S.C. §§ 12131-34 (1994). The relevant language in Title II states: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (1994).

In addition to prohibiting intentional discrimination, Title II requires public entities to operate their programs and services in a manner readily accessible to qualified individuals with a disability.[98] Public entities must, like the private sector, provide reasonable accommodations to disabled individuals.[99] Rather than using the generic term "reasonable accommodation," like Title I of the ADA, Title II expressly mandates the types of accommodations that must be provided. These include the reasonable modifications of rules, policies or practices, the removal of architectural, communication or transportation barriers, and the provision of auxiliary aids.[100] When faced with a claim of discrimination or failure to accommodate, state and local governments have available the same defenses as private entities.[101]

Title II states that the remedies available in any action against a state are the same as those available in an action under the ADA against any other entity.[102]

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98. *See* 28 C.F.R. § 35.150(a) (1998). Title II uses the phrase "qualified individual with a disability" to refer to those who are covered by its provisions. 42 U.S.C. § 12131(2) (1994). The term "qualified individual with a disability" is defined as:

> [A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id.

99. *See* 29 C.F.R. § 1630.9(a) (1998).

100. *See* 42 U.S.C. § 12131(2) (1994).

101. Title II imposes its conditions on all public entities, regardless of size. Like private entities, however, public entities can be excused from some of the requirements if they can show that compliance would create an undue financial and administrative burden, *see* 28 C.F.R. § 35.150(a)(3) (1998) (applying to the modification of existing facilities); *id.* § 35.164 (applying to the procurement of communications devices); 49 C.F.R. § 37.151 (1998) (applying to paratransit services), cause a fundamental alteration in the service, *see* 28 C.F.R. § 35.150(a)(3) (1998) (applying to the modification of existing facilities); *id.* § 35.164 (applying to the procurement of communications devices), or destroy the historic significance of a building, *see id.* § 35.150(a)(2) (qualifying the requirement that public services be readily accessible to disabled individuals).

In the employment context, public entities may avoid the requirements of Title II by demonstrating that providing an accommodation would impose an undue hardship. *See* 29 C.F.R. § 1630.15(d) (1998). "Undue hardship" means "significant difficulty or expense." *See id.* § 1630.2(p)(1). To determine whether an accommodation imposes significant expense, courts must consider the cost of the accommodation and the employer's financial resources. *See id.* § 1630.15(p)(2). In addition, accommodations must be reasonable. *See* Vande Zande v. Wisconsin Dep't of Admin., 44 F.3d 538, 543 (7th Cir. 1995) (holding that to present a prima facie case of discrimination under the ADA for failure to provide an accommodation, an employee "must show that the accommodation is reasonable in the sense both of efficacious and of proportional to costs"). Also, while employers may have to consider the disabled individual's suggestions, *see* 29 C.F.R. § 1630.2(o)(3) (1998), the final choice is left to the employer. *See id.* § 1630 app. at 363.

102. "In any action against a State for a violation of the requirements of this chapter, remedies

Under Title II, plaintiffs with disabilities have successfully challenged laws and policies traditionally considered within the states' police power, including marriage regulations,[103] quarantine rules,[104] social service policies and placements,[105] zoning ordinances,[106] road construction and building modifications,[107] jury selection criteria,[108] and state bar licensing procedures.[109]

(including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State." 42 U.S.C. § 12202 (1994); *see also* Bonnie P. Tucker, *The Americans with Disabilities Act of 1990: An Overview*, 22 N.M. L. REV. 13, 63 & n.325 (1992) (describing Title II's enforcement scheme). Although courts have been willing to award various accommodations to disabled plaintiffs under Title II, *see* Bartlett v. New York State Bd. of Law Exam'rs, No. 97-9162, 1998 WL 611730 (2d. Cir. Sept. 14, 1998), the courts have not yet settled on whether and when damage awards should be available to plaintiffs, particularly in cases where the plaintiff has failed to show intentional discrimination. For a thorough discussion about the debate over the various types of relief available under Title II, see COLKER & TUCKER, *supra* note 94, at 547 (discussing the availability of compensatory and punitive damages under Title II).

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

104. *See* Crowder v. Kitagawa, 81 F.3d 1480, 1486 (9th Cir. 1996) (holding that plaintiffs' suit stated a claim that Hawaii's quarantine law discriminated against blind individuals and remanding for discussion of whether the proposed modifications to the law were reasonable).

105. *See, e.g.*, Helen L. v. DiDario, 46 F.3d 325, 336-39 (3d Cir. 1995) (holding that Title II requires state social service agency to implement reasonably integrated services for clients with disabilities); Weaver v. New Mexico Human Servs. Dep't, 945 P.2d 70 (N. Mex. 1997) (holding that a New Mexico Human Services regulation which imposed a 12-month maximum period of eligibility for disabled adults receiving benefits from the general assistance program violated Title II of the ADA).

106. *See, e.g.*, City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 738 (1995) (holding that federal statute prohibiting discrimination in housing based on disability should be interpreted to allow challenge to city zoning provision that limited the number of unrelated occupants allowed in a dwelling because the provision failed to accommodate reasonably a group home for recovering addicts).

107. *See* Kinney v. Yerusalim, 9 F.3d 1067, 1075 (3d Cir. 1993) (holding that Title II required curb cuts installed when city undertook to make certain street paving and resurfacing repairs).

108. *See, e.g.*, Galloway v. Superior Court, 816 F. Supp. 12, 19-20 (D.D.C. 1993) (holding that blanket exclusion of blind people from jury pool violates the ADA); People v. Caldwell, 603 N.Y.S.2d 713, 716 (N.Y. Crim. Ct. 1993) (holding that court had obligation under ADA to reasonably accommodate potential juror's visual impairment). The courts have also recognized that courthouses must be accessible to individuals with disabilities. *See* Kroll v. Saint Charles County, 766 F. Supp. 744, 752-53 (E.D. Mo. 1991).

109. *See, e.g.*, Clark v. Virginia Bd. of Bar Exam'rs, 880 F. Supp. 430 (E.D. Va. 1995) (holding that state bar application asking questions concerning mental, emotional or nervous disorders are impermissible under Title II); Ellen S. v. Florida Bd. of Bar Exam'rs, 859 F. Supp. 1489, 1494-95 (S.D. Fla. 1994) (holding that Tenth Amendment posed no independent bar to

III. DEBATING THE ADA'S ABROGATION OF STATE SOVEREIGN IMMUNITY

After the *Seminole Tribe* and *City of Boerne* decisions, the Eleventh Amendment and Fourteenth Amendment questions in ADA cases thus are (1) whether Congress abrogated the Eleventh Amendment immunity with sufficient clarity; and (2) whether the ADA is a valid exercise of Congress' power to enforce the Fourteenth Amendment.[110]

Section 502 of the ADA expressly abrogates Eleventh Amendment protection for violations of the ADA and makes both legal and equitable remedies available in federal court against a state "to the same extent as such remedies are available for such a violation and an action against any public or private entities other than the state."[111] Such language satisfies the first part of the *Seminole Tribe* test in ADA cases.[112]

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application of ADA to state regulation of attorneys); *cf.* Medical Soc'y of N.J. v. Jacobs, No. Civ. A. 93-3670 (WGB), 1993 WL 413016, at *7-8 (D.N.J. Oct. 5, 1993) (holding that State Board of Medical Examiners' investigation of mental health history of medical license applicants violated Title II by placing additional burdens on applicants with disabilities). *See also* Catherine C. Cobb, *Challenging a State Bar's Mental Health Inquiries Under the ADA*, 32 HOUS. L. REV. 1383 (1996).

110. Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

111. 42 U.S.C. § 12202 (1994) ("A State shall not be immune under the eleventh amendment . . . ."). *See also* Autio v. AFSCME, Local 3139, 140 F. 3d 802, 804 (8th Cir. 1998) (Congress clearly abrogated states' Eleventh Amendment immunity by enacting ADA); Kimel v. State of Fla. Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998) (holding that the ADA includes a clear statement of intent to abrogate Eleventh Amendment immunity); Clark v. California, 123 F.3d 1267, 1269 (9th Cir. 1997) (Congress unequivocally expressed its intent to abrogate the state's immunity under both ADA and Rehabilitation Act), *cert. denied*, 118 S. Ct. 2340 (1998); Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168 (S.D. Ohio 1997) (Congress plainly indicated intent to abrogate states' immunity under Eleventh Amendment to suit under ADA and Rehabilitation Act). For a discussion of the clear statement rule as applied to the ADA and state prisons, see Michael P. Lee, *How Clear is "Clear?": A Lenient Interpretation of the* Gregory v Ashcroft *Clear Statement Rule*, 65 U. CHI. L. REV. 255 (1998); Laura E. Walvoord, *A Critique of* Torcasio v. Murray *and the Use of the Clear Statement Rule to Interpret the Americans with Disabilities Act*, 80 MINN. L. REV. 1183 (1996). It is also important to note that the statute provides that states are not immune from ADA claims brought in "Federal *or* State court." 42 U.S.C. § 12202 (1994). *See* Weaver v. New Mexico Human Servs. Dep't, 945 P.2d 70 (N. Mex. 1997). Thus, even if an individual cannot use the ADA in federal courts, state courts must still hear the claim.

112. In *Pennsylvania Department of Corrections* v. *Yeskey*, 118 S. Ct. 1952 (1998), a unanimous Supreme Court held that the plain language of Title II covers state prisons and prisoners. The Court further held that the term "qualified individual with a disability" is *not* ambiguous when applied to state prisoners. *Id.* at 1955. The Court determined that the ADA language does not require voluntary participation in the programs or services of a public entity to be protected under Title II. Rather, the Court found that Congress intended Title II to govern all state entities that provide any type of services, whether voluntary or not, to members of the population. *Id.*

Under the *City of Boerne* decision, the second part of the *Seminole Tribe* analysis becomes less certain.[113] It is unclear whether the ADA is a valid exercise of congressional authority under the Fourteenth Amendment.[114] Congress enacted the ADA and declared that disabled individuals were a "discrete and insular minority;" the Supreme Court, however, did not reach the same conclusion in its earlier decision concerning discrimination against disabled individuals.

In *City of Cleburne v. Cleburne Living Center, Inc.*,[115] the Supreme Court addressed whether mental disability is a suspect or quasi-suspect classification.[116] *Cleburne* involved a city zoning ordinance that required a special use permit to operate a group home for mentally retarded persons.[117] The plaintiffs challenged the city's denial of their request for a permit on equal protection grounds.[118] Although the court held that mental disability is not a suspect classification,[119] it found the denial of the permit violated the Fourteenth Amendment using a rational basis standard.[120] In *Cleburne*,[121] the Court observed that no "continuing antipathy or prejudice" exists towards persons with mental disabilities, thereby obviating the need for a heightened level of scrutiny.[122] In its analysis, the Court mentioned a series of groups that it also apparently believed did not trigger

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113. For a discussion of the continuing validity of the ADA after *City of Boerne*, see Jesse H. Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term*, 19 CARDOZO L. REV. 2259, 2289-2302 (1998); Elizabeth Welter, Note, *The ADA's Abrogation of Eleventh Amendment State Immunity as a Valid Exercise of Congress' Power to Enforce the Fourteenth Amendment*, 82 MINN. L. REV. 1139 (1998); Note, *Section Five and the Protection of Nonsuspect Classes After* City of Boerne v. Flores, 111 HARV. L. REV. 1542 (1998).

114. *See supra* notes 13-15 and accompanying text. *See generally* Daniel O. Conkle, *Congressional Alternatives in the Wake of* City of Boerne v. Flores*: The (Limited) Role of Congress in Protecting Religious Freedom From State and Local Infringement*, 20 U. ARK. LITTLE ROCK L.J. 633 (1998); Brent R. Hatcher, Jr., Casenote, City of Boerne v. Flores: *Defining the Limits of Congress' Fourteenth Amendment Enforcement Clause Power*, 49 MERCER L. REV. 565 (1998).

115. 473 U.S. 432 (1985).

116. *Id.* at 435.

117. *Id.* at 436.

118. *Id.* at 437.

119. *Id.* at 442.

120. *Id.* at 435. In his opinion, concurring in part and dissenting in part, Justice Marshall argued that the majority reached this result using a higher level of scrutiny than it acknowledged. *Id.* at 456 (Marshall, J., concurring in part and dissenting in part). Later commentators have agreed with Justice Marshall's analysis. *See* TRIBE, *supra* note 41, § 16-3, at 1444; Galye Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 793-96 (1987) (discussing the heightened level of scrutiny in *Cleburne*).

121. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).

122. *Id.* at 443.

heightened scrutiny, including the physically disabled.[123] As a result, courts and commentators have understood *Cleburne* to establish that disability in general is not a suspect classification.[124] The fact that the disabled appear to be a non-suspect class under current Supreme Court precedent limits Congress' ability to legislate on their behalf. Based on *City of Boerne*, in order to protect a non-suspect class, Congress must find facts that demonstrate the existence of invidious discrimination in a law which would otherwise withstand rational basis scrutiny.[125]

Because *City of Boerne's* narrow interpretation of Congress' Section 5 authority leaves open the possibility that the ADA is not a valid exercise of Congress' power, and thus fails to abrogate state immunity, states have been quick to maintain that the ADA should not be applicable to them.[126] Based on *City of Boerne*, states have maintained that Congress' attempt to abrogate state immunity fails because the ADA applies heightened scrutiny to a non-suspect class and effectively punishes "rational" discrimination by public entities by requiring reasonable accommodations for the disabled.[127] Several courts have

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123. *Id.* at 445-46 (rejecting eligibility for heightened scrutiny for groups such as "the aging, the disabled, the mentally ill, and the infirm").

124. *See* Hansen v. Rimel, 104 F.3d 189, 190 n.3 (8th Cir. 1997) ("Although 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 Adults v. Wingate, 101 F.3d 818, 824-27 (2d Cir. 1996) (applying rational basis standard to claims of disabled individuals), *cert. denied*, 117 S. Ct. 1843 (1997). *See also* Rains, *supra* note 52, at 199 (asserting that *Cleburne* "managed to weaken future equal protection claims asserted by, not only mentally retarded persons, but other individuals with disabilities").

125. City of Boerne v. Flores, 117 St. Ct. 2157, 2169-71 (1997).

126. *See* Autio v. AFSCME, Local 3139, 140 F.3d 802, 805 (8th Cir. 1998) (describing the state's argument as emphasizing that disability is subject to the rational basis test and implying that the ADA illegitimately embodies a higher level of scrutiny than rational basis); Clark v. California, 123 F.3d 1267, 1270-71 (9th Cir. 1997) (rejecting state's argument that Congress' power must be limited to the protection of those classes found by the Court to deserve heightened scrutiny under the Constitution), *cert. denied*, 118 S. Ct. 2340 (1998). *But see* Garrett v. Board of Trustees of the Univ. of Ala., 989 F. Supp. 1409, 1409-10 (N.D. Ala. 1998) (arguing that *City of Boerne* apparently "was not available to, was ignored by, or was misunderstood by those courts that have ruled in favor of applying the ADA . . . to states").

127. *See Garrett*, 989 F. Supp. at 1410 (noting that Congress cannot require a state to grant preferential treatment under the ADA to its employees simply by purporting to invoke Section 5); Brown v. North Carolina Div. of Motor Vehicles, 987 F. Supp. 451, 460 (E.D.N.C. 1997) (finding that Congress improperly invoked Fourteenth Amendment to facilitate the ADA's putative abrogation of the sovereign immunity of the states; therefore Eleventh Amendment is a properly asserted defense for state in ADA action); Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168, 1176 (S.D. Ohio 1997) (finding that insofar as accommodation is defined under 42 U.S.C. § 12111(9) (1994), ADA and Rehabilitation Act accommodation provisions are not a valid exercise of Congress' enforcement power under Fourteenth Amendment).

agreed with these arguments and have refused to abrogate sovereign immunity.[128]

For example, in *Brown v. North Carolina Division of Motor Vehicles*,[129] the court decided that the ADA is a substantive rather than remedial exercise of Section 5.[130] Second the court focused on the ADA's reasonable accommodation requirement and determined that this rendered the ADA an improper exercise of Section 5[131] because "the ADA does not remediate invidious, arbitrary, or irrationally made classifications."[132]

Other courts have taken a different approach to the abrogation issue, upholding the ADA's abrogation of Eleventh Amendment immunity as a valid exercise of its Section 5 power.[133] In *Autio v. AFSCME, Local 3139*,[134] the Eighth Circuit upheld jurisdiction under the ADA.[135] The court applied both the *Morgan* test,[136] and *City of Boerne's* congruence and proportionality analysis,

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128. *See Garrett*, 989 F. Supp. at 1410 ("Congress cannot stretch Section 5 and the Equal Protection Clause of the Fourteenth Amendment to force a state to provide allegedly equal treatment by guaranteeing special treatment or 'accommodation' for disabled persons."); *Brown*, 987 F. Supp. at 458 (stating that "[t] he ADA . . . single[s] out the disabled for special, advantageous treatment"); *Nihiser*, 979 F. Supp. at 1174 (asserting that "[t]he accommodation provisions will place a serious financial burden upon the states").

129. 987 F. Supp. 451 (E.D.N.C. 1997).

130. *Id.* at 458 (noting that Congress cannot alter the Supreme Court's classification of disabled individuals as a non-suspect class).

131. *Id.* The court said "the concept of entitlements has little to do with promoting the 'equal protection of the laws.'" *Id. See also Nihiser*, 979 F. Supp. at 1176 (holding that the ADA does not abrogate sovereign immunity because the ADA's accommodation provisions amount to congressionally "created substantive rights").

132. *Brown*, 987 F. Supp. at 458.

133. *See* Kimel v. Florida Bd. of Regents, 139 F.3d 1426, 1433 (11th Cir. 1998) (holding that Congress effectively abrogated states' Eleventh Amendment immunity from suits under the ADA), *vacated in part*, 118 S. Ct. 2339 (1998); Amos v. Maryland Dep't of Pub. Safety and Correctional Servs., 126 F.3d 589, 604 (4th Cir. 1997) (holding Congress has expressly abrogated Eleventh Amendment immunity of states under ADA); Armstrong v. Wilson, 124 F.3d 1019, 1026 (9th Cir. 1997) (holding that exception to Eleventh Amendment immunity set forth in *Ex Parte Young* applies to allow ADA action against named individuals in their official capacities), *cert. denied*, 118 S. Ct. 2340 (1998). One post-*City of Boerne* decision concerning whether the ADA effectively abrogated state immunity, upheld the ADA's validity against the state without ever applying the new congruence and proportionality standard. *See* Wallin v. Minnesota Dep't of Corrections, 974 F. Supp. 1234 (D. Minn. 1997).

134. 140 F.3d 802 (8th Cir. 1998).

135. *Id.* at 803.

136. As mentioned above, in *Morgan*, the Court applied a three-part test: "We . . . proceed to the consideration whether [section] 4(e) is 'appropriate legislation' to enforce the Equal Protection clause, . . . whether it is 'plainly adopted to that end' and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'" Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

and found that the ADA constituted a valid exercise of Section 5.[137] Deferring to Congress' finding that the disabled are a "discrete and insular minority"[138] that has been historically isolated and lacks legal redress for its treatment, the court found the remedial requirement of *City of Boerne* satisfied.[139] The court further distinguished the ADA from RFRA on the basis that the purpose and structure of the ADA indicate that its primary goal is to eradicate the effects of intentional discrimination.[140] The *Autio* court then rejected the state's argument that Congress cannot act under Section 5 on behalf of non-suspect classes. It observed that many laws abrogating Eleventh Amendment immunity have been upheld as constitutional where the protected rights were not grounded in a quasi-suspect or suspect classification.[141]

Likewise, in *Crawford v. Indiana Department of Corrections*,[142] the Seventh Circuit, in an opinion written by Judge Posner, held that the Eleventh Amendment does not block application of the ADA to state entities.[143]

> Like other anti-discrimination statutes, the Americans with Disabilities Act is an exercise of Congress' power under section 5 of the Fourteenth Amendment (as well as under the commerce clause, which is not excepted from the Eleventh Amendment) to enact legislation designed to enforce and bolster the substantive provisions of the amendment, in this case the equal protection clause. The Eleventh Amendment does not insulate the states from suits in federal court to enforce federal statutes

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137. *Autio*, 140 F.3d at 804-06.

138. 42 U.S.C. § 12101(a)(7) (1994).

139. Autio, 140 F.3d at 805 n.4. Likewise, other courts have also given the ADA's congressional findings great deference when upholding Congress' use of the Fourteenth Amendment enforcement power as remedial in enacting the ADA. *See* Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998).

140. *Autio*, 140 F.3d at 804-05. Although Congress defined "discrimination" to include "the discriminatory effects of architectural, transportation, and communication barriers," Congress' definition of discrimination also includes more traditional examples of purposeful conduct such as "outright intentional exclusion, . . . overprotective rules and policies, . . . [and] segregation." 42 U.S.C. § 12101(a)(5) (1994).

141. *Autio*, 140 F.3d at 805. *See also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985) (stating that method to correct invidious discrimination is not through creation of a new suspect class); Martin v. Kansas, 978 F. Supp. 992, 995 (D. Kan. 1997) ("Congress, in enacting the ADA, has provided the direction absent in *City of Cleburne*, thus making distinctions between the judicial standards of review meaningless."). The *Martin* court cited language from *Cleburne* that suggested that the judiciary has created a standard for reviewing disability-based classifications only in light of Congress' failure to do so through Section 5. *Id.* The *Martin* Court appeared to be arguing that now that Congress had made findings concerning the constitutional treatment the disabled had received by public entities, the courts were free to reconsider their earlier approach and adopt Congress' standard. *See id.*

142. 115 F.3d 481 (7th Cir. 1997).

143. *Id.* at 487.

> enacted under the authority of the Fourteenth Amendment. . . . Invidious discrimination by government agencies . . . violates the equal protection clause even if the discrimination is not racial, though racial discrimination was the original focus of the clause. In creating a remedy against such discrimination, Congress was acting well within its powers under section 5.[144]

The lower courts that considered *City of Boerne* are divided regarding how much deference they should give Congress' finding that a law constitutes arbitrary or invidious discrimination in violation of the Fourteenth Amendment, and whether Congress can abrogate sovereign immunity to remedy the identified violation. The courts that have relied on Congress' findings concerning the pervasive discrimination experienced by the disabled by not only private entities but public, have upheld the ADA as a valid exercise of Congress' Fourteenth Amendment authority. It remains unclear whether the Supreme Court will uphold such decisions.

In general, discrimination experienced by disabled individuals has often been found to be non-intentional and thus not based on invidious discrimination.[145] Public entities will be able to show that the rationale for failing to provide reasonable accommodations to the disabled resulted from economic realities, not hatred.[146] Such disparate impact discrimination may no longer be within Congress' power to remedy after *City of Boerne*.[147] Thus, even though discrimination against the disabled may be unfair and in need of a global federal remedy, Congress may not be able to provide any relief against state discrimination.

Congress is in the unique position to examine what is occurring in this country at a national level. Only Congress can identify systematic failures across the states and can act to address these problems by prohibiting discrimination against minorities, including non-suspect classes, by private and public entities. The enactment of the Fourteenth Amendment and the other Civil War Amendments[148] provided the federal government with greater authority over the states so that individuals would receive protection from various forms of discrimination.[149] Arguably, the Fourteenth Amendment does provide Congress

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144. *Id.*

145. *See* Alexander v. Choate, 469 U.S. 287 (1985) (discussing the Rehabilitation Act and finding that the discrimination against the disabled resulted from thoughtlessness and indifference).

146. *See* Concerned Parents to Save Dehrer Park Ctr. v. City of West Palm Beach, 846 F. Supp. 986, 992 (Fla. 1994) (holding that although the city can make an economic determination that the disabled do not require any level of benefits, the ADA "does require that any benefits provided to non-disabled persons must be equally made available for disabled persons").

147. *See* Washington v. Davis, 426 U.S. 229, 240-41 (1976) (holding that the Equal Protection Clause reaches only intentional discrimination).

148. U.S. CONST. amends. XIII-XV.

149. *See* Nowak, *supra* note 41, at 1209 ("If the civil War did anything, it changed the structure of our nation from one where political and economic power resided in certain localities

with the ability to establish a floor of protection for all citizens against irrational discrimination.[150] As a result of the recent federalism decisions, however, Congress' authority to deal with irrational discrimination against non-suspect classes has been put in doubt. Thus, the practical consequences of the new federalism undermine Professor Yoo's argument that this new federalism contributes to liberty.[151]

Uncertainty now exists as to whether lower courts, and even the Supreme Court, will uphold laws that protect non-suspect classes, such as the disabled, as valid against state governments.[152] Nothing in the Supreme Court's recent

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to one truly unified nation."); John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975) (stating that the history of the Eleventh Amendment "[e]stablish[es] the principle that Congress should be free to determine the extent of federal court jurisdiction over state governments, and this principle was reaffirmed by the ratification of the Fourteenth amendment."). Even the Supreme Court acknowledged that the Fourteenth Amendment changed the balance of power between the state and federal government. City of Boerne v. Flores, 117 S. Ct. 2157, 2165 (1997) (observing that the Fourteenth amendment "'limited but did not oust the jurisdiction of the State[s]'") (quoting CONG. GLOBE, 42d Cong., 1st Sess., at App.151 (1971) (statement of Rep. Garfield).

150. *See* Michael W. McConnell, *The Supreme Court, 1996 Term—Comment: Institutions and Interpretations: A Critique of* City of Boerne v. Flores, 111 Harv. L. Rev. 153, 171 (1997) (arguing that under Section 5, Congress should be viewed "as having some degree of authority to determine for itself what the provisions of the Fourteenth Amendment mean, and to pass enforcement legislation pursuant to those determinations"). Permitting Congress to pass laws that establish a minimum level of protection does not undermine state autonomy and the ability of states to experiment and protect their citizens' liberty interests. States are still free to experiment above the level that congress has legislated. For instance, the ADA provides that states may not discriminate against the disabled and must make reasonable accommodations. Although states may no longer discriminate against the disabled, they may provide more protections than the federal law requires. Thus, states continue to serve as laboratories and protectors of liberty interests.

151. See Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009 (1997), stating:

> Federalism is a bit like abdominal surgery. It can save the political life of a nation under certain circumstances, but it is not benign and should not be resorted to without a reason. It can be divisive, exaggerating political differences that might otherwise have dissipated over time, and exacerbating conflicts that might otherwise have been resolved. Moreover, because it grants political sub-units definitive rights against the central government, it means that some residents of those sub-unties are likely to be treated in a way that the majority of the nation regards as wrong, and even immoral.

152. Jesse Choper argues that:

> The ultimate question, not really addressed in *City of Boerne*, is whether the Court can be persuaded that "[m]any of the laws affected by the . . . [ADA] have a significant likelihood of being unconstitutional" and, if so, whether the ADA's encompassing activities such as wheelchair access to prison recreational facilities

federalism cases prevents lower courts from finding that states are immune from the ADA in federal court. Indeed, the courts that have held that Congress lacks the authority to abrogate state immunity under the ADA appear to be applying the new federalism cases in a principled way.[153] However, these lower court holdings are disturbing in that they are inconsistent with Congress' purpose in enacting legislation to remedy disability discrimination. They also do not seem consistent with a version of federalism that provides greater personal liberty to all citizens.

CONCLUSION

The Court's new federalism does provide greater protection for state autonomy concerns. Although arguably the Supreme Court has an important role to play in these concerns, its federalism theory has undermined, not enhanced, individual liberties. Given the current Supreme Court jurisprudence, the ADA gives an individual access to the federal courts to challenge an exclusion from employment at Burger King and IBM, but not to challenge discrimination by state or local government entities. Surely this is not what Congress had in mind when it enacted the ADA because it found that state governments caused much of the discrimination against the disabled. The current new federalism permits lower courts to find state governments immune in federal suits against them under the ADA for their past or future misdeeds.

Professor Yoo uses historical arguments from the framers' era to demonstrate his theory that a strong form of federalism is mandated. It is easy to overlook the real world implications of that theory. Notwithstanding the cogent historical and theoretical arguments set forth by Professor Yoo, recent developments in disability law weaken the argument that the Court views increasing personal liberty for citizens as the basis for its new federalism.

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and a public school's policy regarding students with HIV satisfies the "congruence and proportionality" requirement in *City of Boerne*.

Choper, *supra* note 113, at 2301-02 (quoting *City of Boerne*, 117 S. Ct. at 2170.

153. *See generally*, Note, *supra* note 113, at 1554 (noting that the courts that have upheld abrogation under the ADA and the ADEA do not appear to do so on a principled, basis as they appear to be relying on the ratchet theory to justify their holdings).