State Sovereignty and the Americans with Disabilities Act

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While the Americans with Disabilities Act ("ADA") proscribes certain discriminatory practices in the provision of services, as well as in employment practices by private entities, state governments may not be required to conform to those strictures, because of the constitutional recognition of state sovereign immunity, which precludes the judiciary from adjudicating disputes brought against state governmental entities by citizens. As a result, states may not be subject to the jurisdiction of federal or state courts in cases in which plaintiffs seek damages under the ADA. This article will review the doctrine of sovereign immunity, discuss its relevance to other federal civil rights legislation, and then examine its application more specifically to Titles I and II of the ADA.

I. State Sovereign Immunity

A. *The Concept in General*

The Eleventh Amendment to the United States Constitution provides that "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."[1] This principle stems from the English common law, which recognized that the king was immune from suit unless consent was given.[2] Neither Article III of the Constitution nor the Judiciary Act of 1789, which established the jurisdiction of the lower federal courts, however, expressly addressed the question whether or not state governments were entitled to such sovereign immunity. Subsequently, in *Chisholm v. Georgia*,[3] the Supreme Court held that citizens of one state could sue another state in federal court. In shocked response, and concerned about the potential depletion of state

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[1] U.S. CONST, amend. 11. For a summary of the sovereign immunity of states, *see* Bless Young & Kurt Gurka, *An Overview of State Sovereign Immunity in the Federal System*, 17 UTAH B.J. 22 (2004); Sharmila Roy, *Suits Against States: What to Know About the 11th Amendment,* ARIZ. ATTY, Oct. 2004, at 18- 26.

[2] Sean M. Monahan, Note, *A Tempest in the Teapot: State Sovereign Immunity and Federal Administrative Adjudications in Federal Maritime Commission* v. *South Carolina State Ports Authority,* 88 CORNELL L. REV. 1794, 1798-99 (2003). *See also* James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government,* 91 NW. U. L. REV. 899 (1997) (outlining the origin of sovereign immunity).

[3] 2 U.S. (2 Dali.) 419 (1793). The case concerned a South Carolina citizen's attempt to secure payment of the State of Georgia's unpaid war debt.

treasuries and the preservation of autonomy,[4] the states ratified the Eleventh Amendment in an effort to nullify the result reached in *Chisholm,*[5]

The principle of state immunity then expanded to embrace more than what the express wording of the amendment seemingly addressed. In *Hans* v. *Louisiana,*[6] the Court held that the immunity established under the Eleventh Amendment extended to suits brought by citizens against their state of residency, even though the amendment referenced only citizens of another state or of a foreign state.[7] Therefore, although the Eleventh Amendment does not expressly preclude a state's own citizens from filing suit against their own state of residence, the Supreme Court has interpreted the constitutional provision as precluding federal jurisdiction over suits brought even by its own citizens, unless the sovereign consents.[8] Further, although it can be argued that that the restriction was intended only to be for suits against states based upon diversity jurisdiction, not federal question jurisdiction,[9] the amendment has been interpreted as precluding Congress from authorizing subject matter jurisdiction for suits against states, unless immunity has been either waived or effectively abrogated.[10]

While the amendment targets Article III jurisdiction of federal courts, it does not address the legitimacy of state courts exercising jurisdiction of claims by citizens against a state under federal law. However, in a case involving alleged violations of the overtime provisions of the Fair Labor Standards Act of 1938, the Court determined that *no* judicial forum is available for suits against states that have not expressly and legitimately waived immunity and that Congress could not

[4] Sovereign immunity has been justified by the Court as an established principle of the common law and as required by our dual sovereignty system, which recognizes that the judiciary should not interfere with political decisions that may include the disbursement of state funds. Marc D. FalkofF, Note, *Abrogating Stale Sovereign Immunity in Legislative Courts,* 101 COLUM. L. REV. 853, 855 (2001).

[5] Principality of Monaco v. Mississippi, 292 U.S. 313, 325 (1934) (recognizing that Eleventh Amendment immunity extends to suits brought by foreign sovereigns).

[6] 134 U.S. 1 (1890). The case involved a creditor attempting to collect against a state for a Civil War debt.

[7] *Id.* at 10.

[8] College Savings Bank v. Fla. Prepaid Postsecondary Ed. Expenses Bd., 527 U.S. 666, (1999) (voluntary participation of a state in allegedly unfair competition in violation of the Lanham Act did not effectuate a waiver of sovereign immunity). This case effectively overruled Parden v. Terminal Railway Co., 377 U.S. 184 (1964), which recognized a partial surrender of sovereignty by states empowering Congress to regulate commerce.

[9] Erwin Chemerinsky, *Theories of Federalism: Federalism Not as Limits, But as Empowerment,* 45 KAN. L. REV. 1219, 1226 (1997); Atascadero St. Hosp. v. Scanlon, 473 U.S. 234, 301-303 (1985) (Souter, Ginsberg, and Breyer, JJ. dissenting). On the other hand, the Court has pointed out that "in light of the fact that the federal courts did not have federal-question jurisdiction at the time the Amendment was passed (and would not have it until 1875), it seems unlikely that much thought was given to the prospect of federal-question jurisdiction over the States." Seminole Tribe of Fla. v. Florida, 517 U.S. 44,69-70 (1996).

[10] Hans v. Louisiana, 134 U.S. 1, 10 (1890). For a discussion of the requirements for an effective abrogation, *see infra* notes 33-59 and accompanying text.

abrogate that immunity under Article I of the Constitution." “We hold that the powers delegated to Congress under Article I ... do not included the power to subject nonconsenting States to private suits for damages in state courts.”[12] Subsequent decisions have interpreted this pronouncement as allowing the states to withhold consent under a number of federal laws, including statutes that regulate maritime trade.[13] Additionally, state sovereign immunity apparently extends to federal administrative forums as well.[14]

Even though generally the parties to a lawsuit cannot waive jurisdictional requirements, a state, nevertheless, may waive its sovereign immunity.[15] States are free to decide whether or not to waive their immunity, and may waive immunity as to certain causes of action and not as to others, provided they do not discriminate systematically against federal law.[16] The Supreme Court also has held that such a waiver must be an express one, not a general waiver of immunity,[17] and has rejected the notion of a constructive waiver of immunity.[18] In lieu of an express statutory waiver of immunity, the Supreme Court has found an implied waiver of immunity to suit under federal law in several instances. For example, a state’s voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity.[19] The Court also has held, in the context of a bankruptcy claim, that a State “waives any immunity . . . respecting the adjudication of a ‘claim’ that it voluntarily files in

[11] Alden v. Maine, 527 U.S. 706 (1999). For a critique of this decision, *see* Erwin Chemerinsky, *The Hypocrisy of Alden* v. *Maine: Judicial Review, Sovereign Immunity and the Rehnquist Court,* 33 LOY. L.A. L. REV. 1283 (2000) (arguing that recognizing state sovereign immunity in state court, a principle that is nowhere stated in the Constitution, should not take precedence over the supremacy of federal law and due process).

[12] *Id.* at 712. The Fair Labor Standards Act was passed pursuant to the Interstate Commerce Clause, so the case did not address specifically the legitimacy of suits filed in state court raising federal claims based on laws passed pursuant to the Fourteenth Amendment.

[13] James E. Pfander, *Jones Act Claims against the States after Alden* v. *Maine: The Surprisingly Strong Case for a Compulsory State Court Forum,* 36 Mar. L. & COM. 1, 9 (2005). However, Professor Pfander asserts that, notwithstanding this decision, constructive consent to be sued in state court arguably survives *Alden,* at least with respect to federal regulatory schemes premised upon the existence of such constructive consent, and in which injunctions play no effective remedial role.

[14] Fed. Maritime Comm. v. S.C. St. Ports Auth., 535 U.S. 743 (2002) (holding that the cloak of immunity extends to adjudications before the Federal Maritime Commission).

[15] For a comprehensive discussion of the consent and waiver exception to state sovereign immunity, *see* Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment,* 52 Duke L.J. 1167 (2003) (concluding that consent should be a matter of state law and waiver should be a matter of federal law).

[16] Alden v. Maine, 527 U.S. 706, 758 (1999) (holding that Maine had neither waived immunity from suit under the FLSA nor “manipulated its immunity in a systematic fashion to discriminate against federal causes of action.”).

[17] Edelman v. Jordan, 415 U.S. 651 (1974) (holding that mere participation in a federal program does not constitute express consent to be sued); Atascadero St. Hosp. v. Scanlon, 473 U.S. 234 (1985) (holding that Congress did not clearly express its intent to abrogate immunity under the Rehabilitation Act of 1973, but not deciding whether or not it had the power to abrogate the Eleventh Amednment).

[18] Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 666 (1999) (holding that state’s sovereign immunity was not voluntarily waived by state’s activities in interstate commerce).

[19] Clark v. Barnard, 108 U.S. 436 (1883). The Court stated that immunity is a personal privilege, which may be waived. *Id.* at 447.

federal court."[20] In another case, a state was deemed to have waived immunity when it voluntarily agreed to remove the case to federal court, after having been brought involuntarily into the case as a defendant in the original state-court proceedings.[21] And, while sovereign immunity bars suits against states, courts can ignore the defense unless it is raised by the state.[22]

Furthermore, the doctrine does not "extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State."[23] Only "arms of the state," such as institutions of higher education, are entitled to claim sovereign immunity.[24] Moreover, the immunity established by the Eleventh Amendment does not preclude suits brought by the federal government against a state to enforce federal statutes.[25] Furthermore, even if states are cloaked with immunity, state officers may be sued in federal court for declaratory or injunctive relief for civil rights violations,[26] the justification being that officials have no right either to violate the Constitution or to enforce a law in violation of the Constitution.[27] This exception, referred to as the *Ex Parte Young* doctrine, recognizes a fictional distinction between a state and its officers[28] and permits only injunctive relief, not a retroactive award of damages.[29]

Federal law also provides a cause of action "at law, suit in equity, or other proper proceeding" against *persons* "who, under color of any statute, ordinance, regulation, custom, or usage, of any State" subject "any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . ,"[30] The Supreme Court has held, however, that "neither a State

[20] Gardner v. New Jersey, 29 U.S. 565, 574 (1947). More recently, the Court held that the Eleventh Amendment did not preclude the exercise of jurisdiction by a federal bankruptcy tribunal against a state. The Court reasoned that state sovereign immunity was not implicated to the same degree in bankruptcy proceedings as in other proceedings, because bankruptcy jurisdiction was exercised in rem. Further, the Court rationalized that the unique history of the Constitution's Bankruptcy Clause, coupled with the singular nature of the jurisdiction of bankruptcy courts, justified the surrender of state sovereign immunity in this type of federal proceeding. Central Va. Comm. College v. Katz, 546 U.S. 356, 369-73 (2006).

[21] Lapides v. Bd. of Regents, 535 U.S. 613 (2002).

[22] Wis. Dept, of Corrections v. Schacht, 524 U.S. 381, 389 (1998) (citations omitted).

[23] Alden v. Maine, 527 U.S. 706, 756 (1999). *See also* Mt. Healthy City Sch. Dist. V. Doyle, 429 U.S. 274 (1977) (holding that a school board does not enjoy immunity).

[24] *Id.*

[25] Alden v. Maine, 527 U. S. 706, 756 (1999).

[26] Ex Parte Young, 209 U.S. 123 (1908).

[27] Jesse H. Choper & John C. Woo, *Effective Alternatives to Causes of Action Barred by the Eleventh Amendment,* 50N.Y.L. SCH. L. Rev. 715, 720 (2005-2006).

[28] Since such a suit seeks an injunction against a state official, it does not constitute a suit against a state, which is an "expedient fiction" designed to insure the supremacy of federal law. Pennhurst St. Sch. & Hosp. v. Halderman, 465 U.S. 89, 114 (1984).

[29] *See* Edelman v. Jordan, 415 U.S. 651 (1974) (holding that a federal court's remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief and may not include a retroactive award which requires the payment of funds from the treasury); Verizon of Md., Inc, v. Pub. Serv. Comm'n, 535 U.S. 635 (2002) (holding that federal court had jurisdiction over a suit against a state officer to enjoin official actions that violated federal law, even if the state itself was immune from suit under the Eleventh Amendment).

[30] 42 U.S.C § 1983 (2005). Some officials, such as judges and legislators, enjoy absolute immunity in the

nor its officials acting in their official capacities are 'persons'" under the act.[31] This statute, commonly referred to as Section 1983, arguably circumvents the justification for recognizing sovereign immunity, that is, the protection of state treasuries, since officers, against whom damage awards are assessed, are usually indemnified by the state.[32]

B. *Abrogation of Sovereign Immunity*

Whether or not suits legitimately are permitted by citizens against states under federal law usually involves a two-step inquiry to determine 1) whether or not Congress unequivocally expressed its intent to abrogate that immunity and if so 2) whether or not Congress acted pursuant to a valid grant of constitutional authority.[33] Presumably a valid grant of authority would exist under either the Commerce Clause[34] or the remedial enforcement authority of the Fourteenth Amendment.[35] In *Pennsylvania* v. *Union Gas Company*,[36] a plurality of the Court concluded that the Interstate Commerce Clause granted Congress the power to abrogate state sovereign immunity. The plurality assumed that the power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages... ,"[37] However, seven years later, in *Seminole Tribe of Florida* v. *Florida*,[38] a majority of the Court repudiated that conclusion and held that Congress lacks power under Article I to abrogate the states' sovereign immunity, even when the Constitution vests in Congress complete law-making authority over a particular area, such as the regulation of commerce among the Indian tribes.[39] The Court concluded that the

> Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.[40]

performance of their official duties, while a qualified immunity exists for executive branch officials who reasonably believed that their actions comported with federal law. Choper & Woo, *supra* note 27, at 721.

[31] Will v. Mich. Dept, of St. Police, 491 U.S. 58, 71 (1989). The Court reasoned that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Id.* (citation omitted)

[32] Carlos Manuel Vazquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE Dame L. Rev. 859, 880 (2000).

[33] Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).

[34] U.S. CONST, art. I, § 8.

[35] U.S. CONST, amend. 14, § 5.

[36] 491 U.S. 1 (1989).

[37] *Id.* at 19-20.

[38] 517 U.S. 44 (1996).

[39] *Id.* at 72. *Seminole Tribe* involved the Indian Commerce Clause, which grants the federal government authority over Indian commerce. Specifically at issue in the case was the Indian Gaming Regulatory Act passed by Congress in an effort to provide a statutory basis for the operation and regulation of gaming by Indian tribes. *Id.* at 47.

[40] *Id.* at 73.

This jurisprudential development, which treasures state autonomy and limits Congressional authority, is often referred to as the new federalism revolution.[41] In other contexts, Congressional regulatory authority has been curbed by the Court under the Interstate Commerce Clause,[42] as well as under the Tenth Amendment,[43] which provides that powers not delegated to the federal government are reserved to the states.[44]

Even though Article I power of Congress cannot be used to abrogate sovereign immunity,[45] another avenue for effective abrogation of sovereign immunity remains under Section 5 of the Fourteenth Amendment, which states "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[46] In *Fitzpatrick* v. *Bitzer*,[47] the Court recognized that "the Eleventh Amendment, and the principle of state sovereignty which it embodies ... are necessarily limited by the enforcement provisions of Section 5 of the Fourteenth Amendment."[48] As a result, plaintiffs may bring suits under civil rights legislation if the Congressional abrogation of immunity is constitutional under the Fourteenth Amendment, Section 1 of which provides in pertinent part that

> [n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall

[41] Erwin Chemerinsky, *Reconceptualizing Federalism,* 50 N.Y.L. SCH. L. Rev. 729 (2005-2006) (asserting that the Court has been using federalism to limit the power of the federal government and prevent the enforcement of desirable social legislation).

[42] *See, e.g.,* United States v. Lopez, 514 U.S. 549 (2000) (holding that the Gun-Free School Zone Act, which prohibited the possession of firearms in a school zone, exceeded authority of Congress to regulate commerce); United States v. Morrison, 529 U.S. 598 (2000) (holding that Congress had no authority under the Commerce Clause to enact the Violence Against Women Act, which provided a federal civil remedy for victims of gender-motivated violence); Gonzales v. Oregon, 546 U.S. 243 (2006) (holding that the Controlled Substances Act does not allow the U.S. Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide under state laws permitting such use).

[43] *See, e.g..* New York v. United States, 505 U.S. 144 (1992) (holding that provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, which provided incentives, but imposed upon states the obligation to provide for the disposal of waste generated within their borders, violated the Tenth Amendment); Printz v. United States, 521 U.S. 898 (1997) (invalidating the Brady Bill, which required local officials to conduct background applications prior to issuing permits to carry firearms).

[44] U.S. CONST, amend. 10.

[45] Similarly, the Patents Clause cannot be used to abrogate the immunity of states. Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 636 (1999) (holding that states cannot be sued for patent infringement, even though Congress intended to abrogate immunity by passing the Patent Remedy Clarification Act). The Patents Clause of the Constitution vests in Congress the authority to "promote the Progress of Science ... by securing for limited Times to ... Inventors the exclusive Right to their ... Discoveries. U.S. CONST, art.l, § 8, cl. 8. *Compare* Central Va. Comm. College v. Katz, 546 U.S. 356 (2006) (bankruptcy trustee's proceeding under federal law to set aside debtor's preferential transfer to state agency is not barred by the Eleventh Amendment). The Bankruptcy Clause empowers Congress to establish uniform laws for bankruptcies. U.S. CONST, art. 1, § 8, cl. 4.

[46] U.S. CONST, amend. 14, § 5.

[47] 427 U.S. 445 (1976).

[48] *Id.* at 456.

> any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[49]

To a degree, courts defer to the determination of Congress as to the legislation that is needed to secure Fourteenth Amendment rights. In *City of Boerne* v. *Flores,*[50] the Court recognized that Congress has the authority to remedy, as well as to *deter,* the violation of constitutionally protected rights. However, in doing so, Congress may only enforce the Fourteenth Amendment, not determine what constitutes a violation of rights. The *Boeme* Court observed that the determination as to whether or not *prophylactic* legislation is appropriate remedial legislation, or alternatively constitutes an impermissible substantive redefinition of the Fourteenth Amendment right at issue, is often difficult.[51] The Court cautioned that, while Congress should be afforded some deference as to where the line between remediation and redefinition should be drawn, "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[52] In other words, courts must examine the history and pattern of constitutional violations by states to determine if such conduct is congruent and proportionate to the remedial *or* prophylactic objectives of the legislation.[53]

A key consideration in applying the congruence and proportionality test is the nature of the constitutional right allegedly violated by the state. State practices that classify persons based upon suspect characteristics, such as race, are subject to the strictest scrutiny under constitutional law.[54] States must establish a compelling state interest and demonstrate a means narrowly tailored to achieve that interest in order to justify practices that treat persons differently based upon race or ethnicity.[55] In comparison, classifications based upon sex are analyzed by an intermediate level of review, which requires states to establish that gender classifications serve an important governmental objective and are substantially related to the achievement of those objectives.[56] Classifications of persons by other criteria, such as disability, age, or sexual orientation, are subject to a rational relationship review under constitu

[49] U.S. CONST, amend. 14, § 1.

[50] 521 U.S. 507(1997). The case concerned the Religious Freedom Reformation Act, which restricted the ability of state governments to burden a person's free exercise of religion.

[51] *Id.* at 519-520. Prophylactic legislation is designed to prohibit facially constitutional actions (or require affirmative measures) in order to deter unconstitutional conduct in an effort to remediate a pattern of prior constitutional violations.

[52] *Id.* at 520.

[53] *See* Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627, 645-46 (1999) (Patent Remedy Act was not a congruent and proportionate remedy to protect the due process rights of patent holders, because Congress did not "respond to a history of widespread and persisting deprivation" of such rights, in addition to the fact that alternative state remedies existed).

[54] Korematsu v. United States, 323 U.S. 214 (1944).

[55] Regents of Univ. Cai. v. Bakke, 438 U.S. 265 (1978); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[56] Craig v. Boren, 429 U.S. 190 (1976); United States v. Virginia, 518 U.S. 515 (1996).

tional law, which examines only whether or not the policy or practice is rationally related to a legitimate governmental objective.[57]

In addition to the heightened judicial scrutiny of classifications for members of suspect classes, constitutional jurisprudence recognizes that certain fundamental rights or interests also demand strict scrutiny analysis under the Fourteenth Amendment. The denial or dilution of voting rights to classes of persons by states is subject to close scrutiny under the Equal Protection Clause,[58] as are state barriers that restrict certain classes of persons from access to the judicial process.[59] Thus, while state sovereignty is not impervious to laws passed pursuant to the remedial provisions of the Fourteenth Amendment, as it is to Congressional authority under the Interstate Commerce Clause, Congress still must tailor remedial legislation to fit the civil rights violations addressed by its statutes, considering the nature of the alleged violation as it relates to classifications or fundamental rights.

II. Federal Civil Rights Legislation

The Civil Rights Act of 1964 was passed

> to enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.[60]

Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against any individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...."[61] The Act also makes it illegal for employers to segregate or classify employees or applicants adversely because of

[57] Romer v. Evans, 517 U.S. 620 (1996) (sexual orientation); Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (disability); Mass. Bd. Retirement v. Murgia, 427 U.S. 307 (1976) (age).

[58] Harper v. Virginia State Board of Elections, 383 U.S. 169 (1966) (holding that the Equal Protection Clause bars a state from making payment of a state tax a prerequisite to voting); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (holding that the Voting Rights Act was a proper exercise of the powers under Section 5 of the Fourteenth Amendment and that the Supremacy Clause precluded the enforcement of New York's English literacy requirement to the extent it conflicted with that Act).

[59] M.L.B. v. S.L.J., 519 U.S. 102 (1996) (holding that Mississippi's conditioning of natural mother's right to appeal from civil decision terminating her parental rights on her ability to prepay record preparation fees was inconsistent with the Fourteenth Amendment's Due Process and Equal Protection Clauses).

[60] 42 U.S.C. § 2000e (2005).

[61] *Id.* at § 2000e-2(a)(l) (2005).

race, color, religion, sex, or national origin.[62] The Equal Employment Opportunity Act of 1972 extended Title VII's coverage to state employers, removing the express exclusion of "a State or political subdivision thereof' from the definition of "employer," and amending the definition of "employee" to include individuals "subject to the civil service laws of a State government, governmental agency or political subdivision."[63] Thus, the statutory scheme seemingly permits the recovery of damages by citizens against states for discriminatory practices in employment, but will the Eleventh Amendment permit such a result?

In *Fitzpatrick* v. *Bitzer*,[64] the first case to pit the Eleventh Amendment against Section 5 of the Fourteenth Amendment, plaintiffs brought a class action suit seeking money damages against Connecticut under the 1972 Amendments to Title VII of the Civil Rights Act of 1964, alleging that the state's retirement plan discriminated against male employees.[65] After examining the circumstances surrounding the passage of the Civil War Amendments, the Court asserted that Section 5 of the Fourteenth Amendment expressly grants Congress

> authority to enforce 'by appropriate legislation' the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to Section 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.[66]

Further, the court asserted

> 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 which are constitutionally impermissible in other contexts.[67]

Thus, *Fitzpatrick* allows Congress through the Fourteenth Amendment to inhibit and sanction state action, whether it expresses its intent in the language of the statute itself, or in the legislative history leading up to the passage of the law.[68] Although the

[62] *Id.* at § 2000e-2(a)(l) (2005).

[63] Pub. L. No. 92-261, 86 Stat. 103(1972) (codified at 42 U.S.C. § 2000e (f) (2005)). The Civil Rights Act of 1991 amended the 1964 legislation to provide for damages in cases of intentional employment discrimination. Pub. L. No. 102-166, 106 Stat. 1071 (1991).

[64] 427 U.S. 445 (1976).

[65] *Id.* at 448.

[66] *Id.* at 456.

[67] *Id.*

[68] Gabriel R. MacConaill, *Nevada Department of Human Resources* v. *Hibbs: Does Application of Section* 5 *Represent a Fundamental Change in the Immunity Abrogation Rules of "New Federalism. " or Have the Burdens Simply Shifted*?, 109 PENN. St. L. REV. 831, 839 (2005).

Court approved the abrogation of sovereign immunity under Section 5 in principle, it did not decide whether or not the application of the substantive law in Title VII to Connecticut's retirement plan was an improper exercise of that remedial power by Congress under the Fourteenth Amendment. In fact, the congruence and proportionality test of *City of Boerne* had not yet been announced.

Subsequently, the Court in *Nevada* v. *Hibbs*[69] applied the *City of Boerne* test in the context of gender discrimination under the Family and Medical Leave Act of 1993 ("FMLA"), which entitles eligible employees to take up to twelve work weeks of unpaid leave annually for any of several reasons, including the onset of a "serious health condition" in an employee's spouse, child, or parent, and creates a private right of action to seek both equitable relief and money damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."[70] In holding that "employees of the State of Nevada may recover money damages in the event of the State's failure to comply with the family-care provision of the Act,"[71] the Court effortlessly concluded that "the clarity of Congress' intent [to abrogate] here is not fairly debatable."[72]

But was the abrogation constitutionally permissible? In deciding this issue, the Court noted that gender-based statutory classifications were subject to a heightened standard of scrutiny, which requires the state to establish that the discriminatory classification serves important governmental objectives and that the means chosen to achieve those objectives are substantially related to the ultimate goal.[73] The Court recognized that Congress had documented a history of discrimination against women by state employment laws, both facially and as applied, including the discriminatory application of parental leave laws, concluding that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic Section 5 legislation."[74] The Court also observed that Congress previously had tried unsuccessfully to address this "difficult and intractable problem," through Title VII and the Pregnancy Discrimination Act, and that its persistence could justify such a *prophylactic* measure, not such a remedial measure.

> By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men.[75]

[69] 538 U.S. 721 (2003).
[70] 29 U.S.C. §§ 2612(aXlXQ> 2617(aX2) & 2615(a)(1) (2005).
[71] Nevada v. Hibbs, 538 U.S. 721, 725 (2003).
[72] *Id.* at 726.
[73] *Id.* at 754. In other words, the state is not permitted to rely instead upon overbroad generalizations or inaccurate stereotypes about the sexes.
[74] *Id.* at 735.
[75] *Id.* at 737.

The Court also noted, "the FMLA is narrowly targeted at the fault line between work and family - precisely where sex-based overgeneralization has been and remains strongest - and affects only one aspect of the employment relationship."[76] In sum, for the first time the Court approved of the abrogation of sovereign immunity by Congress under the Fourteen Amendment, both in principle and context applying the *City of Boeme* test: "Congress' chosen remedy, the family-care leave provision of the FMLA, is 'congruent and proportional to the targeted violation.'"[77] The decision reaffirms the relevance and feasibility of that test, as well as endorses Congress's power to abrogate the States' sovereign immunity through valid prophylactic antidiscrimination legislation.[78] While *Hibbs* and *Fitzpatrick* concerned gender discrimination in employment, it would seem that in the context of intentional racial and national origin discrimination in employment, Congressional prophylactic legislation, such as Title VII, could meet the congruence and proportionality test in many substantive contexts, particularly since such discrimination by states is subject to even more exacting scrutiny than gender discrimination.[79] On the other hand, while Title VII permits claims of unintentional discrimination under disparate impact theory,[80] recognizing such claims against states may not be a congruent and proportional remedy under Eleventh Amendment jurisprudence.[81]

Furthermore, the Age Discrimination in Employment Act ("ADEA") fared less favorably than Title VII's protection of gender in *Hibbs.* Congress passed the Age Discrimination in Employment Act (ADEA) "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; and to help employers and workers find ways of meeting problems arising from the impact of age on employment."[82] The ADEA prohibits discrimination against individuals over the age of forty because of their age and also prohibits covered entities from depriving individuals of employment opportunities or taking

[76] *Id.* at 738. That narrow tailoring, coupled with the fact that the statute requires only unpaid leave, applies only to employees who have worked for the employer for at least one year and provided 1,250 hours of service within the last 12 months, requires advance notice of foreseeable leave, allows certification by a health care provider of the need for leave, excludes employees in high-ranking or sensitive, including state elected officials, their staffs, and appointed policymakers, and provides for damages which are strictly defined and measured by actual monetary losses, all of which provisions taken together proportionately tailor the remedy to accomplish the important governmental objective of the legislation. *Id.* at 739-40.

[77] *Id.* at 737.

[78] Winston Williams, *Check and Checkmate: Congress's Section* 5 *Power After Hibbs,* 71 Tenn. L. Rev. 315, 335-56(2004).

79 Cases involving such immutable traits are subject to strict scrutiny review under the Equal Protection Clause. Miller v. Johnson, 515 U.S. 900 (1995) (holding that congressional redistricting plan, which was based predominantly on race and was not shown to serve compelling governmental interest, violated the Fourteenth Amendment).

[80] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (holding that requirement of a high school diploma or passing an intelligence test may violate Title VII if the qualifications have a disparate impact on a protected class and are not a reasonable measure of job performance).

[81] Ann Carey Juliano, *The More you Spend, the More You Save: Can the Spending Clause Save Federal Anti-Discrimination Laws?,* 46 VILLANOVA L. REV. 1111, 1146 (2001).

[82] 29 U.S.C § 621(b) (2005).

any other adverse action against such individuals because of their age.[83] As passed in 1967, the Act applied only to private employers, excluding "the United States, a corporation wholly owned by the Government of the United States, or a State or political subdivision thereof."[84] In 1974 Congress amended the definition of *employer* contained in the statute to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State...."[85] Congress also amended the enforcement provision to permit an individual to bring a civil action against employers, including governmental entities, in state or federal court.[86] While the ADEA constituted a valid exercise of Congress's power under the Interstate Commerce Clause[87] was it an effective abrogation of state sovereign immunity under the Eleventh Amendment?

In *Kimel* v. *Florida Board of Regents*™ the Supreme Court held that "in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals."[89] The Court recognized that "[U]nder our firmly established precedent..., if the ADEA rests solely on Congress' Article I commerce power, the private petitioners in today's cases cannot maintain their suits against their state employers."[90] Therefore, the authority to abrogate immunity, if it exists, must lie under the Fourteenth Amendment and pass the two-part congruence and proportionality test of *City of Boeme.* In applying this test the Court held that while "the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees,"[91] Congress lacked authority to do so under the Fourteenth Amendment because the substantive requirements the statute imposed on state and local governments were "disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[92] The Court observed that, unlike persons who suffer discrimination on the

[83] The Act makes it unlawful for a covered employer "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this chapter." 29 U.S.C. § 623 (a)(1)- (3) (2005).

[84] Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 68 (2000).

[85] 29 U.S.C. § 630(b) (2005). Congress also amended the definition of employee as excluding elected officials and appointed policymakers at the state and local levels. *Id.* at § 630(f) (2005).

[86] *Id.* at § 216(b) (2005).

[87] *See* EEOC v. Wyoming, 460 U.S. 226 (1983), in which the Court held that the ADEA did not transgress any external restraints imposed on the commerce power by the Tenth Amendment. The Tenth Amendment to the Constitution provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST, amend. 10.

[88] 528 U.S. 62 (2000). In *Kimel,* plaintiffs brought suit against state government employers in consolidated cases alleging illegal discrimination in violation of the ADEA.

[89] *Id. at* 91.

[90] *Id.* at 79.

[91] *Id.* at 74.

[92] *Id.* at 83.

basis of race or gender, older persons historically have not been subjected to purposeful discrimination and age is not a suspect classification under the Equal Protection Clause of the Fourteenth Amendment.

As such, age discrimination by governmental entities is permissible if the age classification in question is rationally related to a legitimate state interest. In light of this constitutional framework and history, the Court held that the ADEA prohibits very little conduct by state and local governments that would be deemed to be unconstitutional. Congress may act to remediate unconstitutional conduct, as well as to enact "reasonably prophylactic legislation,"[93] but Congress may not establish new obligations for states. In sum, the Court concluded that "the ADEA's legislative record confirms that Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem," because, while Congress had found substantial discrimination based upon age in the private sector, it had never identified a pattern of unconstitutional age discrimination by state or local governmental entities."[94] Since disabled persons are subject to the same rational relationship review of state statutory classifications, the outcome of the abrogation issue, at least with respect to discrimination in the terms and conditions of employment, was predictably similar.

III. SOVEREIGN IMMUNITY AND THE AMERICANS WITH DISABILITIES ACT

A. *Title I of the ADA*

The Americans with Disabilities Act ("ADA") in 1990 represented a milestone in championing the rights of persons with disabilities, who as a group represent a substantial percentage of citizens.[95] The Act prohibits employers from "utilizing standards, criteria, or methods of administration...that have the effect of discrimination on the basis of disability."[96] The ADA defines "disability" to include "a physical or mental impairment that substantially limits one or more of the major life, a record of such an impairment; or being regarded as having such an impairment."[97] Title I of the ADA requires employers to make reasonable accommodations for *qualified* disabled employees, that is employees "with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual hold or desires, as long as the

[93] *Id.* at 88.
[94] /d at 89.
[95] Figures suggest that one fifth of Americans have a disability and that the percentage is growing. Robert F. Rich, Christopher T. Erb, & Rebecca A. Rich, *Critical Legal and Policy Issues for People with Disabilities*, 6 DEPAUL J. HEALTH CARE L. 1, 6 (2002) (discussing current policy issues facing this substantial and growing minority group).

[96] 42 U.S.C. § 12112(b)(3)(A) (2005).
[97] *Id.* at § 12102(2).
[98] *Id.* at § 12111(8). In other words, a qualified individual must be able satisfy the prerequisites for the position, such as proper training, skills and experience, in addition to possessing the ability to perform the essential function of the job either with or without reasonable accommodation. 29 C.F.R. § 1630.2(m)
(2005).

accommodation would not result in an undue hardship, that is, one that entails significant difficulty or expense." A reasonable accommodation may include, for example, making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[100]

To briefly digress, the Civil Rights Act of 1964 and the ADEA require covered entities only to refrain from discriminatory employment practices. The 1972 Amendments to Title VII subsequently required employers to reasonably accommodate the religious practices of their employees, as long as doing so did not result in an undue hardship.[101] As interpreted by the Court, an accommodation that resulted in more than a de minimis cost to the employer constituted an undue hardship.[102] Since religious classifications are subject to the strict scrutiny test for constitutional validity, and since the Court's interpretation of undue hardship does not impose an overwhelming burden on state employers, a forceful argument can be made that the provision is congruent and proportional under the *Boerne* test.[103] On the other hand, the ADA must be evaluated under the rational relationship test, not the strict scrutiny test, and the statute by its terms requires state employers to make accommodations that potentially will result in more than a de minimis cost. Is Title I of the ADA, then, a congruent and proportional response to discrimination against disabled employees by states?

The question was answered in *Board of Trustees of the University of Alabama* v. *Garrett,* in which the Court held that Congress did not validly abrogate the States' sovereign immunity from suit for employment discrimination brought by private disabled individuals seeking money damages.[104] Reiterating that Congress could not have abrogated sovereign immunity except under its Section Five authority, the Court looked to prior cases addressing Fourteenth Amendment Equal Protection claims to determine the appropriate framework for the application of the congruence and proportionality test. In doing so, the Court concluded

> [Sjtates are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational. They could quite hard

[99] The Act 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 opera

tion of the [employer's] business." 42 U.S.C. § 12112(b)(5)(A) (2005).

100. Id. at§ 12111(9).

[101] Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. § 2000e (j) (2005)).

[102] TWA, Inc., v. Hardison, 432 U.S. 63 (1977); Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

[103] James M. Oleske, Jr., *Federalism, Free Exercise, and Title VII: Reconsidering Reasonable Accommodation,* 6 U. PA. J. CONST. L. 525, 568 (2004).

[104] Bd. of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

> headedly - and perhaps hardheartedly - hold to job-qualification requirements which do not make allowance for the disabled. If special accommodations for the disabled are to be required, they have to come from positive law and not through the Equal Protection Clause.[105]

Further, the Court surmised that Congress had not identified a history and pattern of unconstitutional employment discrimination by the states against the disabled.[106] The Court determined that, although Congress made a general finding that society tended to isolate and segregate individuals with disabilities, the states were not primarily culpable: "[T]he legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."[10] The Court further concluded that Title I's broad remedial scheme was insufficiently targeted to remedy or prevent unconstitutional discrimination in public employment.[108] The Court did not decide the constitutional issue of whether or not Title II, which has somewhat different remedial provisions from Title I, was appropriate legislation under Section Five of the Fourteenth Amendment.[109]

In sum, it appears that the Supreme Court is willing to justify the abrogation of state immunity under Section 5 of the Fourteenth Amendment in the employment context only when there is a well-documented history of discriminatory treatment of persons for whom constitutional precedents demand heightened scrutiny, such as sex. Since employment itself is not a fundamental right, federal civil rights legislation designed to prohibit arbitrary discrimination against persons for whom the rational relationship test applies instead, such as the ADEA and the ADA, has failed to constitute a valid abrogation of state sovereign immunity.

B. *Title II of the ADA*

In contrast, a different result may be dictated if the denial of a recognized fundamental right under the Fourteenth Amendment, such as access to the courts, the right to be free from the imposition of cruel and unusual punishment, or the right to be free from confinement in violation of constitutional safeguards, is at issue. Title

[105] *Id* at 368-69.

106 Id. at 368.

[107] *Id.* In his concurring opinion Justice Kennedy observed that if the state governments had been "transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find in decisions of the courts of the States and also the courts of the United States extensive litigation and discussion of the constitutional violations, but there was no such record. *Id.* at 375-76 (Kennedy, J., concurring).

108 *Id.* at 369-370.

109 The parties did not brief the Court on that issue, and the Court suggested that since Title I specifically dealt with employment claims, Title II may not have be intended to address such claims. *Id.* at 360 n. 1.

[110] *See* Timothy J. Cahill & Betsy Malloy, *Overcoming the Obstacles of Garrett: An As Applied' Saving Construction for the ADA's Title II,* 39 WAKE FOREST L. REV. 133 (2004) (arguing that the Court should adapt an "as applied" analysis of Title II claims against states which considers the nature of the allegedly

II of the ADA prohibits discrimination with respect to access to certain facilities and services that may implicate the fundamental rights."[1] It applies solely to state and local governments and their agencies and provides that "no 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.""[2] The term "qualified individual with a disability" is defined as

> 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."[3]

The Act defines the term "public entity" to include state and local governments, as well as their agencies and instrumentalities."[4]

In *Tennessee* v. *Lane,* two paraplegics, a criminal defendant and a court reporter, both of whom used wheelchairs for mobility, sued the state of Tennessee, alleging that it had denied them physical access to the state court system in violation of Title II."[5] The facts alleged that the criminal defendant had crawled up two flights of stairs to get to the courtroom for his first criminal appearance and, at his second appearance, he relused to crawl or be carried and subsequently was arrested and jailed for failure to appear."[6] The court reporter alleged that she had not been able to gain access to a number of county courthouses and, as a result, had lost both work and an opportunity to participate in the judicial process."[7] In analyzing Tennessee's claim of immunity from the suits, the Court concluded that the question whether or not Congress intended to abrogate state immunity was easily answered by reference to the statute, which provides, "[A] State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.""[8]

The Court then scrutinized the validity of that abrogation, noting that, like Title I, Title II is designed to prohibit *irrational* disability discrimination under

discriminatory service or program and the constitutional status of the right allegedly infringed).

[111] In addition to those rights enumerated in the first ten amendments, certain other "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" have been recognized as fundamental rights through substantive due process decisions. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (194).

[112] 42 U.S.C. § 12132(2005).
[113]*Id.*
114 Id. at § 12131(1) (2005).
[115] Tennessee v. Lane, 541 U.S. 509 (2004).
[116] Id at 513.
117 Id.
[118] *Id.* at 518 (citing 42 U.S.C. § 12202 (2005)).

constitutional precedent.[119] Additionally, however, Title II enforces a variety of other basic constitutional guarantees, the infringement of which may be subject to strict scrutiny review, not merely a rational basis judicial review, such as the right of access to the courts.[120] The Court noted that "Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights,"[121] such as exercising the right to vote, to marry and to participate in civic activities, such as jury duty and voting. The Court also cited a documented pattern of unconstitutional treatment provided by states in their mental health care facilities, penal systems, and judicial systems, as well as in public education with respect to the disabled.[122] Congress recognized this pattern of discrimination, as stated in the statutory language: "[D]iscrimination against individuals with disabilities persists in such critical areas as . . . education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services."[123] The Court surmised that

> [T]his finding, together with the extensive record of disability discrimination that underlies it, makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation.[124]

The Court declined to examine the validity of Title II under Section 5 in all of its conceivable applications with respect to public services afforded to disabled citizens (a full breadth inquiry), but only concluded that "Title II unquestionably is valid Section 5 legislation as it applies to the class of cases implicating the accessibility of judicial services...."[125] The Court emphasized that Title II requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided eligible disabled persons, which can be satisfied in a number of ways, noting that regulations did not require states to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service.[12]" In sum, in presumably treating the Act as severable, the Court used a modified "as applied" analysis of the legislation which focused upon how the law applied to the^ right in question rather than upon the law applied to the conduct alleged in the case.[127]

[119] *Id* at 522.
[120] *Id at* 523.
[121] ***Id.*** at 524.
[122] ***Id.*** at 524-25.
[123] ***Id.*** at 528 (citing 42 U.S.C. § 12101(a)(3) (2005)).
[124] ***Id*** at 530.
[125] ***Id.*** at 531.
[126] *Id* at 532 (citing 28 C.F.R. § 35.150(a)(2) & (a)(3) (2005)).
[127] Note, *State Sovereign Immunity-Congress's Enforcement Power Under Section 5 of the Fourteenth Amendment,* 118 HARV. L. REV. 258, 263-68 (2004) (arguing that the majority's unusual "as applied" analysis resembled judicial legislation more than judicial interpretation, introducing further uncertainty into an already muddy test).

Because the Court's holding was narrowly limited to the application of Title II to access to justice and due process in state courts, a number of unanswered questions concerning the scope of Title II remain. The Court considered one such issue in *United States v. Georgia,* [128] which presented the question whether or not Title II of the ADA validly abrogates state sovereign immunity for suits by disabled inmates alleging discrimination by state prison systems. The petitioner in the case, a paraplegic who uses a wheelchair for mobility, alleged that he was held in the Georgia State Prison for more than twenty-three hours a day in a cell so narrow that he could not turn his wheelchair, that the prison failed to make toilet and bathing facilities accessible to him such that he was sometimes forced to sit in his own waste, that he was denied needed medical care, such as catheters, treatment for bedsores and access to mental health counselors, and that he was excluded him from programs and activities because of his disability.[129]

In the absence of any violations of fundamental rights, disability-based classifications are subject to a constitutional rational relationship review of state action; therefore, as long as a prison regulation was reasonably related to legitimate penal interests, it should survive constitutional scrutiny.[130] However, the prison setting implicates the protection of certain fundamental rights, such as the right to be free from cruel and unusual punishment.[131] In a narrow holding, the Court announced that Title II of the ADA validly abrogates state sovereign immunity in suits for damages against states for conduct that *actually* violates the Fourteenth Amendment.[132] Justice Scalia, writing for a unanimous Court, concluded that, while members of the Court have disagreed about the scope of Congress's prophylactic enforcement powers under Section 5 of the Fourteenth Amendment, indisputably the enforcement power of Section 5 includes the power to abrogate state sovereign immunity by authorizing private suits for damages against states for claims based on actual unconstitutional conduct, such as violations of the Eighth Amendment.[133] However, the Court suggested that some of Petitioner's allegations were far from actual constitutional violations "under either the Eighth Amendment or some other constitutional provision, or even from Title II violations."[134] Depending upon the

[128] 546 U.S. 151 (2006).

[129] *Id.* at 155. The district court granted summary judgment in favor of Georgia based upon the state's sovereign immunity, and the Eleventh Circuit affirmed in an unpublished opinion, holding that the Eleventh Amendment precludes suits against states for money damages. The United States Department of Justice intervened in support of the statute being a valid abrogation of state sovereignty and in defense of the constitutionality of the ADA. *Id.* at 155.

[130] This argument was asserted by the State of Georgia. Brief for the Respondents, Goodman v. Georgia, 546 U.S. 151 (2006) (No. 04-1236), *available at* www.bazelon.org/issues/disabilityrights/resources/- goodman.htm#Briefs.

[131] U.S. CONST, amend. 8. The Eighth Amendment has been made applicable to the states under the Due Process Clause of the Fourteenth Amendment. Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947).

[132] United States v. Georgia, 546 U.S. 151, 159 (2006).

[133] *Id.* at 158-59.

[134] *United States* v. *Georgia,* 546 U.S. at 159. Because it was not clear from the filings what conduct was alleged in support of his Title II claims, the Supreme Court remanded the case to the lower court for

nature of the amended complaint, the Court instructed the lower courts to determine on a *claim-by-claim* basis

> (1) which aspects of the State's alleged conduct violated Title II; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid.[135]

In sum, the Court left open the basic question whether or not, and under what circumstances, states would be immune to private lawsuits under Title II of the ADA in the absence of a parallel constitutional violation.

Justice Stevens, in a concurring opinion joined by Justice Ginsburg, observed that the Court wisely chose for the parties to create a factual record before attempting to define the outer limits of Title II's valid abrogation of state sovereign immunity, particularly since Title II prohibits more conduct than the Constitution forbids,[136] although he suggested that the record of mistreatment of prison inmates documented by Congress was comparable to the record in *Tennessee* v. *Lane* that was deemed to be sufficient to uphold the application of Title II to cases implicating the fundamental right of access to the courts.[13] He further recognized that, while cases involving inadequate medical care and inhumane conditions of confinement tended to dominate claims made by disabled inmates, courts also have reviewed allegations involving the abridgment of religious liberties, undue censorship, interference with access to the judicial process, and procedural due process violations, all of which, he concluded, should be taken into account in examining the first step of the "congruence and proportionality' inquiry.[138]

Some observers have concluded that Justice Scalia's opinion vaguely hinted that states will retain immunity if there is no constitutional violation, but that the

clarification. Furthermore, because the Eleventh Circuit did not address the issue, it was also unclear as to what extent the conduct underlying his constitutional claims violated Title II as well. *Id.*

[135] *Id.*

[136] *Id.* Justice Stevens opined that a factual record, while not absolutely necessary to the resolution of the question, would aid in determining how Title II's reasonableness requirement applies in the prison context. Justice Stevens also emphasized that the Court's opinion did not suggest that the Eighth Amendment was the only constitutional right applicable in the prison context, and hence relevant to the abrogation issue. He noted that the Court's approach, nevertheless, was consistent with its recognition that the history of mistreatment leading to Congress's decision to extend Title II s protections to prison inmates was not limited to violations of the Eighth Amendment. *Id.* at 161.

[137] *Id.* at 160-161. The petitioner argued that the states had a pattern of unequal treatment of prisoners with disabilities, and compiled an extensive addendum of cases evidencing the problem of unconstitutional treatment of individuals with disabilities in state correctional facilities. Further, the petitioner argued that upholding Title II in the context of a penal system was particularly compelling since the state has total control of all aspects of an inmate's life and the means of existence. Brief for the Petitioner, Goodman v. Georgia, 546 U.S. 151 (2006) (No. 04-1236), *available at* www.bazelon.org/issues/disabilityrights/-resources/goodman.htm#Briefs.

[138] *United States* v. *Georgia,* 546 U.S. at 162-163.

decision at least establishes that the ADA is valid remedial Section 5 legislation in cases in which the state conduct that violates the ADA also violates the Constitution, without the necessity of plaintiffs having to establish a history and pattern of past state constitutional violations.[139] What remains the primary mystery, however, is whether or not, *in the absence of a concurrent constitutional violation,* Title II of the ADA is congruent and proportional remedial or *prophylactic* legislation based upon a sufficiently documented history of the treatment of state prisoners with disabilities as amounting either to irrational discrimination, or the denial of fundamental constitutional rights or interests, under the Fourteenth Amendment.[140]

IV. The Future of the ADA and State Sovereignty

Some commentators argue that the recent trend in interpreting the Fourteenth and Eleventh Amendments demonstrates the dramatic and disturbing shift in ideology, which undermines the achievement of national objectives and lessens the accountability of state government.[141] Professor Chemerinsky argues that the recognition of state immunity should be balanced against the need for accountability, since avenues for ensuring state compliance with federal law otherwise would be foreclosed.[142] He concludes that, while on one side there is the value of protecting state governments by according them immunity from suit, on the other side there is the value of ensuring the supremacy of federal law by providing for its enforcement in federal court.[143] He also argues that this shift in values affords "insufficient weight to ensuring the supremacy of federal law as a crucial constitutional value" and leaves little assurance of state compliance with federal law.[144] Notwithstanding the wisdom of a national mandate to prohibit discrimination against persons with disabilities, more constitutional challenges likely will be raised against the ADA's substantive

[139] Lyle Denniston, *Court rules on state immunity, two other issues* (Jan. 10, 2006), www.scotusblog.com/movabletype/archives/2006/01/court_adds_some.html.

[140] The federal government in its brief argued that Title **II** of the ADA was appropriate prophylactic legislation as applied to state prison administration, asserting that Congress had documented a deeply rooted pattern of indifference by state penal systems to the health, safety, suffering, and medical needs of prisoners with disabilities. Brief for the United States as Petitioner, Goodman v. Georgia, 546 U.S. 151 (2006) (No. 04-1203), *available at* www.bazelon.org/issues/disabilityrights/resources/- goodman.htm#Briefs.

[141] *See, e.g.,* Christina M. Royer, *Paradise Lost? State Employees' Rights in the Wake of New Federalism,* 34 AKRON L. REV. 637 (2001) (arguing that state employees enjoy fewer rights than their private sector counterparts because they are effectively deprived of any meaningful remedies); Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory,* 75 NOTRE DAME L. REV. 1011 (2000) (arguing that the new federalism effort fails to promote any coherent conception of states' rights or state autonomy while harming legitimate national objectives); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity,* 75 NOTRE DAME L. REV. 953 (2000) (arguing that emasculating Congressional enforcement powers flies in the face of modem notions of justice and principles regarding the supremacy of federal law).

[142] Chemerinsky, *supra* note 9, at 1227.

[143] *Id.*

[144] Erwin Chemerinsky, *New Frontiers of Federalism: Formalism and Functionalism in Federalism Analysis,* 13 Ga. St. U. L. REV. 959, 984 (1997).

provisions.[145] Given the growing role of state governments as employers and providers of services to millions of Americans, the issue of state sovereignty versus federal policy of is one of critical importance.

A. *Strategies for Applying Title I to States*

There are several issues that remain concerning whether or not Title II of the ADA is a congruent and proportional prophylactic remedy, which are dependent upon the nature of the right implicated. However, the law under Title I seems to be settled under *Garrett*.'[46] Nevertheless, are there other ways to guarantee that states, like their private sector counterparts, will be prohibited from arbitrary employment discrimination against the disabled? One suggestion for achieving this objective of accountability is that, in the future, Congress itself could do more to ensure the validity of its abrogation of state sovereignty by carefully documenting a pattern of state discrimination against the disabled,[147] although admittedly building such a record is a moot point for previously enacted statutes.[148] Moreover, the Eleventh Amendment does not preclude a suit by the United States on behalf of aggrieved citizens under federal law for monetary relief,[149] because states are considered to have consented to such suits as part of the plan of the constitutional convention, which further requires that federal officials insure that the laws of the United States are faithfully executed.[150] As such, the EEOC may bring suit on behalf of state employees for illegal discrimination,[151] provided such suits are of sufficient importance to the federal government.[152] Nevertheless, relying on the resources of the executive branch to vindicate state violations of federal civil rights legislation may be too burdensome and an unrealistic option.[13] ' Furthermore, the regulatory interest of any given federal agency in enforcing Title II of the ADA is less identifiable than

[145] James Leonard, *The Americans with Disabilities Act: A Ten-Year Retrospective: The Shadows of Unconstitutionality: How the New Federalism May Affect the AntiDiscrimination Mandate of the Americans with Disabilities Act,* 52 Ala. L. Rev. 91, 187 (2000).

[146] *See supra* notes 104-109 and accompanying text.

[147] Erwin Chemerinsky, *Velazquez and Beyond: Closing the Courthouse Doors to Civil Rights Litigants,* U. Pa. CONST. L. J. 537, 555-556 (2003).

[148] Some observers have questioned the fairness of the Court in imposing retroactively a documentation requirement for remedial legislation passed pursuant to Section 5, since Congress would not have know of the need to build a record through testimony. *See* Oleske, *supra* note 103 at 568-570 (citing the comments of Justice Stevens and other authors).

[149] *See* Alden v. Maine, 527 U. S. 706, 759-60 (1999) (acknowledging that the U.S. department of Labor could bring suit against states to enforce the FLSA).

[150] *Id.* at 755.

[151] Ivan E. Bodensteiner & Rosalie B. Levinson, *Litigating Age and Disability Claims Against State and Local Employers in the New 'Federalism " Era,* 22 BiiRKEIJCY J. Emp. & Lab. L. 99, 120(2001).

[152] Alden v. Maine, 527 U. S. 706, 759-60 (1999).

[153] In dissent in *Alden,* Justice Souter asserted that "unless Congress plans a significant expansion of the National Government's litigating forces to provide a lawyer whenever private litigation is barred by today's decision and Seminole Tribe, the allusion to enforcement of private rights by the National Government is probably not much more than whimsy." *Id.* at 810.

that of employment discrimination laws and the EEOC, potentially closing this approach for that Title.[154]

At the state level, states could either enact legislation that parallels federal anti-discrimination legislation and expressly applies to state government or, alternatively, states could enact laws that waive sovereign immunity under federal civil rights legislation. Many states have enacted laws comparable to federal civil rights legislation, which prohibit arbitrary discrimination in employment as well as in the provision of services, while some state legislatures, such as Delaware, Florida, Kentucky, New Hampshire and New York, have enacted laws waiving their sovereign immunity with respect to discrimination suits under some federal statutes.[155] After the Court's decision in *Garrett,* North Carolina and Minnesota waived immunity and consented to being sued in federal court pursuant to federal civil rights statutes.[156] Moreover, if states have waived immunity by enacting state anti- discrimination laws that permit suits against the state for damages in state court, then they may be precluded from attempting to hide behind the cloak of immunity and systematically discriminating against similar federal causes of action in federal court.[157]

Further, Congress has the authority under the Constitution to enact laws to "provide for the common Defence and general Welfare of the United States."[158] Under this *Spending Clause,* Congress constitutionally may require a waiver of sovereign immunity as a condition of receiving federal funding, because there is no unilateral action by Congress in such a case, but rather a reciprocal arrangement, whereby immunity is waiver in exchange for financial support.[159] Therefore, legislation, which on its own may not effectively abrogate immunity under Article I or Section 14, may be permissible if the federal government conditions the receipt of a benefit on the waiver of immunity by the recipient state.[160] The Court has held that Congress may set the terms for the disbursement federal funds to the states and attach conditions to their receipt in order to further policy objectives, as long as the conditions are imposed unambiguously and explicitly.[161]

[154] *But see* Seth A. Horvath, Note, *Disentangling the Eleventh Amendment and the Americans with Disabilities Act: Alternative Remedies for State-Initiated Disability Discrimination Under Title I and Title II,* 2004 III. L. REV. 231, 262(arguing that suits brought by individuals, who have exhausted whatever administrative remedies are available for their particular claim, should be able to proceed under this exception to Eleventh Amendment immunity).

[155] Alden v. Maine, 527 U.S. 706, 756 (1999).

[156] Joseph J. Shelton, *In the Wake of Garrett: State Law Alternatives to the Americans with Disabilities Act,* 52 CATHOLIC Univ. L. Rev. 837 (2003).

[157] Bodensteiner & Levinson, *supra* note 151, at 113-120.

[158] U.S. CONST, art I, § 8.

[159] For a comprehensive analysis of the use of the Spending Clause to override the sovereignty of state actions see Juliano, *supra* note 81.

[160] *See* Charles C. Wong, *State Immunity Doctrine: Demoting the Patent System,* 53 ME. L. REV. I11, 134 (2001) (arguing that a revised Patent Remedy Act constitutionally could permit suits against states for patent infringement in exchange for receiving a patent and a remedy for infringement, or alternatively a patent without the remedy of infringement for states which do not waive immunity).

[161] *See* South Dakota v. Dole, 483 U.S. 203 (1987) (holding that Congress had the authority to withhold

Of importance in the context of civil rights legislation is the fact that federal law provides that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[162] The term "program or activity" includes the operations of a "department, agency, special purpose district, or other instrumentality of a State or of a local government," in addition to governmental entities that distribute such assistance, colleges, universities, postsecondary institutions, local educational agencies and school systems, as well as entities engaged in the business of providing education, health care, housing, social services, or parks and recreational activities.[163] More specifically, the Civil Rights Remedies Equalization Amendment of 1986 provides that a

> State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court" for a violation of Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, the Age Discrimination Act of Title VI of the Civil Rights Act of 1964 or "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.[164]

Specifically, Section 504 of Rehabilitation Act also provides that

> no otherwise qualified individual with a disability in the United States... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any ***program or activity*** receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.[165]

As a practical matter, assuming legitimacy, the privilege of conditioning the receipt of federal money on compliance with federal civil rights legislation is a potent incentive.[166] However, even though all states receive federal financial assistance,

highway funds from states that did not comply with the National Minimum Drinking Age Act); Pennhurst St. Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) (holding that a federal grant program for developmen- tally disabled individuals, which required states to comply with federally imposed conditions, was a legitimate, reciprocal program).

162 42 U.S.C. § 2000d (2005).
163 ***Id.*** at § 2000d-4a (2005).
164 ***Id.*** at § 2000d-7 (2005)). The statute was passed subsequent to the decision in Atascadero St. Hosp. v. Scanlon, 473 U.S. 234 (1985), in which the Court concluded that Congress had not unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity; therefore, a federal suit against a state by a litigant seeking monetary relief under 504 of Rehabilitation Act of 1973 was barred by sovereign immunity. *See* Bodensteiner & Levinson, *supra* note 151, at 125-126.

165 29 U.S.C. § 794(a) (2005).
166 For example, states have been required to give written assurances that they would comply with Section

thus assuring, at a minimum, compliance with the Rehabilitation Act, the ADA's Title II provides a greater level of detail in its coverage,[167] although mandating state compliance with its more comprehensive directives remains debatable.

B. *The Contextual Applicability of Title II to States*

These means of holding states accountable for employment discrimination under Title I are equally applicable with respect to Title II, which provides that "no 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."[168] However, the law is not as settled concerning whether or not Congress effectively abrogated immunity under Title II, because the resolution of the abrogation issue under Title II is seemingly context specific, so additional arguments in favor of abrogation may be available.

Arguably, if the alleged discriminatory provision of a right or service does not implicate a fundamental right, sovereign immunity should prevail under the rational relationship test in most cases. For example, since education is not a fundamental right,[169] the provisions of Title II as applied to state educational institutions may not stand under Eleventh Amendment analysis,[170] thus forcing greater reliance on the Spending Clause to ensure compliance. Alternatively, if the discriminatory provision of a right or service actually violates a fundamental right, as in cases involving constitutional violations of voting rights, access to the judicial process, and involuntary confinement, then effective congressional abrogation of immunity should permit a damage award. For example, litigants, as well as potential jurors, with communication and mobility impairments may be limited in their ability to participate in state judicial proceedings absent some form of accommodation, which

508 of the Rehabilitation Act of 1998, which addresses the accessibility of information and the employment of information technology by federal agencies, as well as standards for access to persons with disabilities as developed by the Architectural and Transportation Barriers Compliance Board, in exchange for receiving grants under Assistive Technology Acts. Edward L. Myers, *Disability and Technology,* 65 MONT. L. REV. 289, 294-298 (2004). For a discussion of Section 508 and the accessibility standards see Leah Poynter, Note & Comment, *Setting the Standard: Section 508 Could have an impact on Private Sector Web Sites Through the Americans with Disabilities Act,* 19 Ga. St. U L. REV. 1197 (2003); Latresa McLawhom, Recent Development, *Leveling the Accessibility Playing Field: Section 508 of the Rehabilitation Act,* 3 N.C. J.L&TECH. 63 (2001).

[167] Matthew D. Taggart, *Title II of the Americans with Disabilities Act after Garrett: Defective Abrogation of Sovereign Immunity and Its Remedial Impact,* 91 CAL. L. REV. 827 (2003). *But see* Katie Eyer, Note, *Rehabilitation Act Redux,* 23 YALE L. & POL'Y REV. 271 (2005) (asserting that the ADA and Section 504 have been construed as being coextensive).

[168] 42 U.S.C. § 12132(2005).

[169] San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S 1 (1973) (holding that education is not a fundamental right afforded explicit or implicit protection under the Constitution).

[170] *But see* Camille L. Zentner, Note, *Between the Hockey Rink and the Voting Booth: The ADA and Abrogation of Sovereign Immunity in the Educational Context,* 71 BROOKLYN L. REV. 589 (2005) (arguing that because public education is important and unique among services offered by the government, it deserves a special place in the abrogation analysis).

may be properly mandated under Title II, because fair access to the judicial process implicates a fundamental right.[171]

What is unclear is the legitimacy of Title IPs prophylactic scope in cases in which the discriminatory provision of a right or service implicates a fundamental right without specifically violating it. For example, in the prison context, the standard for a constitutional violation of the Eighth or Fourteenth Amendment is one of deliberate indifference.[172] The affirmative obligations imposed by the ADA require more of states than to refrain from violating the Constitution through deliberate indifference. However, if the remedial powers of Congress under Section 5 include prophylactic measures, then federal law may do more than merely provide redress for actual constitutional violations.[173] Are these mandates of Title II permissible, that is, congruent and proportional prophylactic measures?[174] Or do the prophylactic measures of Title II of the ADA unconstitutionally threaten a state's sovereignty and the fiscal independence inherent in a state's political process?[173] Other lingering questions surround the applicability of Title II to states in various contexts as well, including what standard applies to determine whether or not there is sufficient evidence before Congress of past constitutional violations to justify an abrogation of state sovereign immunity, how and when such a record must be established, and whether a state may be subject to a claim for damages in the absence of evidence that it specifically had a history of past constitutional violations.[176]

[171] Ironically, emerging technological enhancements may exasperate that problem. For a discussion of this issue and that of equal access to the judicial process generally for persons with disabilities see Peter Blanck, Ann Wilichowski & James Schmeling, *Disability Civil Rights Law and Policy: Accessible Courtroom Technology*, 12 Wm. & MARY Bill OF RTS. J. 825 (2004).

[172] *See* Farmer v. Brennan, 511 U.S. 825 (1994) (holding that a prison official may be held liable for "deliberate indifference" to a substantial risk of serious harm to a prisoner under the Eighth Amendment only if the official is subjectively aware that the prisoner faces such a risk and disregards that risk by failing to take reasonable measures to abate it); Wilson v. Seiter, 501 U.S. 294 (1991) (holding that a prisoner alleging cruel and unusual punishment in violation of the Eighth Amendment must show deliberate indifference by officials).

[173] During oral argument in *Georgia* v. *United States,* Justice Breyer suggested that it was already established that Congress could sweep discrimination that did not technically violate the constitution into the scope of prophylactic legislation. Lauren Kofke, *Yesterday's Argument in Goodman* v. *Georgia and U.S.* v. *Georgia* (November 10, 2005), www.scotusblog.com/movabletype/archives/2005/ll/- yesterdays_argu_2.html#more.

[174] During oral argument the state asserted that the ADA was a seriously disproportionate remedy for the alleged wrongs because the statute was not limited to deliberate indifferences to fundamental needs, but also embraced the denial of nonessential services, programs or activities. Opposing counsel for Goodman and for the United States argued that Title II was congruent and proportional because it primarily targeted violations of constitutional rights. *Id.*

[175] The Justices questioned at oral argument whether the application of Title II in this context would place an undue burden on the states and state budgetary concerns, if Title II would allow for adequate deference to state officials who have to confront issues of safety and security in the prison context, and specifically whether or not the reasonableness requirement of the ADA was expansive enough to account for these types of state concerns. *Id.*

[176] With respect to the history of past state discrimination against prisoners with disabilities, the Justices queried during oral argument what standard the Court should apply to determine whether or not there was sufficient evidence before Congress of past discrimination to justify an abrogation of state sovereign immunity, how and when the record had to be established, and whether it was appropriate to expose a

In order to be a constitutional exercise of Congressional authority, Title II as applied preventatively must be congruent and proportional according to whatever record the Court deems it necessary to establish. What seems incongruent, however, is that disabled Americans, who rely on states for needed services and assistance, may receive varying levels of support, depending upon their state of residence and its choice to either waive or assert immunity. Ironically, the Court under its right to travel jurisprudence, which recognizes interstate movement as a fundamental right,[177] prohibits discrimination against nonresidents in the provision of benefits and services.[178] However, disabled Americans may be excluded as a class from the provision of needed services by the coincidence of their state of residency. In the context of regressive local school district taxes, Justices Douglas and Black once observed,

> True, a family may move to escape a property-poor school district, assuming it has the means to do so. But such a view would itself raise a serious constitutional question concerning an impermissible burdening of the right to travel, or, more precisely, the concomitant right to remain where one is.[179]

The failure of the Supreme Court to recognize the general supremacy of federal civil rights legislation with respect to states[180] should somehow implicate the fundamental freedom to live as an equal among others in the Union and to move about as a citizen, without fear of some threshold of nondiscriminatory treatment beyond mere irrationality. The latest decision of the Court on this fundamental right to travel was based for the first time upon the Privileges and Immunities Clause of the Fourteenth

state to damages when there was no evidence that it specifically had a history of past violations. In other words, the Justices questioned whether or not Congress must establish a record for each state before passing remedial legislation, or instead whether or not a more generic national record was sufficient for enacting Section 5 legislation. *Id.*

[177] The right to travel embraces at least three different components: “It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.” Saenz v. Roe, 526 U.S. 489, 500(1999).

[178] *See, e.g.,* Shapiro v. Thompson, (holding that Connecticut’s imposition of a one-year waiting period before new arrivals to the state could receive welfare benefits violated the Fourteenth Amendment); Vlandis v. Kline, 412 U.S. 441 (1973) (holding that a statute which created a permanent and irrebuttable presumption of non-residence violates the Due Process Clause); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974) (holding that an Arizona statute requiring an indigent to be a resident of a county for the preceding year in order to be eligible for free non-emergency medical care violated the Fourteenth Amendment); Zobel v. Williams, 457 U.S. 55 (1982) (holding that an Alaska statute distributing income derived from state’s natural resources to state’s citizens in varying amounts based on length of each citizen’s residency violated the Equal Protection Clause).

[179] San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S 1, 122 (1973) (Douglas, J., and Black, J., dissenting).

[180] *See* Chemerinsky, *supra* note 11, at 1301(arguing that broad immunity is a license to violate federal law and is insufficient to ensure the supremacy of federal law).

Amendment, instead of the Equal Protection Clause.[181] Perhaps this jurisprudence will develop so as to mitigate the recognized right of states to opt out of the affirmative obligations imposed by civil rights laws like the ADA, in favor of recognizing certain liberty rights and interests as being privileges of citizenship, which trump state sovereignty.[182]

At a minimum, the Court should recognize the power of Congress to act based upon the accumulation of a substantial national record of discriminatory treatment, particularly because citizens do have a recognized, fundamental right to travel interstate.[183] Furthermore, the Court should recognize that Title II must not be limited to actual constitutional violations; instead, due deference should be given to Congress to act in a preventative manner in order to effectively remediate social problems, as previously recognized in affirmative action programs. Finally, while the Spending Clause is a powerful means of assuring compliance with federal civil rights laws, the federal budget is not inexhaustible. In a democratic society, the importance of the right to be free from the discriminatory provision of state services should not rest on the solvency of the federal purse. Therefore, it is imperative that the Court clearly delineate the prophylactic powers of Title II to remediate when fundamental rights are implicated, though not expressly violated, particularly since the holding in *United States* v. *Georgia* was so narrow.[184]

V. Conclusion

The Eleventh Amendment as interpreted honors the right of states to assert immunity from suits for damages brought by citizens in state or federal court. Federal law may not abrogate that immunity under the Interstate Commerce Clause; however, Congress may abrogate state immunity under the Fourteenth Amendment, providing that there is a congruent and proportional nexus between the injury to be prevented and the means adopted to achieve that end in its remedial legislation. As applied to federal civil rights legislation and prohibited classifications, statutes such as Title VII, as applied to suspect classifications or classifications entitled to heightened scrutiny, are likely to be considered congruent and proportionate prophylactic measures, whereas

[181] Saenz v. Roe, 526 U.S. 489 (1999) (holding that California durational residency statute, which limited the welfare benefits of new residents to amount receivable in state of former residence, violated the Fourteenth Amendment). For a discussion of the case see Dan Wolff, *Right Road, Wrong Vehicle: Rethinking Thirty Years of Right to Travel Doctrine,* 25 DAYTON L. REV. 307 (2000).

[182] Alternatively, Congress could use the Privileges and Immunities Clause as the authority for its enactments, perhaps with different results. *See* Rebecca E. Zietlow, *John Bingham and the Meaning of the Fourteenth Amendment: Congressional Enforcement of Civil Rights and John Bingham's Theory of Citizenship* 36 AKRON L. REV. 717 (2003) (contending that the Citizenship Clause and the rights of federal citizenship represent a source of congressional power to enact civil rights legislation even after decisions such as *Kimel* and *Garrett)',* William J. Rich, Privileges or Immunities: *The Missing Link in Establishing Congressional Power to Abrogate State Eleventh Amendment Immunity,* 28 HASTINGS CONST. L.Q. 235 (2001) (asserting that the Privileges or Immunities Clause coupled with the Supremacy Clause should be used to reestablish federal authority to enforce civil rights legislation against the states.).

[183] United States v. Guest, 383 U.S. 745, 758 (1966) (asserting that the "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.).

[184] *See supra* notes 128-140 and accompanying text.

statutes such as the ADEA and ADA, which protect non-suspect classifications, are not likely to be considered congruent and proportionate remedial measures under the Court's rational basis review. In cases brought under Title II of the ADA in which fundamental rights are clearly implicated, the statute is likely to be deemed a congruent and proportionate remedy for actual constitutional violations, although whether or not Title II is a congruent and proportional remedy when applied in a prophylactic manner remains unclear. While Congress may employ the power of the purse to ensure compliance in cases where its remedial authority is not deemed by the Court to be congruent and proportional, it would seem that the recognition of the rights of disabled citizens to access needed services from state governments should exist independently of federal funding. Hopefully, the Court will recognize that the substantial record compiled by Congress in passing Title II will be deemed sufficient to permit prophylactic application of the ADA, without the need to document each state's culpability.