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Title II of the Americans with Disabilities Act Is a Valid Exercise of Congress' Power to Abrogate State Sovereign Immunity: *Tennessee v. Lane*

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Title II of the Americans with Disabilities Act is a Valid Exercise of Congress' Power to Abrogate State Sovereign Immunity: *Tennessee v. Lane*

CONSTITUTIONAL LAW – ELEVENTH AMENDMENT – STATE SOVEREIGN IMMUNITY – FOURTEENTH AMENDMENT – REMEDIAL LEGISLATION – The Supreme Court of the United States held that as it applies to the class of cases implicating the fundamental right of access to the courts, Title II of the Americans with Disabilities Act of 1990 constitutes a valid exercise of Congress' authority under § 5 of the Fourteenth Amendment to abrogate state sovereign immunity.

Tennessee v. Lane, 124 S. Ct. 1978 (2004)

George Lane (hereinafter "Lane") was required on two separate occasions to appear in a county courthouse in the State of Tennessee to answer criminal charges the State had filed against him.[1] Lane is a paraplegic whose mobility is dependent upon the use of a wheelchair.[2] On each occasion when he was required to appear, the proceedings were conducted on the second floor of the courthouse.[3] The courthouse building was not equipped with an elevator, leaving the stairway as the only available access to the second floor.[4] At his first appearance, Lane crawled up the stairs to get to the courtroom, but refused to repeat this effort when he returned to the courthouse for a second appearance.[5] Lane also refused assistance from courthouse officers when he returned to the courthouse for his second scheduled hearing.[6] As a result, he was arrested and incarcerated for failing to appear at this second proceeding.[7]

Beverly Jones (hereinafter "Jones") is also a paraplegic, dependent upon the use of a wheelchair for mobility.[8] Jones was a certi-

1. Tennessee v. Lane, 124 S. Ct. 1978, 1982 (2004).
2. *Lane,* 124 S. Ct. at 1982.
3. *Id.*
4. *Id.*
5. *Id.* at 1982.
6. *Id.* at 1983.
7. *Lane,* 124 S. Ct. at 1983.
8. *Id.* at 1982.

fied court reporter, who performed services in that capacity for parties to judicial proceedings.[9] She alleged that, because of her disability, she was unable to access several county courthouses and that she was deprived of the opportunity to work, as well as to participate in the judicial process.[10]

Lane and Jones filed suit against the State of Tennessee (hereinafter "the State"), as well as several counties alleging past and ongoing violations of Title II of the Americans with Disabilities Act of 1990 (hereinafter "Title II").[11] Lane and Jones each alleged that they had been denied access to, or the services of, state courthouses because of their disabilities.[12]

The State filed a motion to dismiss the suits filed by Lane and Jones on the ground that it was immune from the suit pursuant to the Eleventh Amendment of the United States Constitution.[13] The motion was denied by the United States District Court for the Middle District of Tennessee.[14] The State then appealed to the Unites States Court of Appeals for the Sixth Circuit, which entered an order holding the case in abeyance.[15] The court of appeals then followed its own holding in *Popovich v. Cuyahoga County Court,* affirming the district court's denial of the State's motion to dismiss the case because the claims in the instant case were based upon due process considerations.[16] The State filed a petition for

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9. Brief for the Private Respondents at 5, *Lane,* (No. 02-1667).

10. *Lane,* 124 S. Ct. at 1982.

11. *Id.* There were six named plaintiffs in the original complaint, all of whom alleged violations of Title II of the Act for failure to provide access to courthouses for persons with mobility disabilities. Brief for the Private Respondents at 4, *Lane,* (No. 02-1667). The district court granted two separate motions to join the others as plaintiffs to this action. *Lane,* 124 S. Ct. at 1982.

12. *Lane,* 124 S. Ct. at 1982.

13. *Id.* at 1983.

14. *Id.* The district court did not file an opinion after ruling upon this motion. *Id.*

15. *Id.* The circuit court awaited the decision of the United States Supreme Court in *Board of Trustees v. Garrett,* 531 U.S. 356 (2001), before ruling on the instant case. *Id.* at 1983. In *Garrett,* the Court held that the Eleventh Amendment bars private suits seeking money damages for state violations of Title I of the Act. *Id.* (citing *Garrett,* 531 U.S. at 360.) The Court, however, did not answer whether such suits were permitted under Title II of the Act, providing, "[w]e are not disposed to decide the constitutional issue whether Title II, . . . , is appropriate legislation under § 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question." *Id.* (citing *Garrett,* 531 U.S. at 360).

16. *Id.* In *Popovich,* the majority of the court of appeals sitting en banc held that a hearing impaired litigant seeking money damages could bring a suit against a State under Title II of the Act over the States assertion of Eleventh Amendment immunity. *Id.* (citing *Popovich v. Cuyahoga County Court,* 276 F.3d 808, 811-16 (6th Cir. 2002)). The majority in *Popovich* interpreted the *Garrett* decision to bar private suits on equal protection grounds, but not on the grounds of due process violations. *Id.* (citing *Popovich,* 276 F.3d at 811-16.)

rehearing, in which it argued that *Popovich* was not controlling because the complaint submitted by Lane and Jones in the instant case did not allege due process violations.[17] The court of appeals filed an amended opinion in response to the petition for rehearing, in which it did not reject the State's argument, but stated that the questions presented could not be answered absent a fully developed factual record, and remanded the case for further proceedings.[18] The United States Supreme Court granted certiorari to answer the question of whether Title II of the Act, enacted in part to enforce the guarantees of the Fourteenth Amendment as they apply to disabled persons, exceeded the power of Congress to abrogate the state's sovereign immunity which is protected by the Eleventh Amendment.[19]

Justice Stevens, writing for the majority of the Court, concluded that Title II of the Act was a valid exercise of Congress's power under section 5 of the Fourteenth Amendment to enforce the guarantees of that amendment as Title II applies to the class of cases implicating the constitutional right of access to the courts.[20] He began his analysis by noting that Congress has broad authority to enforce the Act "including the power to enforce the Fourteenth Amendment and to regulate commerce."[21] He then turned to Title II of the Act, stating that Title II prohibits any public entity from discriminating against qualified persons with disabilities in the provision or operation of public services, programs, or activities.[22] Finally, the Court acknowledged that private citizens

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17. *Lane,* 124 S. Ct. at 1982.

18. *Id.* at 1984. In its amended opinion, the court of appeals stated that access to the courts is a right protected by the Due Process Clause of the Fourteenth Amendment. Lane v. Tennessee, 315 F.3d 680, 682 (6th Cir. 2003). Jones and Lane brought the suit to enforce this right, each alleging that they were denied access to the courts because of the lack of accommodations for disabled persons. *Lane v. Tennessee,* 315 F.3d at 683. Ultimately, the court decided that there was not a sufficient factual record to decide the case, but disposed of the case pursuant to its holding in *Popovich* that Title II of the Act was an appropriate exercise of Congress' power under §5 of the Fourteenth Amendment to enforce individual's due process rights. *Id.*

19. *Lane,* 124 S. Ct. at 1984

20. *Id.* The majority included Justices O'Connor, Souter, Ginsburg, and Breyer. *Id* at 1981. Justice Souter concurred and filed a separate opinion in which Justice Ginsburg joined. *Id.* Justice Ginsburg also concurred and filed separate opinion in which Justices Souter and Breyer joined. *Id.* Chief Justice Rehnquist filed a dissenting opinion in which Justices Kennedy and Thomas joined. *Id.* Justice Scalia and Justice Thomas each filed separate dissenting opinions. *Lane,* 124 S. Ct. at 1994.

21. *Id.* at 1984 (citing 42 U.S.C. §12101 (1990)).

22. *Id.* (citing 42 U.S.C. § 12132 (1990)). "Public Entity" includes state and local governments. *Id.* (citing 42 U.S.C. § 12131 (1990)). Persons with disabilities are "qualified" if

are permitted to bring suits for money damages against states under Title II, for violations of that title's provisions.[23]

Justice Stevens next turned his attention to the state's immunity under the Eleventh Amendment, which prohibits suits brought against a state by citizens of another state, as well as suits brought by a state's own citizens.[24] He stated that Congress may abrogate a state's immunity by unequivocally expressing its intent to do so, as long as it acts pursuant to a valid grant of constitutional authority.[25] Applying this test to Title II of the Act, Justice Stevens found the first requirement to be satisfied by the language of the Act.[26] Next, he addressed the question of whether Congress had the power to give effect to this intent.[27]

The majority stated that Congress's power to abrogate a state's sovereign immunity is provided by section 5 of the Fourteenth Amendment.[28] Under section 5, Congress is authorized to enact prophylactic legislation to prevent and deter unconstitutional discrimination.[29] This power is limited, however, as Congress may not substantively change governing law.[30] The Court set forth the test to determine whether legislation is enacted pursuant to a valid exercise of section 5 power in *City of Boerne v. Flores*.[31] Such legislation is valid if it "exhibits a congruence and proportionality between the injury to be prevented or remedied and means

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they would otherwise be able to participate in or utilize services, programs, or activities provided by a public entity. *Id.* (citing 42 U.S.C. § 12131 (1990)).

23. *Id.* The enforcement provision of Title II incorporates by reference the enforcement provision of the Rehabilitation Act of 1973 which grants the authorization of private citizens to file suits seeking monetary damages. *Id.* (citing 29 U.S.C. § 794 (1973)).

24. *Lane,* 124 S. Ct. at 1984. The text of 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." U.S. CONST. amend. XI. This language has been extended by the Supreme Court to include suits brought by a State's own citizens. *Lane,* 124 S. Ct. at 1985.

25. *Id.* at 1985.

26. *Id.* The language of Title II of the Act provides: "A State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter." *Id.* (citing 42 U.S.C. § 12202).

27. *Id.*

28. *Lane,* 124 S. Ct. at 1985.

29. *Id.*

30. *Id.* at 1986.

31. 521 U.S. 507 (1997). In *Boerne,* the Court held that the Religious Freedom Restoration Act of 1993 exceeded Congress' authority because the RFRA was "so out of proportion" to its objective that it worked a substantive change in constitutional protections. *Lane,* 124 S. Ct. at 1986-87 (citing *Boerne,* 521 U.S. at 512).

adopted to that end."[32] Justice Stevens then applied the *Boerne* test to Title II of the Act to determine whether Congress exceeded its section 5 power to abrogate the states' sovereign immunity.[33]

Justice Stevens stated that the first step of the *Boerne* test requires the Court to identify the constitutional right that Congress sought to protect when it enacted Title II.[34] In this case he identified the constitutional right in jeopardy to be the right of access to the courts.[35] The analysis turned to decide whether Title II validly protects this right.[36] While recognizing Congress's power to enact legislation pursuant to its section 5 authority, the Court stated that "the appropriateness of the remedy depends on the gravity of the harm it seeks to prevent."[37] The majority recognized that the harm sought to be prevented by Title II was the unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.[38] The Court found evidence of the pervasive nature of this harm in the documented history of unconstitutional treatment of disabled persons arising in its own cases as well as cases in several other courts that confirmed a consistent recurrence of unconstitutional treatment in the judiciary.[39] Focusing on the specific issue in the instant case, the majority acknowledged the widespread inaccessibility of state courthouses to disabled persons revealed by congressional findings leading up to enactment of the ADA.[40] Citing the overwhelming evidence of the nature and extent of unconstitutional discrimination against persons with disabilities in the provision of public services, the majority determined that the inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.[41]

Justice Stevens next considered the question of whether Title II was a proportional legislative response to the discriminatory

32. *Lane*, 124 S. Ct. at 1986.
33. *Id.* at 1988.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Lane* 124 S. Ct. at 1988.
38. *Id.* at 1989.
39. *Id.* at 1989-90.
40. *Id.* at 1989-90 The congressional findings were sourced by testimony before Congress by disabled persons describing physical inaccessibility of local courthouses as well as accounts given to the appointed task force of exclusion from state judicial services and programs. *Id.* at 1990-91.
41. *Id.* at 1991.

treatment of disabled persons seeking access to the courts.[42] In his proportionality analysis, Justice Stevens recognized that Congress's chosen remedy was limited in that it required the states only to take reasonable measures to accommodate disabled persons.[43] The majority noted that Title II requires reasonable modifications only when an individual seeking modification is otherwise eligible for the service.[44] Furthermore, it recognized that a state does not have to make such modifications if in doing so would be financially or administratively burdensome, would threaten historic preservation interests, or would cause the service to suffer a fundamental alteration in nature.[45] The Court then stated that a state's obligation to allow citizens to be heard in its courts is consistent with the duty to accommodate.[46] The majority concluded that the affirmative obligation to accommodate disabled persons called for by Title II is proportional to the harm sought to be remedied and is therefore a "reasonable prophylactic measure, targeted to a legitimate end."[47] Therefore, the Court upheld Title II of the ADA as a valid exercise of Congress's section 5 power.[48]

Justice Souter filed a short concurring opinion in which he agreed with the application of the congruence and proportionality test to Title II of the Act.[49] He noted that if the Court would have engaged in a broader analysis, the evidence would have emphasized the appropriateness of action under section 5 because the Court would have found that the judiciary itself had participated in some of the practices that led to the discrimination that Congress remedied.[50] Justice Souter concluded by praising the Court's effort in reversing this judicial trend.[51]

Justice Ginsburg also filed a concurring opinion in which she agreed with the reasoning of the majority and reiterated Con-

42. *Lane*, 124 S. Ct. at 1993. Justice Stevens restricted the scope of his analysis to the narrow issue of whether Title II was a valid exercise of Congress's power to enforce the constitutional right of access to the courts. *Id.* He chose not to expand the analysis to include all public facilities. *Id.*

43. *Id.*

44. *Id.* (citing 42 U.S.C. § 12131 (1990)).

45. *Id.* at 1994 (citing 28 C.F.R. § 35.150 (2003)).

46. *Id.*

47. *Lane*, 124 S. Ct. at 1994.

48. *Id.*

49. *Id.* at 1995 (Souter, J., concurring).

50. *Id.* (Souter, J., concurring).

51. *Id.* (Souter, J., concurring).

gress's objective in enacting the Act.[52] She noted that disabled persons are included in "We the People" and that Congress realized that such persons required accommodation as opposed to indifference.[53] She argued that legislation governing all government actors with respect to accommodating disabled persons was an appropriate federalist approach as opposed to addressing each state individually only when violations occurred.[54] Justice Ginsburg concluded by recognizing that the Court held appropriately in supporting the uniform governance provided by Title II of the Act, which Congress enacted based on the evidence of inaccessibility of the courts to disabled persons on a national scale.[55]

Chief Justice Rehnquist filed a dissenting opinion in which he disagreed with the majority's holding that Title II was a valid exercise of Congress's section 5 power.[56] The Chief Justice argued that the majority applied the congruence and proportionality test inconsistently with the Court's recent precedents.[57] He began his analysis by stating that the constitutional right to be protected under Title II is ambiguous because that Title "purports to enforce a panoply of constitutional rights of disabled persons."[58] Next, he attacked the majority's finding that Congress enacted Title II in response to violations of due process rights of disabled persons, stating that the evidence relied upon by the majority focused on an overall societal discrimination, and that it was irrelevant to the enforcement of due process rights under Title II.[59] The Chief Justice further contended on this point that the greater part of the evidence relied upon by the majority focuses on discrimination not by the states, but by non-state governments.[60] He also argued that

52. *Lane*, 124 S. Ct. at 1996. (Ginsburg, J., concurring). Justice Ginsburg stated Congress' objective as "the elimination or reduction of physical and social structures that impede people with some present, past, or perceived impairments from contributing, according to their talents, to our Nation's social, economic, and civic life." *Id.* (Ginsburg, J., concurring).

53. *Id.* (Ginsburg, J., concurring).

54. *Id.* (Ginsburg, J., concurring). Justice Ginsburg disagreed with the approach set forth by Justice Scalia in his dissenting opinion that Congress can impose §5 legislation only upon states in which a violation has been established. *Id.* at 2012 (Scalia, J., dissenting).

55. *Id.* (Ginsburg, J., concurring).

56. *Id.* at 1997. (Rehnquist, C.J., dissenting).

57. *Lane*, 124 S. Ct. at 1997 (Rehnquist, C.J., dissenting).

58. *Id.* at 1998 (Rehnquist, C.J., dissenting).

59. *Id.* (Rehnquist, C.J., dissenting).

60. *Id.* at 1999 (Rehnquist, C.J., dissenting). Alternatively, Chief Justice Rehnquist argued that even if the evidence presented by the majority warranted its holding, a violation of due process could not be established merely on the grounds of architectural impedi-

Title II can only be read as an attempt to "rewrite the Fourteenth Amendment law laid down by this Court."[61]

Turning to the proportionality branch of the *Boerne* test, the Chief Justice stated that Title II goes beyond protection of due process rights and applies to any service provided by any public entity, therefore exceeding the scope of a constitutional review.[62] Chief Justice Rehnquist reasoned that because of this overbreadth, Title II cannot validly abrogate the State's sovereign immunity.[63] He disagreed with the majority's approach of narrowing the focus of Title II to only the class of cases implicating access to the courts, stating that in section 5 analysis, the proper approach is to measure the entire statute against the constitutional right to be enforced.[64] He argued that this approach would subject the states to ongoing litigation to defend their Eleventh Amendment immunity, as the legislature would defer to the courts to resolve issues regarding enforcement of statutes against the states.[65] The Chief Justice further contended that, even when limited to protecting access to the courts, Title II does not abrogate immunity because absent evidence of any denial of such access, Title II does not meet the congruence and proportionality test.[66] Chief Justice Rehnquist concluded his dissenting opinion by arguing that Title II is not limited only to due process violations, but that a state would face litigation for simply maintaining a courthouse that is not equipped to accommodate disabled persons, regardless of any due process violations.[67]

Justice Scalia also filed a dissenting opinion in which he argued that requiring access for disabled persons to all public buildings does not fit within the enforcement of the Fourteenth Amendment.[68] He began his analysis by noting the origins of Congress's power to enact prophylactic legislation, providing that in its origi-

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ments. *Id.* at 2002 (Rehnquist, C.J., dissenting). He stated that due process is violated only when a person is actually denied the constitutional right to access to a judicial proceeding, and that the Court has never held that a person's ability to access a courtroom without assistance is in itself a constitutional right. *Id.* (Rehnquist, C.J., dissenting).

61. *Id.* at 2003 (Rehnquist, C.J., dissenting). Rehnquist drew this conclusion after comparing the Court's decisions in other cases where it ruled on section 5 legislation. *Id.* at 2003 (Rehnquist, C.J., dissenting).

62. *Id.* at 2004 (Rehnquist, C.J., dissenting).

63. *Lane*, 124 S. Ct. at 2004 (Rehnquist, C.J., dissenting).

64. *Id.* at 2004-05 (Rehnquist, C.J., dissenting).

65. *Id.* at 2005 (Rehnquist, C.J., dissenting).

66. *Id.* (Rehnquist, C.J., dissenting).

67. *Id.* at 2006 (Rehnquist, C.J., dissenting).

68. *Lane*, 124 S. Ct. at 2013. (Scalia, J., dissenting).

nal form, Congress's power to enact such remedial legislation was limited to violations of Fourteenth Amendment guarantees on the basis of racial discrimination.[69] Next, he discussed the development of the "congruence and proportionality" test, which arose in *Boerne* to address legislation passed by Congress that exceeded protection against racial discrimination.[70] He then stated his opposition to tests based upon flexible parameters – such as "congruence and proportionality" – because they open the door to policy based adjudication.[71] He also argued that the "congruence and proportionality" test causes the courts to take on a role that calls for recurring review of the actions of the legislature, thereby putting the courts in conflict with that branch of government without textual support of the Constitution.[72] Justice Scalia went on to suggest that the approach the majority took in requiring accessibility to all public services is an overly broad prohibition that overlaps a narrower prohibition.[73] He stated that such an approach does not fit within the meaning of "enforce" as that term is used in section 5.[74] He also stated that section 5 does not authorize prophylactic legislation to prohibit conduct that, on its face, is constitutional.[75] Justice Scalia admitted that the approach he suggests, if implemented, would contradict precedent set since the Court's ruling in *Morgan*.[76]

Justice Scalia noted that the cases decided since *Morgan* have expanded the scope of the meaning of "enforcement" in section 5.[77] While Justice Scalia agrees that a broad interpretation is acceptable with regard to racial discrimination cases, he stated that cases outside of that realm call for a more narrow reading of section 5.[78]

Justice Scalia concluded his dissenting opinion by stating that he would adhere to the limitation that Congress may enact prophylactic legislation under section 5 only when constitutional vio-

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69. *Id.* (Scalia, J., dissenting).
70. *Id.* at 2007 (Scalia, J., dissenting).
71. *Id.* at 2007-08 (Scalia, J., dissenting).
72. *Id.* at 2009 (Scalia, J., dissenting). Justice Scalia suggested that he would insert a test that has textual support in the Constitution in place of the "congruence and proportionality" test. *Id.* (Scalia, J., dissenting).
73. *Lane,* 124 S. Ct. at 2009 (Scalia, J., dissenting).
74. *Id.* (Scalia, J., dissenting).
75. *Id.* (Scalia, J., dissenting).
76. *Id.* at 2010 (Scalia, J., dissenting).
77. *Id.* (Scalia, J., dissenting).
78. *Lane,* 124 S. Ct. at 2012 (Scalia, J., dissenting).

lations have been identified.[79] He also argued that such a remedy should affect only the states and their actors, but not the public at large.[80] He stated that when racial discrimination is not at issue, he would disregard the "congruence and proportionality" test, limiting its application to true violations of the Fourteenth Amendment.[81]

Justice Thomas filed a brief dissenting opinion in which he joined the Chief Justice's dissenting opinion.[82] He reiterated the position that Title II does not meet the "congruence and proportionality" test because the Act itself did not have evidentiary support of the harm it sought to remedy, and because the scope of Title II extends beyond the protection of due process rights.[83]

Congress's legislative power under section 5 of the Fourteenth Amendment was established in 1880 when the Supreme Court decided the case *Ex Parte Virginia*.[84] In *Ex Parte Virginia,* Justice Strong defined this section 5 power as the authority to enact appropriate legislation adapted to enforce the objectives of the Fourteenth Amendment.[85] He declared that Congress's legislative power is enlarged under section 5, which grants congressional authority to enforce, by appropriate legislation, the constitutional prohibitions that limit states' power.[86]

The intersection between this enforcement power and state sovereign immunity was encountered by the Supreme Court in *Fitzpatrick v. Bitzer,* where Justice Rehnquist explained in the majority opinion that sovereign immunity is limited by the enforcement provisions of section 5.[87] In the *Fitzpatrick* majority, Justice Rehnquist stated,

> 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 which are constitutionally impermissible in other contexts.[88]

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79. *Id.* (Scalia, J., dissenting).
80. *Id.* (Scalia, J., dissenting).
81. *Id.* (Scalia, J., dissenting).
82. *Id.* (Thomas, J., dissenting).
83. *Lane,* 124 S. Ct. at 2012. (Thomas, J., dissenting).
84. Ex Parte Virginia, 100 U.S. 339 (1880).
85. *Ex Parte Virginia*, 100 U.S. at 345-46.
86. *Id.* at 345.
87. 427 U.S. 445, 456, (1976).
88. *Fitzpatrick,* 427 U.S. at 456.

The Court has refined the exercise of this power by setting forth the threshold requirements that first, if legislation purports to abrogate state sovereign immunity, Congress must specifically express its intent to do so in the language of that legislation, and second, that such legislation must be passed under a valid exercise of congressional power.[89] Current Supreme Court jurisprudence holds that the source of Congress's power in this regard is section 5 of the Fourteenth Amendment.[90]

The current test for whether section 5 legislation is passed under a valid exercise of congressional power was set forth in *City of Boerne v. Flores.*[91] In *Boerne,* the Supreme Court announced the "congruence and proportionality" test.[92] The *Boerne* case arose when the City Council of Boerne, Texas, denied a building permit to enlarge St. Peter Catholic Church, because the church was within the historical designation established under a recently passed ordinance.[93] Flores, the Archbishop of San Antonio, Texas, brought suit in the United States District Court for the Western District of Texas, challenging the permit denial under the Religious Freedom Restoration Act of 1993 (hereinafter "RFRA").[94] The district court held that Congress exceeded its section 5 authority in enacting RFRA, but the U.S. Court of Appeals for the Fifth Circuit reversed, finding that RFRA was constitutional.[95] The U.S. Supreme Court granted certiorari and reversed the decision of the court of appeals.[96]

Justice Kennedy wrote for the majority, stating that the issue faced by the Court was whether RFRA exceeded Congress's power under the enforcement provision of section 5 of the Fourteenth

89. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 55 (1996). *See also,* Dellmuth v. Muth, 491 U.S. 223 (1989), Green v. Mansour, 474 U.S. 64 (1985).

90. *Seminole Tribe,* 517 U.S. at 59. In *Seminole Tribe,* the Court recognized that at one time, Congress had at its disposal two provisions of the Constitution from which it could validly exercise this power: section 5 of the Fourteenth Amendment, and the Interstate Commerce Clause. *Id.* at 59. *Seminole Tribe* upheld Congress's authority under section 5, but overruled prior case law by declaring that Congress may not abrogate state sovereign immunity through legislation enacted under the Commerce Clause. *Id.* at 72. (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).

91. 521 U.S. 507 (1997).

92. *Boerne,* 521 U.S. at 520.

93. *Id.* at 512. The ordinance authorized the city's Historic Landmark Commission to prepare a preservation plan with proposed historic landmarks and districts, and required the Commission to preapprove any construction affecting historic landmarks or buildings in a historic district. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*.

Amendment.[97] Justice Kennedy stated at the outset that RFRA was enacted by Congress in direct response to the Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith,* in which the Court declined to apply a balancing test to a Free Exercise claim.[98] Kennedy noted that, among the Act's stated purposes, are: "[T]o restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened."[99] The proponents of RFRA contended that RFRA was permissible enforcement legislation and that Congress's section 5 power is not limited to remedial or preventative legislation.[100] The majority responded by explaining that Congress's broad power of enforcement is a remedial power, and that Congress is not empowered to redefine the substantive rights guaranteed by Fourteenth Amendment's provisions.[101] Recognizing that it is difficult to distinguish between remedial action and action that substantively changes governing law, the Court stated, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[102] The Court concluded that legislation enacted without "con-

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97. *Boerne,* 521 U.S. at 511.

98. *Id.* at 512-13. In *Employment Division, Department of Human Resources of Oregon v. Smith,* members of the Native American Church challenged an Oregon statute that generally prohibited the use of peyote, which the members used for sacramental purposes. *Id. at 513* (citing *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990)). The test would have required the Court to ask whether a statute of general applicability substantially burdened a religious practice, and, if so, whether it was justified by a compelling government interest. *Id.* at 513. The Court said that applying this test would have resulted in "a constitutional right to ignore neutral laws of general applicability," which it deemed to be an anomaly of the law. *Id. Smith* held that a compelling governmental interest is not required to justify neutral laws of general applicability that burden religious practices. *Id. at 514.*

99. *Id.* at 515 (citing 42 U.S.C. § 2000 (1993)). Justice Kennedy next set forth the main provisions of the Act, stating:

> RFRA prohibits 'government' from 'substantially burdening' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'

Boerne, 521 U.S. at 515 (citing 42 U.S.C. § 2000 (1993). The Court noted that RFRA broadly applied to any branch, department, agency, instrumentality, and official; any State or subdivision of a state, and that it applied to all Federal and State law. *Boerne,* 521 U.S. at 516 (citing 42 U.S.C. § 2000 (1993)). The majority concluded that local and municipal ordinances fell within this scope. *Id.*

100. *Id.* at 517.

101. *Id.* at 519.

102. *Boerne,* 521 U.S. at 520. Here, the Court gave birth to the "congruence and proportionality" test. *Id.*

gruence and proportionality" would be, in effect, substantive legislation.[103]

The Court justified its determination that section 5 authorizes only remedial enforcement action by looking to the history of the ratification of the Fourteenth Amendment.[104] It noted that the original draft of the amendment was widely criticized and rejected on the ground that it gave Congress too much legislative power at the expense of the existing constitutional structure.[105] The majority stated that the rejection of this draft directly bears on the definition of Congress's enforcement power.[106] After discussing the litany of debates waged by Congress concerning the appropriate language of the proposed amendment, the Court concluded that the revised amendment provided Congress with a remedial power of enforcement to give effect to the substantive constitutional prohibitions against the states, not a plenary power to legislate.[107]

Justice Kennedy next discussed the confirmation of this approach as demonstrated by *The Civil Rights Cases,* the earliest cases faced with the decision of whether Congress exceeded its enforcement power.[108] He noted that central to the holding in *The Civil Rights Cases* was the notion that the enforcement clause did not grant Congress the power to enact "general legislation upon the rights of the citizen, but corrective legislation."[109] Justice Kennedy continued by noting that the Court's recent cases regarding the issue have centered upon the question of whether section 5 legislation can be considered to be remedial.[110] He stated that this

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103. *Id.*

104. *Id.*

105. *Id.* The original draft of the Fourteenth Amendment read as follows:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

CONG. GLOBE, 39th CONG., 1st Sess., 1034 (1866).

106. *Boerne,* 521 U.S. at 520.

107. *Id.* at 522.

108. *Id.* at 524-25. In the *Civil Rights Cases,* the Court invalidated the first and second sections of the Civil Rights Act of 1875 which prescribed criminal penalties for denying full enjoyment of public accommodations and conveyances. *Id.* at 524 (citing United States v. Stanley, 109 U.S. 3, 13-14 (1883)). The Court stated: "[U]nder the Fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings." *United States v. Stanley,* 109 U.S. 3, 23 (1883).

109. *Id.* (citing *Stanley,* 109 U.S. at 13-14).

110. *Id.* at 525.

case law supports the conclusion that Congress does not have a substantive, non-remedial power.[111]

Finally, the majority turned to analyze RFRA to determine whether it could be considered valid enforcement legislation under section 5.[112] First, the Court restated the test that "there must be a congruence between the means used and the ends to be achieved" and also the "appropriateness of remedial measures must be considered in light of the evil presented."[113] Next, the majority detailed the legislative record behind RFRA finding that it lacked evidence to support the harm RFRA sought to remedy.[114] Before turning to RFRA's provisions, Justice Kennedy noted that section 5 legislation should be confined to an injury or harm prohibited by the Fourteenth Amendment.[115] With this in mind, he attacked the breadth of RFRA and its restrictions, stating that because RFRA calls for "intrusion at every level of government," applies to "all federal and state law," and has "no termination date or termination mechanism," any person alleging a substantial burden on free exercise of religion can challenge any law on any one of those grounds.[116] He rejected the argument that RFRA was remedial and preventative legislation because, by its terms, it is "so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[117] Instead, he decided that RFRA was a congressional attempt to alter constitutional protections.[118] The Court noted that in comparison to RFRA, other legislation Congress enacted under its enforcement power contained such limitations as to scope and time.[119] The Court stated that although such limitations are not determinative of valid section 5 enforcement legislation, their existence makes it more likely than not

111. *Boerne,* 521 U.S. at 527.
112. *Id.* at 529.
113. *Id.* at 530.
114. *Id.*
115. *Id.* at 532.
116. *Boerne,* 521 U.S. at 532.
117. *Id.*
118. *Id.*
119. *Id.* at 532-33. The Court referenced the Voting Rights Act in comparison to RFRA. *Id.* at 532. Enforcement of The Voting Rights Act was confined to regions of the country where voting discrimination was most flagrant. *Id.* at 532-33. Coverage was limited to cases where constitutional violations were most probable, allowing the states to terminate coverage under the act where violations had not taken place within five years leading up to termination. *Id.* at 533.

that Congress's "means are proportionate to ends legitimate under section 5."[120]

Finally, Justice Kennedy addressed RFRA's strict requirements that when a law purports to substantially burden free exercise of religion, a state must demonstrate a compelling interest, and must show that it employed the least restrictive means possible.[121] Justice Kennedy stated that RFRA's requirements call for the strictest test under constitutional law which many laws would fail to meet regardless of whether there was a direct impact on free exercise of religion.[122] Because this would have the effect of validating laws that would have been held invalid under *Smith,* Justice Kennedy stated that RFRA is a substantive alteration of the Court's holding in *Smith.*[123]

Ultimately, the majority determined that the purpose of RFRA was not to identify and counteract state laws that unconstitutionally discriminate against religion, because the scope of RFRA extends to laws of general applicability that burden the entire populace.[124] The Court concluded that incidental burdens on religion do not equate a greater burden on those people practicing religion anymore than on other citizens.[125] For these reasons, the Court struck down RFRA as an invalid exercise of Congress's section 5 enforcement power.[126]

The Court next had the opportunity to apply the "congruence and proportionality" test in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank.*[127] In *Florida Prepaid,* College Savings Bank (hereinafter "College Savings") filed a patent infringement suit against the State of Florida.[128] Just prior to the suit, Congress amended the Patent and Plant Variety Protection Remedy Clarification Act (hereinafter "Patent Remedy Act") to expressly abrogate state sovereign immunity in suits brought under that Act's provisions.[129] Writing for the majority, Chief Justice Rehnquist recognized that "Congress's intent to ab-

120. *Id.* at 533.
121. *Boerne,* 521 U.S. at 533-34.
122. *Id.* at 534.
123. *Id.*
124. *Id.* at 535.
125. *Id.*
126. *Boerne,* 521 U.S. at 536.
127. 527 U.S. 627 (1999).
128. *Florida Prepaid,* 527 U.S. at 630. College Savings alleged that the Florida Prepaid Postsecondary Education Expenses Board, an entity created by the State of Florida, infringed upon the patent it obtained for its college financing methodology. *Id.* at 630-31.
129. *Id.* at 630.

rogate could not have been any clearer."[130] He applied the "congruence and proportionality" test, by first identifying the steps to the test that were applied but not expressly stated in *Boerne.*[131] Chief Justice Rehnquist stated that the first step is for the Court to identify the "evil or wrong that Congress intended to remedy."[132] Next, he stated, "the propriety of any section 5 legislation 'must be judged with reference to the historical experience . . . it reflects."[133] Rehnquist declared that the conduct at issue was patent infringement by the states coupled with employment of sovereign immunity to deny patent owners any remedy.[134] He stated that this conduct must "give rise to the Fourteenth Amendment violation that Congress sought to redress in the Patent Remedy Act."[135] The Court searched the legislative record behind the Patent Remedy Act to determine if the Act reflected any historical experience of unremedied patent infringement by the states.[136] It determined that Congress not only failed to identify a pattern of such conduct, but it also did not reveal any pattern of constitutional violations.[137]

The Chief Justice then focused on a second argument raised to invoke the Fourteenth Amendment, that unremedied patent infringement by a state amounted to a deprivation of property without due process of law.[138] While recognizing that patents are considered a species of property, the deprivation of which Congress may legislate to prevent, Chief Justice Rehnquist countered that the legislative history of the Patent Remedy Act still failed to show that Congress intended to remedy a Fourteenth Amendment violation.[139] He stated that, under the terms of the Due Process Clause, patent infringement by a state, in and of itself, is not a constitutional violation unless that infringement is accompanied by a failure of the state to provide a remedy.[140] Chief Justice

130. *Id.* at 635. The language Congress inserted into the amended provisions of the Patent Remedy Act stated, "Any State . . . shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in federal court . . . for infringement of a patent." *Id.* (citing 35 U.S.C. § 296 (1992)).

131. *Id.* at 639-40.

132. *Id.*

133. *Florida Prepaid,* 527 U.S at 640 (citing *City of Boerne v. Flores* 521 U.S. at 525 (1997)).

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Florida Prepaid,* 527 U.S at 641-42.

139. *Id.* at 642.

140. *Id.* at 643.

Rehnquist continued by arguing that Congress did not consider in great depth the state remedies available, but that it was presented only with narrow evidence which amounted to complaints of the inconvenience of state remedies, and assertions that resorting to state remedies could undermine the uniformity of patent law.[141] Chief Justice Rehnquist acknowledged the importance of uniformity in patent law but stated that it had no bearing on the issue of whether a patentee suffered a deprivation of property without due process as a result of a state pleading sovereign immunity in response to claims of patent infringement.[142]

The Court noted that under *Boerne,* lack of support in legislative history does not resolve the issue of whether Congress validly exercised its section 5 power, but that the legislative history is a key component to identifying the constitutional violation the Congress sought to remedy.[143] Based on the minimal support of the record behind the Patent Remedy Act that states engaged in unremedied patent infringement, the Court decided that the Patent Remedy Act was "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."[144]

Next, the majority discussed the unlimited potential for liability under the Patent Remedy Act, noting that Congress subjected the states to suits for patent infringement of every variety, for an indefinite period of time.[145] The Court reiterated the principle set forth in *Boerne* that limitations as to scope and time "tend to ensure Congress's means are proportionate to ends legitimate under section 5."[146] It stated that the Patent Remedy Act was not in line with this principle because it contained no such limitations.[147] Taking this along with the lack of legislative support, the majority determined that the Patent Remedy Act was incongruent with the conduct that Congress purported to remedy.[148]

The Court ultimately decided that the Patent Remedy Act was really intended to provide uniformity of patent law, and to cause the states to be subject to lawsuits for patent infringement "on the

141. *Id.* at 644.
142. *Id.* at 645.
143. *Florida Prepaid,* 527 U.S at 646.
144. *Id.* (citing *City of Boerne v. Flores,* 521 U.S. at 532 (1997)).
145. *Id* at 646-47.
146. *Id.* at 647 (citing *City of Boerne v. Flores,* 521 U.S. at 533 (1997)).
147. *Id.*
148. *Florida Prepaid,* 527 U.S at 647.

same footing as private parties."[149] Therefore, the Court ruled that the Patent Remedy Act could not be upheld as valid exercise of section 5 authority.[150]

The Supreme Court was presented with the opportunity to apply the "congruence and proportionality" test to a discrimination action arising under federal law in *Kimel v. Florida Board of Regents*.[151] The statue at issue in the *Kimel* case was the Age Discrimination in Employment Act of 1967 (hereinafter "ADEA"), which prohibited discrimination against employees on the basis of age.[152] The case arose when three separate plaintiffs sued their respective state employers for money damages, alleging violations of ADEA resulting from discrimination on the basis of age.[153] In each case, the state employers filed motions to dismiss the ADEA claims on Eleventh Amendment immunity grounds.[154] Two of the motions were denied by the District Court for the Northern District of Florida, as the court held that ADEA validly abrogated state sovereign immunity.[155] However, one motion was granted by the District Court for the Northern District of Alabama, which held that ADEA did not validly abrogate state sovereign immunity.[156] Appeals were brought from each case and consolidated by the Court of Appeals for the Eleventh Circuit.[157] The court of appeals, in a divided panel opinion, ruled that ADEA did not prop-

149. *Id.* at 647-48.
150. *Id.* at 648.
151. 528 U.S. 62 (2000).
152. *Kimel,* 528 U.S. at 66. ADEA "makes it unlawful for an employer, including a State, 'fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age'." *Id.* at 67 (citing 29 U.S.C. § 623 (1967)).
153. *Id.* at 69-71. In the first case, Roderick MacPherson and Marvin Narz, ages fifty seven and fifty eight respectively, filed suit in the District Court for the Northern District of Alabama, against the University of Montavallo, an instrumentality of the State of Alabama. *Id.* at 69. The allegations were that the University's business college, at which both plaintiffs worked, employed an employment evaluation system that had a disparate impact on older faculty members. *Id.* The second case arose when current and former librarians of Florida State University sued the Florida Board of Regents in the District Court for the Northern District of Florida, alleging that that body refused to allocate funds to provide for agreed upon salary adjustments which in turn negatively impacted older employees. *Id.* at 70. The final case was brought by Wellington Dickson against the Florida Department of Corrections in the District Court for the Northern District of Florida. *Kimel,* 528 U.S. at 70. Dickson claimed that he was not promoted due to his age. *Id.*
154. *Id.* at 69-71.
155. *Id.* at 70-71.
156. *Id.* at 69.
157. *Kimel,* 528 U.S. at 71.

erly abrogate the states' sovereign immunity.[158] The Supreme Court granted certiorari to resolve a conflict among several circuit courts on the question of whether ADEA validly abrogated state sovereign immunity.[159]

Justice O'Connor, writing for the majority, stated that the issue facing the Court was whether ADEA contains a clear statement of Congress's intent to abrogate the states' Eleventh Amendment immunity and, if so, whether ADEA is a proper exercise of Congress's constitutional authority.[160] Justice O'Connor first addressed the question of whether Congress clearly stated its intent to abrogate state sovereign immunity.[161] Justice O'Connor interpreted sections 626(b) and 626(c)(1) of ADEA together, and determined that taken as a whole, ADEA clearly evidences Congress's intent to subject the states to suits brought by private individuals seeking money damages.[162]

Having found that Congress expressly stated its intent to abrogate state sovereign immunity, the Court turned to the issue of whether ADEA was appropriate legislation under section 5 of the Fourteenth Amendment under the "congruence and proportionality test."[163] The majority stated at the outset that the requirements sought to be imposed on the states by ADEA were dispro-

158. *Id.* (citing Kimel v. Fla. Board of Regents, 139 F.3d 1426, 1430, 1447 (11th Cir. 1998)). Out of a three judge panel, one judge held that Congress did not expressly state its intent to abrogate, and another held that Congress did not act pursuant to a valid exercise of section 5 power. *Id.* at 71-72. The third judge of the panel dissented on both grounds. *Id.* at 72.

159. *Kimel,* 120 S. Ct. at 72. Several circuit courts of appeals invalidated ADEA. *See* Cooper v. New York State Office of Mental Health, 162 F.3d 770 (2nd Cir. 1998), Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998), Coger v. Board of Regents of the State of Tenn., 154 F.3d 296 (6th Cir. 1998), Keeton v. University of Nev. System, 150 F.3d 1055 (9th Cir. 1998), Scott v. University of Miss., 148 F.3d 493 (5th Cir. 1998), *and* Goshtasby v. Board of Trustees of the Univ. of Ill., 141 F.3d 761 (7th Cir. 1998). The Eighth Circuit upheld ADEA. *See* Humenansky v. Regents of Univ. of Minn., 152 F.3d 822 (8th Cir. 1998).

160. *Kimel,* 528 U.S. at 66-67.

161. *Id.* at 73.

162. *Id.* at 73-74. Section 626(b) of ADEA incorporates by reference section 216 (b) of the Fair Labor Standards Act of 1938 which provides: "An action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." *Kimel,* 528 U.S. at 73 (citing 29 U.S.C. § 216(b) (1938)). Section 203(x) of FSLA defines "public agency" to include "the government of a State or political subdivision thereof, and any agency of . . . a State or a political subdivision of a State." *Kimel,* 528 U.S. at 74. (citing 29 U.S.C. §203(x) (1938)) (internal quotations omitted). Section 626 (c)(1) provides: "Any person aggrieved by an employer's violation of the Act 'may bring a civil action in any court of competent jurisdiction' for legal or equitable relief." 29 U.S.C. §626(c)(1) (1967).

163. *Kimel,* 528 U.S. at 81-83.

portionate to any unconstitutional conduct sought to be cured.[164] Justice O'Connor recognized the argument that the conduct sought to be cured gave rise to an Equal Protection claim.[165] She reiterated that the Court has repeatedly held that claims of unconstitutional age discrimination did not violate the Equal Protection Clause.[166] She conveyed the general principle of Equal Protection jurisprudence that as long as states can show a rational relationship between an age classification and a legitimate state interest, they can discriminate on the basis of age without violating the Fourteenth Amendment.[167] With this in mind, Justice O'Connor proceeded to strike down ADEA because its provisions allowed a broad-based use of age as a discriminating characteristic.[168] She argued that ADEA's provisions would prohibit a greater number of state employment decisions than would be held unconstitutional if the rational basis test for violation of the Equal Protection clause were to be applied.[169] The majority concluded that ADEA was "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."[170] In addition to this finding, the Court determined that Congress failed to identify a pattern of age discrimination by the states prior to amending ADEA to apply to the states.[171] It stated that the legislative record offered no basis upon which Congress could have found that states were unconstitutionally discriminating against their employees.[172] Ultimately, the Court held that the "indiscriminate scope" of ADEA and the lack of support in the legislative record rendered ADEA an invalid exercise of Congress's section 5 legislative power and, therefore, did not effectively abrogate state sovereign immunity.[173]

Prior to *Tennessee v. Lane,* the Supreme Court first applied the "congruence and proportionality" test to The Americans with Disabilities Act of 1990 (hereinafter "ADA") in *Board of Trustees of*

164. *Id.* at 83.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Kimel,* 528 U.S. at 86.
169. *Id.*
170. *Id.* (citing *Boerne,* 521 U.S. at 532).
171. *Id.* at 89.
172. *Id.* at 90-91.
173. *Kimel,* 528 U.S. at 91.

the University of Alabama v. Patricia Garrett.[174] At issue in *Garrett* was whether Title I of the ADA abrogated state sovereign immunity in order to allow disabled employees to recover in suits for money damages against state employers for failing to comply with the ADA's requirements.[175]

The *Garrett* case arose when two separate lawsuits were filed in the District Court for the Northern District of Alabama against different state employers situated in the state of Alabama.[176] Each suit alleged discrimination based upon disabilities suffered by the plaintiffs.[177] In each case the defendants filed motions for summary judgment, claiming that the ADA exceeded Congress's power to abrogate state sovereign immunity.[178] The district court granted the motions, and the Court of Appeals for the Eleventh Circuit consolidated the appeals and reversed, holding that the ADA did validly abrogate state sovereign immunity.[179] The Supreme Court granted certiorari to resolve a split among the circuit courts on the question of whether an individual can maintain a suit for money damages against a state under the ADA.[180]

Chief Justice Rehnquist wrote for the majority and began his analysis by discussing the substantive provisions of Title I of the ADA.[181] Title I forbids any employer, including states, from discriminating against any disabled person in a variety of ways, because of their disability.[182] Where an employee or potential employee suffers from a disability, ADA requires employers to make "reasonable accommodations" to those disabilities unless the ac-

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174. 531 U.S. 356 (2001).

175. *Garrett,* 531 U.S. at 360.

176. *Id.* at 362.

177. *Id.* One suit was filed by Patricia Garrett, a registered nurse, against her employer the University of Alabama in Birmingham Hospital. *Id.* Garrett was diagnosed with breast cancer and her treatments required substantial absences from work. *Id.* Her employer notified her that she had to forfeit her director's position, and she subsequently applied for and received a lower paying position. *Id.* The other suit was filed by Milton Ash against the Alabama Department of Youth Services. *Garrett,* 531 U.S. at 362. Ash suffered from chronic asthma as well as sleep apnea and requested that his employer take measures to accommodate his disabilities which the employer refused to do. *Id.*

178. *Id.*

179. *Id.* at 362-63.

180. *Garrett,* 531 U.S. at 363.

181. *Id.* at 360-61.

182. *Id.* The provisions of Title I forbid the discrimination "against any qualified individual with a disability . . . in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* (citing 42 U.S.C. §12112(a), 12111(2), (5), (7) (1990)).

commodations would substantially affect the employer's business operations.[183]

Chief Justice Rehnquist applied the "congruence and proportionality" test beginning with the first step of identifying the constitutional right at issue.[184] In doing so, he stated that the Court had to determine whether state treatment of disabled persons fell within the restrictions of the Fourteenth Amendment.[185] Recognizing this conduct as giving rise to another potential Equal Protection claim, the Chief Justice followed the Court's approach in *Kimel,* where it looked to prior case law dealing with the issue under the Equal Protection Clause.[186] The Court reiterated that under the "rational basis" standard applicable to Equal Protection claims, states do not violate the Constitution as long as there is "a rational relationship between the disparity of treatment and some legitimate governmental purpose."[187] Based upon this reasoning, the Court declared that states are not compelled to make special accommodations for disabled persons under the Fourteenth Amendment as long as state action affecting such persons is rational.[188]

Moving through the "congruence and proportionality" test, the majority examined the legislative record behind the ADA to determine whether or not Congress uncovered a pattern of unconstitutional treatment by the states.[189] It found that Congress had made findings of general mistreatment of disabled persons but the majority of that mistreatment did not come from the hands of states or state actors.[190] Furthermore, the minimal number of specific instances of unfair treatment actually committed by state actors was not persuasive in the Court's eyes.[191] Accordingly, the majority decided that the legislative history did not support the

183. *Id.* at 361 The ADA requires employers to "make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless the [employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business." *Id.* (citing 42 U.S.C. §12112(b)(5)(A) (1990)).

184. *Id.* at 364.

185. *Garrett,* 531 U.S. at 364.

186. *Id.*

187. *Id.* at 366-67.

188. *Id.* at 367-68.

189. *Id.* at 368.

190. *Garrett,* 531 U.S. at 369.

191. *Id.* at 370.

notion that Congress had identified a recurring pattern of unconstitutional discrimination.[192]

Finally, Chief Justice Rehnquist guided the analysis to the scope of the "rights and remedies" which the ADA provided against the states.[193] First, he noted that the ADA requires that employers make existing facilities usable by disabled persons, demanded that the states take affirmative action to accommodate those with disabilities and virtually prohibited states from simply hiring people who could readily use existing facilities.[194] The Chief Justice acknowledged that, under Title I, a state would not be required to make "reasonable accommodations" if it realized an undue burden in making such accommodations.[195] But he argued that, despite this exception, states were still subject to a duty to accommodate disabled persons under Title I, which exceeded any accommodation required by the Constitution.[196] Chief Justice Rehnquist's reasoning was that the undue burden requirement prohibits almost any alternative action available to a state, even if that action would be rational.[197] Furthermore, Chief Justice Rehnquist disagreed with the fact that, under the ADA, the burden of proving an undue burden fell to the employer rather than requiring the claimant to prove that the employer did not have a rational basis for its actions.[198] Finally, he discussed the ADA's prohibition on using "standards, criteria, or methods of administration" that would have a disparate impact on disabled persons.[199] Chief Justice Rehnquist argued that disparate impact would not hold up as evidence of discrimination even under a strict scrutiny analysis, let alone a rational basis test.[200]

The Court concluded by recognizing Congress's authority to enact legislation pursuant to desirable public policy, which the ADA reflected.[201] However, it reiterated that in order to subject states to private lawsuits for money damages, Congress is required to identify a pattern of unconstitutional discrimination in violation of the Fourteenth Amendment, and that the remedy chosen by Con-

192. *Id.* at 368.
193. *Id.* at 372.
194. *Id.*
195. *Garrett,* 531 U.S. at 372.
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Garrett,* 531 U.S. at 373.
201. *Id.* at 374.

gress must be congruent and proportional to that violation.[202] Because the ADA did not meet these requirements, the majority stated that applying the ADA's provisions to the states would permit the legislature to work a substantive change in governing law.[203] Therefore, the Court held that the ADA did not validly abrogate state sovereign immunity.[204]

The authority of the federal government to abrogate state sovereign immunity remains a hot button issue and there is little doubt that it will appear before the United States Supreme Court again in the near future. The issue goes right to the heart of the federalist system created by the Constitution, invoking the strong competing principles of the federal government's power and the limits of the exercise of that power over the states. There is a line drawn between the federal government and the states, which has been erased and redrawn throughout this country's short history. The federal government and the sovereign states continue to peer across that line at each other waiting for the other to blink.

From the state side of the line comes the argument that states should be immune from suits brought by citizens seeking monetary damages. The federal government, however, is vested with the authority to protect rights granted to citizens by the Fourteenth Amendment against infringement by the states. The teeth of any limitation on the ability to take away citizens' rights are the consequences of violating such a limitation. The argument can be made that any such limitation would be completely ineffective if the citizen whose rights are violated could not seek legal remedies. Without the threat of legal action, states could readily disregard the law without fear of consequence. Thus, there is a fundamental necessity for allowing citizens to initiate legal proceedings against a state. But then, the question becomes to what extent can a citizen seek relief against the actions of a state? In some cases, injunctive relief may suffice. However, it is implausible to completely limit the remedies available to citizens to non-monetary injunctive relief. How can justice be served when, because of state action, a citizen is deprived of income or, worse yet, the ability to defend one's own liberty? Taking away the right to recover monetary damages would do harm to the basic notion of justice.

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202. *Id.*
203. *Id.*
204. *Id.*

On the other hand, should Congress be able to take away state sovereign immunity at all? The states must be protected from an onslaught of litigation by citizens seeking compensation for state action, when that action may be in the best interests of the state or other citizens of a state. The argument for prohibiting suits for money damages was aptly presented by Justice Kennedy in *Alden v. Maine.*[205] First, the notion of state immunity is firmly rooted in the Constitution.[206] It is the very structure of the Constitution that demands that the states not be subjected to litigation at the hands of its citizens.[207] Second, the financial demands placed upon the states by having to pay out damages to litigants and attorney's fees to litigate cases brought by citizens would create a burden that the states may not be able to bear.[208] Finally, enabling the federal government to subject the states to lawsuits by its citizens creates power in the federal government that is not provided for by the Constitution.[209]

Both of these arguments carry significant weight and have been vigorously disputed throughout history. A complete exploration of this topic exceeds the scope of this text. Therefore, following the Court in *Tennessee v. Lane,* the discussion will be limited to the due process right of access to the courts of disabled persons as it is protected by Title II of the ADA, the remedies such a litigant can seek when that right is violated under Title II, and the states' interest in being protected from suits seeking monetary damages.

When the right deprived is the right of access to the courts, monetary damages must be available to the injured party. The rationale behind this conclusion is found in the very reasons for which a person would wish to appear in court in the first place. Litigants appear in courts to advocate their rights, resolve disputes, or to defend themselves against criminal charges. What they seek is to recover something lost, or to defend against having something taken away from them. A citizen who is denied access to the courts will lose out on liberty, money, or some other fundamental right. The situation takes an even more egregious turn

205. 527 U.S. 706 (1999).

206. *Alden,* 527 U.S. at 715-16. Justice Kennedy stated: "Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified." *Id.*

207. *Id.* at 751.

208. *Id.* at 750.

209. *Id.* at 749.

when a citizen has the desire and the means to invoke the justice available through the courts, but cannot do so because of state imposed barriers or a state fails to remove pre-existing barriers. This is where Title II of the ADA comes to the rescue of the disabled citizen. Title II demands that disabled persons be given access to the courts, just as would any other citizen. Justice Ginsburg echoed this point in her concurring opinion in *Tennessee v. Lane* when she argued that disabled persons are included in "We the People."[210] Title II also enables disabled persons who are denied access to the courts to seek monetary damages against a state when the state is responsible for failing to provide access to its courts. This is a legitimate means of enforcing a fundamental right. As stated above, to provide for protection of a right without a way to ensure compliance would render such protection ineffective.

The fear that states would be subjected to unlimited litigation lacks merit. The states enjoy great protection even with Congress's ability to abrogate sovereign immunity. This is because Congress's authority in this area is extremely limited by judicial review. Congress cannot simply remove state sovereign immunity on a whim. An Act of Congress purporting to do so must pass constitutional muster which, as history has shown, is a very tall task. Title II of the ADA was up to the task, and met the Court's requirements so as to be considered a valid enforcement mechanism. Whether the "congruence and proportionality" test is an effective way to evaluate an Act of Congress will be a topic that finds itself debated time and again by the Court, by legal scholars, and by practitioners of Constitutional law.

Justice Scalia makes a valid point in his dissent in *Tennessee v. Lane,* that there is no textual support in the Constitution for the congruence and proportionality test.[211] However, it is a well recognized principle that the Constitution cannot and does not supply in its text the answers to each and every case that necessitates constitutional interpretation. The "congruence and proportionality" test offers a logical and methodical way to evaluate legislation enacted under section 5 of the Fourteenth Amendment. Its parameters are sound, and not as flexible as Justice Scalia would argue.

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210. *Lane,* 124 S. Ct. at 1996 (Ginsburg, J., concurring).
211. *Id.* at 2009 (Scalia, J., dissenting).

For legislation to even fit within the test, the constitutional right at issue must be found under the Fourteenth Amendment. This is a narrow class of constitutional rights, and the Court has struck down legislation that seeks to expand these rights.[212] Next, only if a Fourteenth Amendment right is at issue will the Court move on to assess the "congruence and proportionality" of the legislation. The "congruence" arm of the test is the simplest step. Its function is simply to determine whether the legislation at issue directly remedies the purported harm suffered. This is, of course, a sound and necessary approach. Little explanation of this step is given by the Court, nor is it needed. Finally, the proportionality assessment is made to determine whether the burdens imposed by remedial legislation are too great. The Court has identified limitations that, if contained within legislation, operate to ensure that a remedial scheme does not extend past the boundaries of being proportional.[213] Furthermore, each step of the test is required for legislation to be upheld. The Court has been consistent with its approach while running several different types of legislation through the "congruence and proportionality" wringer.

The "congruence and proportionality" test is not without its flaws, however. Applying the test is a tedious task, requiring an extensive reading of the legislative history of the conduct in question. The Court constantly downplays the role of legislative history and its determinative value, but the cases applying the congruence and proportionality test show a heavy reliance on it. Each step of the test hinges on the Court's interpretation of the legislative record. This is problematic because there is no standard for determining the sufficiency of legislative history. Evaluating the legislative record results in disputes among the Justices, resulting in lengthy dissenting opinions, examining each and every piece of evidence gleaned by the majority from the legislative record.

Overall, the "congruence and proportionality" test is a sound and effective method for evaluating whether Congress has effectively addressed a Fourteenth Amendment violation. Whether the

212. *See Board of Trustees v. Garrett*, 531 U.S. 356 (2001).

213. The Court stresses that such limitations are not determinative, but the cases show that where they exist, they are instrumental to upholding or invalidating legislation. *See Florida Prepaid v. College Savings*, 527 U.S. 627 (1999) (Patent Remedy Act contained unlimited potential for states' liability for patent infringement).

test stands up to the test of time and to changes in the composition of the Supreme Court is yet to be seen.

Aaron Ponzo